

**INQUIRY INTO CONSTITUTION AMENDMENT (WATER
ACCOUNTABILITY AND TRANSPARENCY) BILL 2020
AND THE PROVISIONS OF THE WATER MANAGEMENT
AMENDMENT (TRANSPARENCY OF WATER RIGHTS)
BILL 2020 AND THE WATER MANAGEMENT
AMENDMENT (WATER ALLOCATIONS - DROUGHT
INFORMATION) BILL 2020**

Organisation: Environmental Defenders Office

Date Received: 5 July 2020



Environmental Defenders Office

5 July 2020

Hon Mark Banasiak MLC
Committee Chair
Portfolio Committee No. 4 - Industry
Upper House Committees
Legislative Council
Parliament of New South Wales

Sent by email: portfoliocommittee4@parliament.nsw.gov.au.

Dear Sir,

Re: Inquiry into the provisions of three water-related Bills

1. The Environmental Defenders Office (**EDO**) is a national community legal centre specialising in public interest environmental law. We have a long history of advising a broad range of clients including floodplain graziers, irrigators, Traditional Owners, community groups and conservation groups on water laws and policies that apply across the Murray-Darling Basin (**MDB**).
2. The EDO and our clients share a common interest in the sustainable and transparent management of the rivers, floodplains and aquifers of the MDB. We are all concerned by evidence indicating that many water sources in the Basin are in declining health due to ongoing over-extraction and by the fact that climate change is exacerbating these underlying problems.
3. It is against this backdrop that the Environmental Defenders Office (**EDO**) welcomes the opportunity to provide brief comments on the following three bills:
 - Water Management Amendment (Water Allocations—Drought Information) Bill 2020
 - Water Management Amendment (Transparency of Water Rights) Bill 2020
 - Constitution Amendment (Water Accountability and Transparency) Bill 2020

Water Management Amendment (Water Allocations – Drought Information) Bill 2020

4. The EDO **supports** this Bill, particularly in light of the fact that the current drought has highlighted the ever-evolving nature of our climate and its impact on water availability, water security and ecosystem function. Our concerns regarding this issue – underpinned by data from the Bureau of Meteorology and elsewhere – are articulated in the paper entitled '[Are our water laws climate ready?](#)'.

T +61 2 9262 6989

E info@edo.org.au

F +61 2 9264 2414

W edo.org.au

Level 5, 263 Clarence St, Sydney NSW 2000

5. In short, good water governance and risk management require drought reserves to be based on best available evidence regarding lowest inflows. Deliberately omitting this information from water sharing plans in order to maintain historic levels of reliability for certain licences is not sustainable, and invariably diminishes the volume of water set aside for use during periods of drought. It also suggests that affected water sharing plan areas are over-allocated, which in-and-of-itself requires redress.
6. Significantly, clauses in WSPs that seek to maintain historic levels of reliability and decisions made in reliance on such clauses may flout core provisions of the WM Act, notably ss. 5(3) and 9(1).
7. More generally, we would also like to note that decisions regarding drought reserves and allocations ought to be based on transparent rules which are themselves underpinned by a justifiable (and codified) methodology. Recent scholarship examining allocations and management decisions – both of which are inextricably linked to drought reserves – found the following:

For the Gwydir and Macquarie Rivers, no public records existed which codified the resource assessment process to reveal how each allocation decision was made, or justified the management rules. The idiosyncratic and heuristic nature of this process was underscored by the fact that both were governed by the same agency and the legislative and policy frameworks were the same. Management history, parochial knowledge and individual preferences primarily determined this difference. Lack of knowledge of other drivers potentially affecting availability (e.g. unmetered water use, plantations, evaporation loss) may further undermine water management decisions (Young and McColl, 2009). There is a clear need for transparency, particularly given the water current reforms in Australia's Murray-Darling Basin which require aligning local water management rules across more than 30 surface and groundwater zones under a single overarching framework for river management, the Basin Plan (MDBA, 2012, 2013).¹

8. This article includes analysis and discussion that is of broader relevance to this inquiry, in particular in relation to the interplay between rules, management decisions and water availability in a changing climate. We have therefore attached it to our submission.
9. We further note that the Bill represents the minimum standard required to deal with a repeat of the lowest inflows on record in a particular water source. However, historic worse case scenarios can and most certainly will be superseded at some point in the future. This will expose both the environment and water users (particularly lower reliability licence holders) to additional risk.
10. Finally, it is important to note that under the risk assignment provisions set out in the National Water Initiative (**NWI**), *Water Management Act 2000* (NSW) (**WM Act**) and *Water Act 2007* (Cth) (**Water Act**),² the entirety of that risk will be borne by licence holders i.e. no compensation will be payable for reductions in allocations that are attributable to climate change. This alone ought to form the basis of a more serious

¹ Celine M.M. Steinfeld, Ashish Sharmab, Raj Mehrotrab, Richard T. Kingsford, The human dimension of water availability: Influence of management rules on water supply for irrigated agriculture and the environment; *Journal of Hydrology* 588 (2020) 125009, p. 11.

² National Water Initiative, cl. 48; WM Act s. 87AA(3)(c); Water Act 2007, Division 4, Part 2.

discussion about sustainable water use and adaptive management within the context of rural development policy.

Water Management Amendment (Transparency of Water Rights) Bill 2020

11. We wish to make the following comments regarding Schedule 1 of this Bill:

- The EDO supports greater transparency in relation to water management, this being a cornerstone of good governance. It is also necessary if trust is to be built between government and various stakeholders. We accordingly **support** the proposals set out in Schedule 1.
- More specifically, we support the proposal to improve the public's ability to access accurate information regarding ownership of water access licences (**WALs**) and related matters (including associated works approvals, which are linked to extractive capacity) and trading data.
- To that end, we note that there is a publicly available, free register known as the NSW Water Register (which is separate from the Water Access Licence Register which is maintained by the NSW Land Registry Services). Based on our experience, it would be useful to add the following to the NSW Water Register:
 - Mandatory publication of identity of WAL holder (this would require the addition of one field to the NSW Water Register).
 - Mandatory cross referencing of WALs held by associated individuals and/or entities (this would require the addition of one or more fields in the NSW Water Register).
 - Retention of details of cancelled WALs in the NSW Water Register.
 - Approval applications and decisions (including an explanation as to how the approval or refusal reflects the legislative framework)³ and decisions to approve dealings (including an explanation as to how the approval or refusal reflects the relevant laws and rules). Failure to render this information accessible makes it virtually impossible for the public to know when a decision has been made, and then to assess its lawfulness against relevant legislative requirements. This office has, after forensic analysis, found instances of unlawful dealings. However, this occurred well outside the limitation period to seek judicial review. In short, failure to make this information public acts as a barrier to justice.
 - Usage data published for each management zone level (i.e. aggregated and not individual) on a quarterly basis. This, together with information regarding maximum, lawful use at that scale could improve public confidence in compliance without revealing what many irrigators argue is commercially sensitive information. This recommendation is again based on the fact that water is a shared resource vested in the Crown, and that the public has a legitimate interest in being able to access information regarding compliance with relevant laws.

³ At present only applications that are currently advertised are available in the NSW Water Register. An application number is required to search for all other approvals, which means the information is essentially inaccessible.

- We would further support auditing of the information contained in the NSW Water Register (noting the aforementioned instances of unlawful dealings, some of which were found after analysing information on the NSW Water Register and assessing it against relevant legal requirements).
- We do note that if the Natural Resources Access Regulator (**NRAR**) is to be accorded additional auditing responsibilities with respect to the NSW Water Access Licence Register and/or NSW Water Register, it will invariably require additional resources to undertake such work (and that it does, in any case, require additional resources to continue to enforce the state's water laws).
- Beyond the scope of this Bill, there are a range of other measures which would improve community confidence in the fairness of decision-making processes underpinning water management in NSW and compliance with relevant laws. These include, but are not limited to, improved administration of the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**). This recommendation is based on extensive experience attempting to legitimately obtain information under this Act, only to encounter obfuscation and unnecessary delays. We can provide specific examples, if required.
- Finally, we note that the ACCC is currently undertaking an inquiry into water markets in the MDB. Its interim report has been completed and will be released to the public in due course. While we cannot yet comment on the contents of the interim report, we note that a number of submissions to that inquiry raised legitimate concerns regarding governance and overall regulation of water markets. A number of these matters are arguably of relevance to the Portfolio Committee's inquiry, particularly to the extent that they can be rectified at the state level (or via cooperative arrangements with the Commonwealth). To that end, we particularly commend the submission of [H2OX](#), which highlighted problems in relation to, *inter alia*, pricing and transparency and made a series of sensible recommendations. For the purposes of this inquiry, we particularly support the recommendation to record trades within irrigation corporations on state water registers.

12. We wish to make the following comments regarding Schedule 2 of this Bill

- The EDO **supports** the proposed amendments set out in Schedule 2 of the Bill.
- We recommend incorporating provisions that apply to irrigation corporations (as contained in Schedule 2 of the Constitution Amendment (Water Accountability and Transparency) Bill 2020).

Constitution Amendment (Water Accountability and Transparency) Bill 2020

13. We wish to make the following comments regarding Schedule 1 of this Bill:

- We are **generally supportive** of the amendments set out in Schedule 1 (subject to our comments, below).
- We note that the proposed s.71H(4)(c) introduces the possibility of the regulations being amended to withhold 'personal information' held on the Water Access Licence Register in order to protect 'the privacy of that information'. However, this contradicts clause 7(i) of the *Privacy and Personal Information Protection Regulation 2019*,

which exempts this Register from Part 6 of the *Privacy and Personal Information Act 1998*.

- The exemption was created in recognition of the fact that the public's interest in accessing basic information regarding WALs, approvals and associated dealings outweighs any possible private interest in concealing this information. This is particularly true insofar as water is a vital, shared resource that is vested in the Crown.⁴
- We further note that withholding 'personal information' in relation to real property is not possible.⁵ It is therefore unclear why the NSW Government would attempt to introduce such a possibility for WALs.
- In summary, we object to the proposed s.71H(4)(c). To clarify, we object to the inclusion of this provision on the basis that it could be used to reduce transparency (and because it is, in any case, inconsistent clause 7(i) of the *Privacy and Personal Information Protection Regulation 2019*).
- Please refer to comments set out in paragraph 11, above, which are also relevant to this Bill.

14. We wish to make the following comments regarding Schedule 2 of this Bill:

- The EDO is generally supportive of the intent of Schedule 2, which is to increase transparency regarding ownership of water rights by elected members of Parliament, and to expose any possible conflict of interest that may affect important decision-making processes regarding water management in NSW.

Please do not hesitate to contact us if you have any questions regarding this submission.

Yours sincerely

Environmental Defenders Office

Dr Emma Carmody
Special Counsel

⁴ WM Act, s. 392.

⁵ *Privacy and Personal Information Protection Regulation 2019*, cl. 7.