



australian network of environmental defender's offices

Submission to National Water Commission 2014 Triennial Assessment of water reform progress in Australia

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The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

Contact Us

EDO ACT (tel. 02 6247 9420)
edoact@edo.org.au

EDO NSW (tel. 02 9262 6989) edonsw@edo.org.au

EDO NQ (tel. 07 4031 4766)
edonq@edo.org.au

EDO NT (tel. 08 8981 5883)
edont@edo.org.au

EDO QLD (tel. 07 3211 4466)
edoqld@edo.org.au

EDO SA (tel. 08 8410 3833)
edosa@edo.org.au

EDO TAS (tel. 03 6223 2770)
edotas@edo.org.au

EDOVIC (tel. 03 9328 4811)
edovic@edo.org.au

EDO WA (tel. 08 9221 3030)
edowa@edo.org.au

Submitted to National Water Commission via: submissions@nwc.gov.au

For further information, please contact nicola.rivers@edo.org.au

INTRODUCTION

The Australian Network of Environmental Defender's Offices (ANEDO) is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. Our lawyers have extensive experience working with and analysing water law – providing legal advice and representation, policy and law reform and community legal education across all Australian states and territories.

This submission will focus on the issues raised under Part 3 of the discussion paper – 'water supports a healthy environment'. Responses cover water systems in New South Wales, Victoria, ACT and South Australia. As legal offices, we focus on the legal issues arising in those jurisdictions.

DISCUSSION

AUSTRALIAN CAPITAL TERRITORY

The following section focuses on the implications for National Water Initiative (NWI) compliance from the recently released *Draft ACT Water Strategy 2013 (the Strategy 2013)*¹.

The *Strategy 2013* is an overarching water management strategy which provides for long-term water resource planning and in part implements the NWI obligations in the ACT. The *Strategy 2013* was released in July 2013, and in its final form will replace the ACT's 2004 strategy, *Think water, act water (TAWW)*.² The *Strategy 2013* builds on the work of *TAWW*, and envisages 'a community working together to manage water wisely to support a vibrant, sustainable and thriving region'.³

The *Water Resources Act 2007* (ACT) (the *WRA*) controls water use from surface water and groundwater through a system of water access entitlements,⁴ and licences.⁵ The *WRA* also provides the legislative basis for the *Environmental Flow Guidelines*,⁶ which determine the 'environmental flow requirements needed to maintain aquatic ecosystems'.⁷ The *WRA* must reflect the principles and goals of the

¹ Environment and Sustainable Development Directorate, *Water for the future- striking the balance: Draft ACT Water Strategy 2013* (July 2013)

http://www.environment.act.gov.au/water/act_water_strategy/draft_act_water_strategy_2013.

² Environment and Sustainable Development Directorate, *Think water, act water* (28 April 2004)

http://www.environment.act.gov.au/water/act_water_strategy/draft_act_water_strategy_2013.

³ *Draft ACT Water Strategy 2013* (July 2013), 1.

⁴ *Water Resources Act 2007* (ACT) pt 4.

⁵ *Water Resources Act 2007* (ACT) pt 5.

⁶ *Water Resources Act 2007* (ACT) pt 3.

⁷ *Water Resources Environmental Flow Guidelines 2013* (ACT) 1.

Strategy 2013. The *Strategy 2013* acknowledges that ‘appropriate governance structures’ will be necessary to ensure an ‘efficient and effective implementation path’,⁸ and identifies the *WRA* as an area in which amendments may need to be made.⁹

The following sections address specific questions raised in the NWC discussion paper under Part 3.

3.1. Environmental condition of water systems is maintained or improved

A practical understanding of the environmental condition of the water system(s) and associated ecosystem services

In the ACT a practical understanding of the environmental condition of the aquatic system can primarily be ascertained by the information contained in the ACT Water Report which is compiled annually by the ESDD.¹⁰ The ACT Water Report can now be found online pursuant to the ACT’s commitment at Clause 40(iii).¹¹ For the purposes of this submission, ANEDO has relied upon the most recent Water Report, namely the 2011-12 Report.

The 2011-12 Water Report acknowledges the impact of the ACT climate on water resources, including the impact of landforms and rainfall in the Territory.¹² The ACT also aims to ensure that ‘waters flowing through the ACT are of appropriate quality’, through monitoring of water quality, stream flow and biological data undertaken by the (ESDD).¹³ This data is available in Section 2 of the Water Report.¹⁴

The report also notes the interconnectedness of groundwater and surface water,¹⁵ which is reflected in the *Water Resources Environmental Flow Guidelines 2013* (ACT) (the *Guidelines*).¹⁶ The *Guidelines*, as approved by the Minister,¹⁷ work out ‘the flow of water that is needed to maintain aquatic ecosystems’¹⁸ and aim to ensure

⁸ *Draft ACT Water Strategy 2013* (July 2013), above 6.

⁹ *Draft ACT Water Strategy 2013* (July 2013), above 6.

¹⁰ Environment and Sustainable Development Directorate, ‘ACT Water Report 2011-12’ (2012) 14 http://www.environment.act.gov.au/data/assets/pdf_file/0007/268873/Water_Report_2011-12.pdf.

¹¹ NWI cl 40(iii).

¹² *ACT Water Report*, 14.

¹³ *ACT Water Report* 17.

¹⁴ *ACT Water Report* Section 2.

¹⁵ *ACT Water Report* 8.

¹⁶ *Water Resources Environmental Flow Guidelines 2013* (ACT). In particular, page 5 of the report states that ‘there is a relationship between surface and ground water and that ground water abstraction will impact on base flows of surface streams’.

¹⁷ WRA s 12(1).

¹⁸ WRA s 12(1).

the health of waterways, streams, heavily used systems and highly modified systems.¹⁹ The EPA also conducts five-yearly strategic reviews of the *Guidelines*, which establish the components of flow required to maintain stream health.²⁰

The ACT Water Reports appear to be the only source of updated information concerning the condition of aquatic ecosystems that is available to the public in the ACT. This may hamper the ability of the public to gain a real practical understanding of water quality. The Reports collate data from the last twelve months, however they do not seek to compare ecosystem health with the previous years.

The *ACT State of the Environment Report 2011* provided some information on the state of water bodies in the ACT,²¹ however it does not examine the condition of individual ecosystems.

Identification of water systems and their environmental conditions that require protection/maintenance or improvement

The ACT Government aims to protect water resources through an 'integrated catchment approach to planning, development controls' and 'controls on water abstracted'.²² There has been an increasing emphasis in the ACT on 'improved design and management of urban storm water systems', in order to 'reduce urban impacts on water quality'.²³ Urban storm water infrastructure such as wetlands and vegetated flood-ways are designed to 'ensure that water quality is suitable for designated uses'.²⁴ Water sensitive urban design principles have also been incorporated into the Territory Plan.²⁵ Theme 1 of the *Strategy 2013* also acknowledges the need for 'improved urban water and catchment management'.²⁶ As the *Strategy 2013* notes, the desired focus on 'greater integration of water and catchment management activities' will require 'significant investment'.²⁷ For protection/maintenance and/or improvement of the environmental condition of water, it is vital that these statements of policy are supported by appropriate funding and

¹⁹ *Environmental Flow Guidelines 2013*, 1.

²⁰ The Guidelines will be reviewed after five years of operation 'to determine if the ecological objectives specified are the most appropriate, and the environmental flows required achieve those objectives': *2006 Environmental Flow Guidelines*, 11.

²¹ Office of the Commissioner for Sustainability and the Environment, 'Land and Water Theme Paper', *ACT State of the Environment Report* (2011).

²² *ACT Water Report*, 5.

²³ *ACT Water Report*, 5

²⁴ *ACT Water Report*, 5

²⁵ ACT Planning and Land Authority, *Water Ways: Water Sensitive Urban Design General Code* (2007) <http://www.legislation.act.gov.au/ni/2008-27/copy/56032/pdf/2008-27.pdf>.

²⁶ *Draft ACT Water Strategy 2013* (July 2013), 11..

²⁷ *Draft ACT Water Strategy 2013* (July 2013), 11

backed by the above described investment. Lack of implementation through the required measures will render this policy purely aspirational and potentially damaging to the ACT aquatic ecosystem.

The 2011 *State of the Environment Report* found that the ACT has not been as proactive in improving ecosystems as it could have been. It was found that there are several continuing concerns with land and water health, including high levels of nutrients leading to blue-green algae in lakes and ponds,²⁸ and water quality being negatively impacted by urban development.²⁹ The Report also noted the continuing challenges to land and water health from land clearing and urbanisation, climate change, population growth, and cross-boundary catchment management.³⁰ The 2011-12 Water Report noted that weekly monitoring of algal conditions is performed by the Environment Protection Authority and Health Protection Services from September to May,³¹ however these steps do not appear to have reduced the algal populations.³²

EDO ACT noted in its recent submission to the ESDD on the *Strategy 2013*,³³ that the objects section of the *WRA* only commit to reversing damage to aquatic ecosystems 'where practicable',³⁴ rather than providing for the 'resolution of over allocation and overuse' as required by the NWI Objectives.³⁵ To date, it appears that there has been no over allocation in the ACT,³⁶ however as discussed below, it is crucial that the ACT establishes a safeguard or legislative mechanism to prevent it from over allocating ecosystems in the future.

Environmental Water in the ACT

i. Definition of 'environmental water':

²⁸ *State of the Environment Report* (2011), 4.

²⁹ *State of the Environment Report* (2011),2.

³⁰ *State of the Environment Report* (2011),6.

³¹ *ACT Water Report*, 36.

³² National Capital Authority, 2012 Media Releases: *Extreme Blue-Green Algae Alert for Lake Burley Griffin*, 27 January 2012

³³ Environmental Defenders' Office ACT - Submission to the Environment and Sustainable Development Directorate on the *Draft ACT Water Strategy 2013* (13 September 2013). 6.

³⁴ *Water Resources Act 2007* (ACT) s 6(b).

³⁵ National Water Commission, 'NWI Objectives', Department of Sustainability, Environment, Water, Populations and Communities, www.nwc.gov.au/nwi/objectives.

³⁶ National Water Commission, 'The National Water Initiative- securing Australia's water future: 2011 Assessment, Appendix B', 2011, National Water Commission, 211, www.nwc.gov.au/publications/topics/assessments/ba-2011.

The ACT framework has no definition for ‘*environmental water*’. Enabling legislation ought to be enacted pursuant to the NWI action, namely that:

‘Water that is provided by the States and Territories to meet agreed environmental and other public outcomes as defined within relevant water plans (paragraphs 36-40 refer) is to:

- i. be given statutory recognition and have at least the same degree of security as water access entitlements for consumptive use and be fully accounted for;...’³⁷*

The *Strategy 2013* acknowledges this national policy.³⁸ However, a further step must be taken to formalise this important concept and its delivery into the *WRA*. The ACT should move towards incorporating the following water management regimes for environmental water into its governing Act:

- an ‘environmental water reserve’ as defined in the Victorian *Water Act 1989* (Vic)³⁹ and as required by a NWI commitment,⁴⁰
- an ‘environmental water holder’ as defined in the Victorian *Water Act 1989* (Vic)⁴¹ which is a separate statutory body independent from government and responsible for the separate and secure environmental entitlements allowed for under that Act;
- ‘planned environmental water’ as per the NSW’s *Water Management Act, 2000* (NSW)⁴² committed by management plans for environmental purposes and ecosystem health, and licenced environmental water that is adaptive environmental water, or water taken under a licence; and
- ‘environmental water rules’⁴³ also under the NSW Act which provide that a management plan must contain provisions for the identification, establishment and maintenance of planned environmental water.

- ii. Environmental Water Objective:*

³⁷NWI cl 35(i).

³⁸*Draft ACT Water Strategy* (2013), Theme 1, 11.

³⁹*Water Act 1989* (Vic) s 4A. The EWR comprises water that is set aside for the environment a) as an environmental entitlement and b) through the operation of i) conditions on any bulk entitlement, licence or permit, ii) any management plan, and iii) any other provision.

⁴⁰NWI cl 78(ii).

⁴¹*Water Act 1989* (Vic) s 22DB.

⁴²*Water Management Act 2000* (NSW) s 8(1).

⁴³*Water Management Act 2000* (NSW) s 8(2).

The WRA does not provide for 'environmental water' or its delivery in its objectives. An objective should be introduced into the WRA so as to preserve the environmental values and health of water ecosystems. Such an objective would be in line with the intention of the *Strategy 2013* to maintain environmental values, water-dependent ecosystems and water quality.⁴⁴

iii. Transparency and environmental water:

The National Water Commission *2012 Review* provides an overview of the ACT framework for environmental water management.⁴⁵ Namely, the WRA forms the legal basis for 'providing environmental flows', which are detailed in the *Water Resources Environmental Flow Guidelines 2013*.⁴⁶ The *2012 Review* approved of the ACT's environmental water management mechanisms, including rules and licence conditions, water access entitlements and water allocations.⁴⁷ There is no held environmental water in the ACT,⁴⁸ water for the environment is determined first, and the remainder is made available for consumptive use.⁴⁹ Management of environmental water occurs through water licences and conditions imposed on licences.⁵⁰ These arrangements give the EPA the responsibility for achieving environmental water objectives.⁵¹

Parts 3 to 6 and Part 10 of the WRA should provide greater transparency regarding the management of water in the ACT. Specifically, transparency for water allocation, its management, metering, monitoring and reporting and compliance. Water Management Agreements (WMAs) should include specific objectives and measurable (performance) indicators to enable confident assessment of the progress made (towards reaching the objectives).

In relation to the *Strategy 2013* the outcomes and strategies for Theme 1 - Environmental Water and Urban Waterways,⁵² are aligned with those of the NWI,⁵³ for example, a 'well managed, functioning aquatic ecosystems that protect ecological

⁴⁴*Draft ACT Water Strategy* (2013). See 1.6: Strategies- achieve better water health and environmental flow outcomes, and establish, attain and maintain water quality standards for all ACT water bodies. National Water Commission, *Australian environmental water management: 2012 review* (May 2012) http://www.nwc.gov.au/_data/assets/pdf_file/0019/22168/Australian-environmental-water-management-2012-review.pdf.

⁴⁶ National Water Commission, *Australian environmental water management: 2012 review* 38.

⁴⁷ National Water Commission, *Australian environmental water management: 2012 review* 42.

⁴⁸ National Water Commission, *Australian environmental water management: 2012 review* 46.

⁴⁹ National Water Commission, '2011 Assessment: Appendix B', 210.

⁵⁰ National Water Commission, *2012 review*, 46.

⁵¹ National Water Commission, '2011 Assessment: Appendix B', 214.

⁵²*Draft ACT Water Strategy 2013*, 'Theme 1 – Environmental water and urban waterways', 11.

⁵³NWIcl 25(ii).

values and contribute to the sustainability and livability of the ACT and region.⁵⁴ This is an encouraging outcome, however it needs a specific and clear governance structure in relation to environmental water.

iv. Environmental water and the NWI commitments:

An important initiative in the Murray Darling Basin Plan (Basin Plan)⁵⁵ are the provisions requiring accounting for 'environmental water' within that system (or otherwise appropriate institutional structures) with the aim of maintaining and restoring the systems health. Strategy 1 in Theme 1 of the *Strategy 2013* is to achieve better water health and environmental flow outcomes,⁵⁶ however introduction into the enabling legislation of 'environmental water' and the above described mechanisms are required.

A key NWI commitment is to give environmental water at least the same degree of security as water access entitlements and to fully account for their measurement, monitoring and reporting.⁵⁷ If water is held as a water access entitlement, making it available to be traded,⁵⁸ then establishing a register of new and existing environmental water⁵⁹ and annual reporting on 'environmental water rules'⁶⁰ is required in the ACT water management system. Such amendments would make it a legal requirement for the Minister or any other authority to secure the environmental water needed to restore and maintain the environmental values and health of aquatic ecosystems as well as aligning the *WRA* with the objectives of the *Strategy 2013*.⁶¹

The Commission's *2011 Assessment* found the delivery of environmental water is assured through assessments of compliance and licence conditions by the EPA, that compliance reports are not 'publicly accessible',⁶² and that the ACT does not produce general purpose environmental water accounts.⁶³ Pursuant to clause 81, the ACT has participated in the development of national water accounting standards, including the Water Accounting Conceptual Framework,⁶⁴ however these standards are yet to be implemented in the ACT. The ACT also contributed to the Commission's *Australian Environmental Water Management Report 2010*, which summarises the

⁵⁴NWI 5.

⁵⁵ *Murray Darling Basin Plan (2012)*.

⁵⁶ *Draft ACT Water Strategy (2013)*, 11.

⁵⁷ NWI cl 35(i).

⁵⁸ NWI cl 35(iii).

⁵⁹ NWI cl 85(j).

⁶⁰ NWI cl 85(ii).

⁶¹ *Draft ACT Water Strategy (2013)*, 11.

⁶² National Water Commission, '2011 Assessment: Appendix B', cl 85(ii), 215.

⁶³ National Water Commission, '2011 Assessment: Appendix B' cl 85(i), 215.

⁶⁴ National Water Commission, '2011 Assessment: Appendix B'

Territory's environmental water provisions.⁶⁵ The ACT should be complying with the Commission's requirements in this regard by accounting for environmental water and making these reports publicly available as well as the Commission's recommendations in the above mentioned 2010 report for compliance reports regarding the *Environmental flow guidelines* flow rules.⁶⁶

Identification of system requirements for different community values and priorities

The *WRA* deals with general rights in relation to water use by the ACT community. These rights are described in more detail below. The *Strategy 2013* contains objectives one of which is to create a water supply system that 'secures the social, economic and environmental needs of the ACT community'.⁶⁷ This objective involves 'action items' including the provision of economically efficient water and wastewater services,⁶⁸ securing long-term water supplies, and managing water usage to optimise the liveability outcome for the ACT community.⁶⁹ The *Strategy 2013* is in its draft phase only and its action items need to be implemented before there are clear identification of system requirements for community values and priorities.

Indigenous Values:

It is crucial that water planning processes consider the values and priorities of Indigenous communities. The NWI obligates Parties to ensure that planning processes include 'Indigenous representation...wherever possible', and that 'water plans...incorporate social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed'.⁷⁰ In assessing the ACT's compliance with these articles, the National Water Commission stated that the ACT has 'statutory requirements to consult all stakeholders, including Indigenous groups, in the development of water plans and to identify their water values and the water requirements to maintain them'.⁷¹ However, this obligation is not acknowledged in the *WRA* nor does the *Strategy 2013* mention Indigenous stakeholders. Indigenous values should be recognised in water planning, and the ACT Government should strive to improve the capacity of Indigenous leaders to participate in water planning and management.

Indigenous water needs should also be recognised in water planning through 'cultural flows', which have been defined as:

⁶⁵ National Water Commission, '2011 Assessment: Appendix B'

⁶⁶ National Water Commission, *2012 review*, above 47.

⁶⁷ *Draft ACT Water Strategy 2013* (July 2013), 5.

⁶⁸ *Draft ACT Water Strategy 2013* (July 2013), 12.

⁶⁹ *Draft ACT Water Strategy 2013* (July 2013), 13.

⁷⁰ NWIcl 52(i)(ii).

⁷¹ National Water Commission, '2011 Assessment: Appendix B', 211.

'Water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations'.⁷²

It is crucial that these objectives are prioritised in water planning, as water planning can disproportionately impact Indigenous people.⁷³

Public consultation

States and Territories are obligated to ensure 'open and timely consultation with all stakeholders' in the circumstances referred to in clause 95.⁷⁴ Community consultation is a priority for the *Strategy 2013*, as reflected in the vision of 'a community working together to manage water wisely to support a vibrant, sustainable and thriving region'.⁷⁵ However, under the *WRA* public consultation is allowed for the development of the *Environmental Flow Guidelines* only.⁷⁶ The public has no input into whether an access entitlement is granted.⁷⁷ While community consultation could pose logistical difficulties if it was required for every entitlement granted, it is desirable for the public to have a say in the decision-making process for those entitlements which are likely to have a major impact on the water system in the ACT. It is problematic, for example, that information about water access entitlements and other allocations are not available online, despite Clause 59 of the *NWI* requiring adoption of publicly accessible, compatible systems for registering water access entitlements and trades.⁷⁸ The *WRA* provides that a Register may be kept 'in any form'⁷⁹ and while the Register 'must be available for public inspection at reasonable times',⁸⁰ it is unrealistic for the community to inspect the Register within working hours at the EPA. All water allocations including entitlements should be available online, where they are more readily accessible.

Until recently the ACT Water Report was not available online.⁸¹ The 2011-12 Water Report comments on 'community engagement' in section 4, reporting on the progress of community organisations such as Waterwatch and Frogwatch. However, there is

⁷² Environmental Defender's Office NSW, *Murray Lower Darling Rivers Indigenous Nations- Cultural Water Brief* (2008).

⁷³ EDO Victoria, *Environmental Justice Project; Final Report*, 25.

⁷⁴ *NWI* cl 95.

⁷⁵ *Draft ACT Water Strategy 2013* (July 2013), 1.

⁷⁶ *Water Resources Act 2007* (ACT) s 14.

⁷⁷ *Water Resources Act 2007* (ACT) pt 4.

⁷⁸ National Water Commission, '2011 Assessment: Appendix B', 211.

⁷⁹ *Water Resources Act 2007* (ACT) s 66(2).

⁸⁰ *Water Resources Act 2007* (ACT) s 67(1).

⁸¹ National Water Commission, '2011 Assessment: Appendix B', 217.

no further information or reportage concerning identification of system requirements for community values and priorities.

Trade-off decisions between social, environmental and economic values are transparent

The ACT has not reported on the trade-off between social, environmental and economic values in decision-making. The only mention of social, environmental and economic considerations in the 2011-12 Water Report is in the context of 'Inter-jurisdictional arrangements'.⁸² This section reports that the ACT meets all ten objectives set out by s23 of the NWI through its legislation and its planning process.⁸³

The ACT's environmental and use values are found in Volume 2 of the Territory Plan, General Code 1.8 Water Use and Catchment General Codes which sets the permitted uses and protected environmental values for the waterways in the ACT.⁸⁴ And further that sustainable water use is encouraged through regulation which allows the EPA to manage the use of water resources in an environmentally sensitive manner.⁸⁵ Broadly speaking, the WRA provides Water Access Entitlements (WAEs) may only be acquired by purchase from an existing holder (trading) or by grant by the Minister.⁸⁶ The EPA issues licences to take water, bore works licences and waterway works licences (needed for construction of dams), subject to conditions and volume considerations and approves applications to trade WAEs both within the ACT and with other jurisdictions.⁸⁷

Environmental aspects of water plans are implemented and improve the environment

In the ACT there are no water management plans. Water Management Areas are dealt with in Part 4 of the WRA which are determined by the Minister.⁸⁸ The Minister is also responsible for determining the total amount of surface and ground water that is available for taking in each water management area.⁸⁹ These determinations take into account matters including the environmental flow guidelines and any investigations undertaken by the authority to establish sustainable yields for the

⁸² ACT Water Report, 9.

⁸³ ACT Water Report 9.

⁸⁴ ACT Water Report 7.

⁸⁵ ACT Water Report 9.

⁸⁶ Water Resources Act 2007(ACT) ss 20, 26.

⁸⁷ Water Resources Act 2007(ACT) s 64.

⁸⁸ Water Resources Act 2007(ACT) s16.

⁸⁹ Water Resources Act 2007(ACT) s17.

water management area.⁹⁰ The Minister may also determine an amount of the water in a management area that is to be reserved for future use.⁹¹

In the Water Report, Table 2a 'Water resources, entitlements and use 2011–2012'⁹² sets out the total average volume of water available in each water management area in the ACT, the volume set aside for the environment, the volume available for extraction, the amount allowed for extraction (entitlements issued) and the volumes extracted in 2011–12. The totals for the whole of the ACT and the portion of the total resource of each component are also set out.

The Water Report also details the total number of licences to take water on issue in the ACT as well as those newly issued during the reporting year.⁹³ A licence holder must have a Water Access Entitlement (WAE) and may hold multiple WAEs, but not all WAEs may have active licences in the reporting period. The Report recognises that while it seeks to define the total entitlement volume of water in the ACT, there may still be bores without entitlement in use and existing entitlement holders may exceed their entitlement volume. The EPA conducts a compliance program to monitor volumes extracted and detect unauthorised extraction and compliance actions are detailed in Table 4 of the Water Report.⁹⁴ However, while conditions can attach to water licences, they are not mandatory nor are there specific obligations on licence holders to report their water use. An NWI commitment requires a publicly accessible and reliable water register to be made available,⁹⁵ and detail of water access entitlements and licences issued by the EPA are available for inspection in the Water Resource Act Register at the office of the EPA, however this information is not available online.⁹⁶

3.2. Future water options aren't compromised by today's decisions

Clearly defining sustainable levels of extraction for water systems and publicly acknowledging and addressing situations where over use and over allocation exists

According to the *Strategy 2013*, 'environmental flow restrictions ensure that 55% of water that flows through the ACT is not available for consumptive use...and that water is given to the environment before it is taken for consumptive use'.⁹⁷ However, this percentage is not allowed for in both the *Environmental Flow Guidelines 2013*

⁹⁰ *Water Resources Act 2007*(ACT) s17(2).

⁹¹ *Water Resources Act 2007*(ACT) s17(3).

⁹² ACT Water Report, 11.

⁹³ ACT Water Report, Table 3, 13.

⁹⁴ ACT Water Report, 13.

⁹⁵ NWIcl 59.

⁹⁶ National Water Commission, '2011 Assessment: Appendix B', 211.

⁹⁷ *Draft ACT Water Strategy 2013* (July 2013), 29.

and the WRA. The *Guidelines* identify *separate* components of environmental flows, including a 'base flow' for individual ecosystems.⁹⁸

Sustainable levels of extraction first requires a regime or mechanism whereby monitoring and assessment determines and defines what is a sustainable base flow. The use of sustainable extraction methods and the implementation of measures to ensure the use stays within the recommended (sustainable) levels is also essential. In particular, we refer to the *Strategy 2013* and its recognition for the need for allocation within sustainable limits.⁹⁹ We agree with the policy, however a statutory mechanism or other safeguard should be established to ensure against over allocation and over use.

In its report to the National Water Commission for the 2011 Biennial Assessment, the ACT reported no over-allocated water systems.¹⁰⁰ It is crucial that the ACT does not strain aquatic ecosystems (and potentially breach its national obligations) by any future over-allocation.

In water systems where use and allocation is below the sustainable level of extraction, NWI compliant arrangements are in place to ensure any growth in use does not exceed those agreed levels

The most recent *State of the Environment Report* prepared by the Office of the Commissioner for Sustainability and the Environment identified the ACT's affluence and growth as giving rise to key challenges for the ACT environment including increasing demand for water.¹⁰¹ The Report also found that greenfield development is expected to comprise 55% of new residential development which will result in environmentally harmful impacts including vegetation clearing, land degradation, water quality impacts and altered water flows.¹⁰²

In its 2011-12 Water Report, the ACT has not reported on whether there are any areas in which use and allocation is below the sustainable level of extraction, however the 2011 Biennial Assessment of implementation of the NWI reported that the ACT 'monitors the performance of its water plan and has adaptive management systems in place'.¹⁰³

⁹⁸ *Water Resources Environmental Flow Guidelines 2013*, 16 [3.2.1].

⁹⁹ *Draft ACT Water Strategy 2013* (July 2013), 4.

¹⁰⁰ National Water Commission, '2011 Assessment: Appendix B', 211.

¹⁰¹ *State of the Environment Report* (2011), iv.

¹⁰² *State of the Environment Report* (2011), iv.

¹⁰³ NWIcl 46-50.

One of the objectives of the *Strategy 2013* is to create an integrated and efficient water supply system that is 'adaptive to change'.¹⁰⁴ The ACT government should prioritise adaptive management, in order to ensure that the projected growth does not result in exceeding the agreed levels.

Relative to the other States, the ACT has a smaller catchment area and so it is in an excellent position to be adaptive to the changing conditions and to modify its management arrangements relatively quickly. The ACT should accept this challenge and position itself as a leader in adaptive management modeling and to invest in additional scientific research so that the water management system, including allocations, is based on the best available ecological science.

In over allocated or over used systems, pathways are in place to return water use to sustainable levels of extraction

The ACT has not reported any over allocated or over used systems.¹⁰⁵ Nor does the ACT appear to have instituted an action plan or safeguard mechanism for the aquatic systems if they do become over allocated or over used, however we note the draft *Strategy 2013* contains a principal focus on a sustainable water strategy which takes a long-term view of integrated water resource planning.¹⁰⁶

Long term water planning is in place to predict and prepare for likely future demand and supply scenarios

The draft *Strategy 2013* builds on the ACT's previous water strategy, *Think water, act water*, and seeks to provide a sustainable vision for future water management in the ACT.¹⁰⁷ It anticipates that a report will be issued in March 2014 on the implementation of its objectives.¹⁰⁸

The draft *Strategy 2013* adopts a '30 year planning horizon, with reviews to be conducted every five years to ensure it remains current and relevant'.¹⁰⁹ This long-term view encompasses 'all water sources and the needs of the environment, urban areas, industry and commercial enterprises'.¹¹⁰ The *Strategy 2013* acknowledges that 'there are many pressures and challenges that our future water environment faces in the ACT and region'.¹¹¹ In particular, the *Strategy 2013* discusses the challenge of

¹⁰⁴ *Draft ACT Water Strategy 2013* (July 2013), 5.

¹⁰⁵ National Water Commission, '2011 Assessment: Appendix B', 211.

¹⁰⁶ *Draft ACT Water Strategy 2013* (July 2013), 3.

¹⁰⁷ *Draft ACT Water Strategy 2013* 1.

¹⁰⁸ *Draft ACT Water Strategy 2013* 21.

¹⁰⁹ *Draft ACT Water Strategy 2013* 1.

¹¹⁰ *Draft ACT Water Strategy 2013*.

¹¹¹ *Draft ACT Water Strategy 2013* 17.

droughts, climate change, and population growth and water availability and notes the imperative of 'increasing long term water supply security',¹¹² in order to adapt to periods of drought. The previous strategy, *Think water, act water* made some significant achievements in this area, through the construction of the enlarged Cotter Dam, and the Murrumbidgee to Googong Dam water transfer pipeline.¹¹³

To ensure this long term planning is in place, the ACT should make certain that the *Strategy 2013* is adequately resourced and that it is implemented in a way that it can adapt to future climate variability, to increased demand on water supply caused by population growth and to meet the various future challenges described in the *State of Environment Report 2011*.¹¹⁴

The ability for the *Strategy 2013* to meet these challenges would be vastly improved if the ACT incorporated certain amendments into its water governance regime. Some of these are discussed as follows.

WRA Objectives

The Act makes no mention of the ACT's obligations under the Basin Plan. The objects of the *WRA* should be amended to reflect the Basin Plan as well as objectives of the NWI. For example, s 6(b) of the *WRA* only commits to reversing damage to aquatic ecosystems and aquifers 'where practicable'. This section should be amended to include the 'resolution of over allocation and overuse', as provided in the NWI objectives.¹¹⁵ The objects of the *WRA* should also be amended to reflect the objectives of the *Water Act 2007* (Cth), for example, to include the principles of ecologically sustainable development,¹¹⁶ which are also provided for in the objectives of the *Water Management Act 2000* (NSW).¹¹⁷

In relation to the objectives of the *Strategy 2013*, s 6(a) should be maintained, as it acknowledges the need for 'effective water planning', and is in harmony with Theme 1 of the *Strategy*.¹¹⁸ However, attention should be given as to how the *WRA* might be amended to reflect the *Strategy's* further objectives.¹¹⁹

¹¹² *Draft ACT Water Strategy 2013* 18.

¹¹³ *Draft ACT Water Strategy 2013* 1.

¹¹⁴ *State of the Environment Report* (2011), iv.

¹¹⁵ National Water Commission, 'NWI Objectives',.

¹¹⁶ *Water Act 2007* (Cth) s 3(c).

¹¹⁷ *Water Management Act 2000* (NSW) s 3(a).

¹¹⁸ *Draft ACT Water Strategy 2013* (July 2013), the outcome of Theme 1 is 'well managed, functioning aquatic ecosystems that protect ecological values and contribute to the liveability of the ACT community', 11.

¹¹⁹ *Draft ACT Water Strategy 2013* i.

Risk Assignment

Greater flexibility is also needed in ACT water management. The NWI recommended that a risk assignment framework be implemented for all changes in allocation not provided for in over allocation pathways in water plans.¹²⁰ The *WRA* does not address the assignment of risk arising from future changes in the availability of water from the consumptive pool. In 2009, the ACT informed the National Water Commission that provisions would be included in amended legislation in 2009. However, the ACT has not reported any such revisions to the *Water Resources Act 2007*.¹²¹ Accordingly, the *WRA* should contain amendments to address prerequisites that water management during periods of extreme drought should reflect best available science and allow for flexibility to protect and consider the overall health of the aquatic ecosystem in times of drought and the continuing impacts of climate change. The *WRA* should also contain amendments to allow for changes to water allocation entitlements and licences if there is a need to increase the environmental flow when scientific information recommends or if it is to bring it into line with best practice.

Environmental Flows

Environmental flows are dealt with in Part 3 of the *WRA*. The *WRA provides* that the ecological needs of aquatic ecosystems are considered in priority to consumptive use when the EPA is preparing the guidelines for environmental flow,¹²² however there needs to be clarification and distinction between the 'ecological needs of aquatic ecosystems' and the 'environmental impacts' as matters the EPA may take into account when preparing the *Guidelines*.

i. Knowledge and capacity building

Clause 101 obligates parties to 'identify the key knowledge and capacity building priorities' needed, and to 'identify and implement proposals' to coordinate the 'national water knowledge effort'.¹²³ The 2011 Biennial Assessment noted that in the ACT it appears that no specific work has been undertaken to identify key science or knowledge and capacity priorities to assist in the implementation of the NWI,¹²⁴ and that there is a 'knowledge gap on the effectiveness of the territory's environmental flows'.¹²⁵ Further, clause 79 obligates parties to recognise the different types of

¹²⁰ National Water Commission, '2011 Assessment: Appendix B', 211.

¹²¹ National Water Commission, '2011 Assessment: Appendix B', 211.

¹²² *Water Resources Act 2007* (ACT) s 13(2).

¹²³ NWI cl 101.

¹²⁴ National Water Commission, '2011 Assessment: Appendix B', 217.

¹²⁵ National Water Commission, '2011 Assessment: Appendix B'

surface water and groundwater systems, and establish 'effective and efficient management and institutional arrangements to ensure the achievement of environmental and other public benefit outcomes'.¹²⁶ The EPA monitors environmental flows,¹²⁷ however the *ACT State of the Environment Report 2011* found that 'improved monitoring of groundwater' is needed to provide 'greater knowledge and understanding of groundwater in the ACT',¹²⁸ and recommended that a 'complete assessment of the ACT's at-risk groundwater resources' be undertaken.¹²⁹ This 'knowledge gap' ought to be addressed and a co-ordinated scientific based research into key areas including the nature of groundwater; best practice in water planning management; a water management system that prioritises environmental flows based on ecologically sustainable development and science based criteria; and ensuring environmental flows create resilient ecosystems in light of climate change.

ii. *Amount of Available Water*

The *Strategy 2013* acknowledges that the finalisation of the Basin Plan is a key development since the *Think Water Act Water* initiative.¹³⁰ Reference should be made in the *WRA* to the ACT's commitments under the Basin Plan as a further matter that the Minister must take into account when determining the total amount of surface water and the total amount of groundwater that is available for taking in each water management area.¹³¹

iii. *Monitoring and Assessment Framework*

The *Guidelines 2013* have developed a framework for monitoring and assessment, adapted from that developed by Cottingham et al (2004) in *Environmental Flows Monitoring and Assessment Framework*.¹³² As the proposed framework is described in very general terms, it is difficult to assess whether it will be able to account for whether environmental flows are delivered. The focus of the methodology also seems to be on understanding the 'flow- ecology relationships', and achieving 'ecological objectives'.¹³³ While it is commendable that ecological objectives are considered in the study design, it is crucial that the monitoring and assessment framework not only seeks to ensure environmental outcomes, but that it accounts for

¹²⁶ NW1cl 79.

¹²⁷ National Water Commission, '2011 Assessment: Appendix B', 214.

¹²⁸ *State of the Environment Report (2011)*, 6.

¹²⁹ *State of the Environment Report (2011)*, 6.

¹³⁰ *Murray Darling Basin Plan (2012)*.

¹³¹ *Water Resources Act 2007*, s17.

¹³² *Water Resources Environmental Flow Guidelines 2013*, 34.

¹³³ *Water Resources Environmental Flow Guidelines 2013*, 34.

whether environmental flow is delivered. The methodology should be revised to give this consideration greater weight.

Monitoring and Enforcement

Effective regulatory framework is undermined when there is irregular monitoring and enforcement and a lack of transparency. The following components are essential for the efficient operation of any future governance regime in the ACT:

i. Transparency in Water Allocation

In the ACT, water extraction is managed through a system of access entitlements and licences. Under the *Water Resources Act*, it is a requirement to hold a Water Access Entitlement (WAE) before a licence to take water can be issued.¹³⁴ A WAE is a right to an amount of surface water or groundwater within a Water Management Area. The licence can be subject to any condition 'prescribed by regulation' or 'imposed on the licence by the authority'.¹³⁵ The EPA, being one of the authorities responsible for management as well as monitoring and enforcement, must be adequately informed with specific data regarding the influence of licencing conditions on compliance levels.

Restoration and maintenance of the aquatic ecosystem necessitates the EPA to be more active in its assessment of licences, its monitoring for breaches of licences and other aspects of the *WRA*, and enforcing these provisions.¹³⁶ In a recent submission to the Natural Resources Commission regarding the review of Water Sharing Plans (WSP) in NSW, EDO NSW observed that there were gaps in 'monitoring and data collection' in relation to water licences,¹³⁷ that it was 'not possible to determine whether the individual licence holder has complied with their licencing conditions',¹³⁸ and advocated 'increased transparency' in terms of individual accounts data.¹³⁹ The same argument can be applied to the licencing system in the ACT.

The EPA must be more proactive in its monitoring and data collection in relation to water use. The lack of prosecutions pursuant to Part 9A under the *WRA* raises

¹³⁴ *Water Resources Act 2007* (ACT) s 28.

¹³⁵ *Water Resources Act 2007* (ACT) s 31.

¹³⁶ Environmental Defender's Office ACT, Submission to the Environment and Sustainable Development Directorate, *Environment Protection Act Review* (November 2012) 5.

¹³⁷ Environmental Defender's Office NSW, Submission to the Natural Resources Commission, *Water Sharing Plan Review* (February 2013) 12.

¹³⁸ Environmental Defender's Office NSW, Submission to the Natural Resources Commission, *Water Sharing Plan Review* 13.

¹³⁹ Environmental Defender's Office NSW, Submission to the Natural Resources Commission, *Water Sharing Plan Review* 14.

doubts as to the existing capacity of the EPA to enforce the Act. Again, for the implementation of the *Strategy 2013* and its aims, the EPA needs to be able to effectively monitor water use by licence holders and exercise the enforcement powers provided under Part 10 of the *WRA*.

100% of licenced extraction in the ACT is metered with the exception of stock and domestic use of surface water.¹⁴⁰ We commend the ACT government for this not insignificant achievement, however it is meaningless unless it is effectively and routinely monitored, the extraction reported and enforced in circumstances where there has been a breach and the adoption of an effective compliance policy.¹⁴¹ Irregular monitoring or lengthy intervals between meter reading may result in a delay of compliance and enforcement actions until well after the breach has occurred.

ii. Transparency in Water Accounting

The NWI obligates Parties to develop and implement water accounting.¹⁴² However, the Commission's 2011 Assessment found that the ACT does not have consolidated water accounting.¹⁴³ The ACT government has reported that it intends to apply the accounting standards in information management for its water systems in the future.¹⁴⁴ Further, it has participated in the development of national water accounting standards and reporting frameworks, including the Water Accounting Conceptual Framework and the Preliminary Australian Water Accounting Standards (AWAS).¹⁴⁵ It is necessary for the ACT to adopt and implement the Water Accounting Conceptual Framework (WACF) into the water accounting regime.

iii. Transparency in Reporting

It appears that the ACT has not fulfilled its obligation to establish effective and efficient management and institutional arrangements, including environmental water managers accountable for the management of environmental water provisions.¹⁴⁶ It is the ACT's intention to establish a peak oversight group in the Directors General Water Group (DGWG),¹⁴⁷ however the DGWG should be a statutory authority with its duties set out in the *WRA* including managing water delivery, maintaining water management accounts and reporting to the public on the delivery of water services.

¹⁴⁰ National Water Commission, '2011 Assessment: Appendix B', 215.

¹⁴¹ *Water Resources Act 2007* (ACT) s 77G.

¹⁴² National Water Commission, 'NWI Objectives', cl 82(i).

¹⁴³ National Water Commission, '2011 Assessment: Appendix B', 215.

¹⁴⁴ National Water Commission, '2011 Assessment: Appendix B'

¹⁴⁵ National Water Commission, '2011 Assessment: Appendix B'

¹⁴⁶ NWI cl 79(i)(d).

¹⁴⁷ *Draft ACT Water Strategy 2013*, 21.

As discussed above, it is also necessary the ACT provides an environmental water holder as a separate statutory body responsible for the management and delivery of environmental water so as to comply with the NWI commitment to establish an environmental water manager with the necessary resources and authority to manage environmental water effectively.¹⁴⁸

iv. Transparency in Review

Decisions for major projects and the giving of entitlements and licences are not reviewable decisions under the *WRA* and are therefore not subject to an independent merit review pursuant to the *ACT Civil and Administrative Tribunal Act 2008 (ACT)*.¹⁴⁹ The *WRA* should be amended in respect of major projects involving water planning so that it is aligned with other ACT planning laws such as the ability for third parties to lodge an objection to a development application with a potential opportunity for an ACAT review in certain circumstances.¹⁵⁰ ANEDO also recommends that similar amendments be made for the issuing of water entitlements and licences likely to have a sizeable impact on the water resource regime and dependant ecosystems.

NEW SOUTH WALES

The following section address three key issues regarding the implementation of NWI reforms in NSW:

1. Transparency of decision-making under the *Water Management Act 2000 (NSW) (WM Act)*;
2. Exemptions in water sharing plans concerning mining developments; and
3. Water shepherding.

These three matters broadly fall under Part 3 - Water supports a healthy environment.

1. Transparency of decision-making under the WM Act

The WM Act permits third parties who have objected to the granting of a water use or water works approval to appeal the decision within 28 days.¹⁵¹ Third parties may also seek an order restraining or remedying a breach of the Act, including breaches involving administrative decisions (to grant a licence or approval a licence transfer,

¹⁴⁸ NWI cl 78(ii).

¹⁴⁹ *Water Resources Act 2007 (ACT)* Schedule 1.

¹⁵⁰ *Planning and Development Act 2007 (ACT)* s 156.

¹⁵¹ WM Act, s. 368.

for example).¹⁵² Recent changes to the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) now require such proceedings to be commenced within three months of the relevant decision being made under the Act.¹⁵³

These appeal rights must be considered in tandem with barriers to accessing information regarding decisions to approve water use applications, water works, a new licence or a licence transfer.

While the NSW Office of Water does maintain a Register of Water Approvals (for water use or water management works),¹⁵⁴ the Register can only be used if an interested party can specify the exact kind of approval and the month and year that it was issued. Based on our experience, most members of the community do not have access to this information, effectively barring them from accessing the Register.

Furthermore, while a water access licence register (WAL Register) is maintained by Land and Property Information (as per the requirements of the WM Act),¹⁵⁵ searches are only possible where an individual has access to a specific licence number.

In short, there is no central, entirely transparent register of decisions regarding water use, water management works, the granting of new licences or licence transfers. We also note with some concern that 'activity approvals', which includes approvals for aquifer interference activities,¹⁵⁶ do not have to be recorded in a publicly accessible register. As such, it is difficult for third parties to know when the Minister has made such a decision under the WM Act. In the absence of this information, interested third parties are unable to scrutinise and where necessary appeal decisions made under the Act.

We are aware that certain parties are of the opinion that a more transparent system would undermine the privacy of entitlement and approval holders. However, the *Privacy and Personal Information Protection Act 1998* (NSW) permits the disclosure of information contained on public registers as long as the agency concerned is 'satisfied that it is to be used for a purpose relating to the purpose of the register or the Act under which the register is kept.'¹⁵⁷

ANEDO submits that accessing and using information contained on the Water Approvals Register and WAL Register for the purposes of verifying whether a

¹⁵² WM Act, s. 336.

¹⁵³ UCRP, rule 59.10.

¹⁵⁴ Available at: <http://registers.water.nsw.gov.au/wma/ApplicationSearch.jsp?selectedRegister=Application>

¹⁵⁵ *Water Management Act 2000* (NSW), s. 71.

¹⁵⁶ WM Act, s. 91.

¹⁵⁷ *Privacy and Personal Information Protection Act 1998* (NSW) s 57(1).

decision has been made in accordance with the WM Act, relevant water sharing plan and the Access Licence Dealing Order 2004 is entirely consistent with this requirement.

ANEDO further submits that proper disclosure of administrative decisions concerning water use, water management works, activity approvals, new licences and licence transfers is necessary if the objectives of the NWI are to be met. Specifically, the NWI provides that:¹⁵⁸

The Parties agree that, once initiated, their water access entitlements and planning frameworks will:

- i. ...*
- ii. ...*
- iii. be characterised by planning processes in which there is adequate opportunity for productive, environmental and other public benefit considerations to be identified and considered in an open and transparent way;*
- iv. ...*

The aforementioned lack of transparency has disadvantaged a number of our clients who were unable to access information regarding approvals granted under the WM Act within the relevant limitation period. While the UCPR do provide the courts with discretion to waive the three month limitation period, there is no guarantee that they would choose to exercise this discretion. Regardless, judicial discretion is not a substitute for disclosure of administrative decisions, in particular decisions concerning an important component of natural resource management in NSW.

To address these issues the WM Act would need to be amended to:

- provide for a Register of Approvals which provides users with a range of search options, including an option to search for all approvals issued in a particular valley between dates specified by the user;
- provide for the creation of a central register of decisions to grant new licences and to approve licence transfers. The central register must provide users with a range of search options, including an option to search for all licences issued or transferred in a particular valley between dates specified by the user;

¹⁵⁸ NWI, cl. 25 (iii).

- require decisions to issue activities approvals, including approvals for aquifer interference activities, to be registered in an accessible, central register which provides users with a range of search options, including an option to search for all activity approvals in a particular valley between dates specified by the user.

2. Exemptions in water sharing plans concerning mining developments

ANEDO is concerned by recent amendments to a number of water sharing plans which exempt large mining developments (including coal mining and coal seam gas (CSG) developments)¹⁵⁹ from rules designed to protect groundwater and interconnected surface water sources during periods of low flow, including drought. The rules in question concern aquifer access licences.

ANEDO notes that the following water sharing plans have been amended to include such exemptions:

- Water Sharing Plan for the Hunter Unregulated and Alluvial Water Sources 2009 (Hunter WSP);¹⁶⁰
- Water Sharing Plan for the Bellinger River Area Unregulated and Alluvial Water Sources 2008 (Bellinger WSP);¹⁶¹
- Water Sharing Plan for the Coffs Harbour Area Unregulated and Alluvial Water Sources 2009 (Coffs Harbour WSP);¹⁶²
- Water Sharing Plan for the Lower North Coast Unregulated and Alluvial Water Sources 2009 (Lower North Coast WSP).¹⁶³

We note that these rules have been enacted in part to ensure that large mining developments which result in incidental take (which is continuous) do not breach cease-to-pump rules. However, enacting rules which render ongoing take lawful does not address the underlying issue, namely impacts on the hydrological functioning of the water source, on water-dependent ecosystems and on other users.

¹⁵⁹ Namely state significant mining developments and Part 3A mining developments. State significant developments arise pursuant to Part 4.1 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). While Part 3A of the EPA Act has been repealed, a significant number of mining developments are being assessed under this Part due to transitional provisions.

¹⁶⁰ See cl. 68, cl. 19.

¹⁶¹ See cl. 65, cl. 21.

¹⁶² See cl. 63, cl. 19.

¹⁶³ See cl. 67, cl. 19.

ANEDO submits that ongoing take is particularly problematic in the Hunter catchment, which is home to the largest coal field in NSW,¹⁶⁴ and 20 of the largest coal mines in the world.¹⁶⁵ Data suggests that water sources in this catchment are under stress due to over allocation.

Specifically, report cards for each of the 39 water sources regulated under the Hunter WSP tend to highlight the impact of extractions on the hydrological functioning of groundwater and surface water in the catchment. For example, report cards for the Glennies water source and the Upper Wollombi Brook water source (both of which are proximate to a significant number of large coal mines)¹⁶⁶ indicate that they are under a 'high' level of hydrological stress due to demand for water exceeding availability during peak periods.¹⁶⁷

As incidental take is by nature continuous, planning and water management laws must in the first instance assess the overall capacity of a water source to support mining development without compromising hydrological functioning, connectivity or the well-being of groundwater-dependent ecosystems. Development which exceeds this capacity should be refused.

ANEDO submits that high-level, strategic planning of this nature would help to promote the objectives of the NWI. Specifically, cl. 25 of the NWI provides that:

The Parties agree that, once initiated, their water access entitlements and planning frameworks will:

i. ...

ii. ...

iii. ...

iv. ...

¹⁶⁴ See the 'Mining in NSW' section of the New South Wales Minerals Council Ltd website at www.nswmin.com.au (accessed 17 April 2013).

¹⁶⁵ See the 'Mining in NSW' section of the New South Wales Minerals Council Ltd website at www.nswmin.com.au (accessed 17 April 2013).

¹⁶⁶ These include Ashton Coal Mine, Hunter Valley Operations, Ravensworth (open-cut and under-ground), Mount Owen and Mount Thorley Warkworth.

¹⁶⁷ See the 'Hunter Unregulated and Alluvial' section of the NSW Office of Water website at www.water.nsw.gov.au.

- v. *implement firm pathways and open processes for returning previously overallocated and/or overdrawn surface and groundwater systems to environmentally-sustainable levels of extraction;...*

...

- xi. *protect the integrity of water access entitlements from unregulated growth in interception through land-use change.*¹⁶⁸

Cl. 37 of the NWI further states that:

Broadly, water planning by States and Territories will provide for:

- i. *secure ecological outcomes by describing the environmental and other public benefit outcomes for water systems and defining the appropriate water management arrangements to achieve those outcomes; and...*¹⁶⁹

It is arguable that that the high concentration of coal mines in the Hunter catchment is inconsistent with 25 (v), (xi) and 37 (i). Exemptions recently incorporated into the Hunter WSP further undermine these objectives.

ANEDO also notes that CSG exploration licenses are held over vast areas of NSW, including areas covered by the Bellinger, Coffs Harbour, and Lower North Coast WSPs. The exemptions that now apply under these WSPs are inconsistent with 25 (xi) and 37 (i) in particular.

Up-front, strategic planning based on best available science is necessary to determine the capacity of a water source to support mining development (including CSG development) without compromising the hydrological functioning, connectivity or the well-being of groundwater-dependent ecosystems. Development which exceeds this capacity should be refused.

3. *Water shepherding*

While ANEDO supports the development of an effective shepherding framework with optimises the delivery of Commonwealth Environmental Water (CEW) in the Murray-Darling Basin, we are concerned that the 'Proposed arrangements for shepherding

¹⁶⁸ NWI, cl. 25 (iii).

¹⁶⁹ NWI, cl. 37 (i).

water in NSW' (Proposed arrangements)¹⁷⁰ are incapable of meeting this objective. Our concerns are outlined in considerable detail in a submission by EDO NSW responding to the Proposed arrangements. We have attached EDO NSW's response (which includes a series of recommendations) to this submission.

VICTORIA

The Victorian Water Act is currently undergoing a wholesale redraft. The Victorian Government initially stated that the purpose was to simplify and clarify the Water Act rather than make major substantive alterations. However the indications are that the review will in fact include some more substantive changes to the Water Act, possibly in relation to environmental water and long term resource planning. Brief details of the scope of the review is on the Department of Environment and Primary Industries website.¹⁷¹ An exposure draft bill is due to be released in December 2013 for public review. In part the redraft will address any issues with Basin Plan compliance. It is unclear whether broader compliance with the NWI is a consideration in the drafting. EDO Victoria will provide the NWC with an analysis of the draft legislation once it is released.

The Victorian Water Act has not substantially changed since the last NWI review and therefore there is little value in providing detailed comment on the operation of the Act. The following section therefore focuses on a few key issues of note and concern.

Condition of Victorian rivers

The Victorian Government has recently released its third Index of Stream Condition which provides a very useful assessment of the environmental condition of Victoria's rivers¹⁷² (despite the 3 year delay in its release).

The Index shows that only 23% of streams in Victoria are in good or excellent condition, and 32% are in poor or very poor condition (with the rest – 43% - being moderate). Stream condition stayed the same between 2004 and 2010 in 50% of reaches, improved in 20% of reaches and decreased in 30% of reaches. The report states this is a good result keeping in mind the drought. However it shows that there is a lot of work to be done to improve Victorian river health. The location of good versus poor rivers clearly shows that stream condition is the worst in heavily cleared

¹⁷⁰ See <http://www.water.nsw.gov.au/Water-management/Water-recovery/Water-shepherding/Water-shepherding>

¹⁷¹ See - <http://www.depi.vic.gov.au/water/governing-water-resources/water-law-review>

¹⁷² See Index of Stream Condition , The Third Benchmark of River Condition 2010 at <http://www.depi.vic.gov.au/water/water-resource-reporting/Third-Index-of-Stream-Condition-report>

agricultural areas and greatly improved in areas with formal protection such as national parks.¹⁷³

Qualification of environmental water

The Victorian Act still allows the Minister to suspend or reduce environmental entitlements (as well as any other entitlements) if he or she is of the opinion that there is a 'water shortage' in an area. A water shortage is when 'the volume or quality of water available in the area or system to satisfy any rights to water (whether or not they relate to that area or water system) is or will shortly be inadequate for any reason'. This provision is not accordance with the NWI. The provision focuses on the protection of consumptive rights, as a water shortage can only be declared if existing rights to water are under threat. A water shortage cannot be declared if the environment is suffering from lack of water (as can occur in other jurisdictions with a similar provision).

In practice, the use of this provision has fallen disproportionately on environmental water, as environmental entitlements and rules-based environmental water is qualified the most often in favour of consumptive use. So in times of shortage, environmental water is qualified (re-directed) ahead of consumptive water.

Decision-making regarding temporary qualifications is not transparent and qualifications are often not publicly known until after the qualification is in place. There is no ability to challenge qualifications or provide for independent review of the decision to qualify. The Act gives very little guidance as to the circumstances under which a water shortage can be declared, providing the Minister with extensive discretion as to when to apply this provision. In addition there is no limit to the amount of time a qualification can remain in force.¹⁷⁴ Once a qualification is made, the Act only requires notice of the qualification to be given to the persons affected. It is difficult to find public records of declarations of water shortages or qualification of rights. Although some information appears in the Water Accounts, the information is not complete and there is a two-year time lag on the release of the information. Some qualifications to bulk entitlements and environmental entitlements is provided in the Victorian Water Register but they are difficult to find and incomplete.¹⁷⁵

¹⁷³ Index of stream condition p8

¹⁷⁴ The Government recently introduced amendments into Parliament to the Victorian *Water Act* to allow the Minister to temporarily qualify rights for as long as he/she declared, effectively allowing a 'permanent' temporary qualification, however the amendment was rejected by Parliament – Water Amendment (Entitlements) Bill 2009 (Vic), introduced on 24 November 2009.

¹⁷⁵ See the EDO 2010 report pp 24–25 for more detail.

Proposed Water Sharing Orders

A proposal for 'Water Sharing Orders' (WSOs) is being developed as an element of the Victorian water law reform process. Very few details have been released by the government so far, however we understand the context for the proposal to be at least partly motivated by the perceived need to develop an instrument that is better aligned with the Water Resource Plan requirements under the Basin Plan. This issue arises because of Victoria's alternative approach to implementing the NWI because of the differences in the Victorian system from the water sharing plans model that has been adopted the Commonwealth Water Act.

It seems likely that the process to formulate WSOs will be to identify sufficiently common elements from existing bulk entitlements and licences, and incorporate these into an overarching set of rules to govern all entitlements in Victoria. There might also be the incorporation of common provisions from other instruments. We understand that the commitment is that this will be done without altering entitlements, however we are concerned that elements of the environmental water reserve (which is mostly comprised of conditions on other entitlements) could be impacted as a result of the change.¹⁷⁶ Our primary concerns are that WSOs be developed on the basis that they will not negatively impact existing environmental entitlements as well as the other elements of the environmental water reserve; and they make compliance with the Basin Plan more transparent and accessible than is presently the case.

Long term water resource assessment

The Victorian Water Act provides for a long-term water resource assessment every 15 years in order to determine whether there has been a decline in river health, or a decline the availability of surface or groundwater and if so whether it has fallen disproportionately on the environment or consumptive users.¹⁷⁷ Given the current rate of climate variation it is crucial that such a provision remains in the Act. However the government has indicated that this provision may be removed in the current Water Act review. Unless an equivalent process is included to replace it, Victoria will not have a legal mechanism to properly address long term reduction in water availability and risk. We can provide the NWC with analysis on this and other changes that come from the review once the Bill is released.

¹⁷⁶ For example, if through the formulation of WSOs some licence and bulk entitlement holders find themselves subject to conditions that they previously were not, or no longer subject to certain conditions, while this might not impact the *volume* of water attached to an entitlement, it stands to impact the nature of those entitlements. This also has the potential to re-define environmental protection measures in terms of storage operation, river flows and maintenance of the EWR.

¹⁷⁷ *Water Act 1989* (Vic) s 22K.

SOUTH AUSTRALIA

The following section addresses the questions posed in the discussion paper in relation to Part 3 - Water supports a healthy environment in relation to the South Australian water management system.

A practical understanding of environmental condition of water system(s) and associated ecosystem services

This is dealt with largely in terms of the role and membership of Natural Resource Management (“NRM”) boards. An NRM board is required amongst other matters to provide for the care, control, management, conservation or preservation of any natural resource.¹⁷⁸ To help achieve this the Minister must, as far as reasonably practicable in the circumstances, give consideration to nominating persons so as to provide a range of knowledge, skills and experience across a number of areas, one such area being water resource management.¹⁷⁹ It is implied that a person or persons with such experience would have a practical understanding of the environmental condition of water systems(s) and associated ecosystems.

The identification of water systems and their environmental conditions that are in need of protection, maintenance or improvement

A water resource is broadly defined to include watercourses, lakes, surface water, underground water, storm water and effluent.¹⁸⁰ A watercourse is defined as a river, creek or other natural watercourse and includes dams or reservoirs, lakes, channels and estuaries.¹⁸¹ In addition to this, the *NRM Act* addresses the management of wells and wetlands.¹⁸²

In terms of protecting, maintaining or improving water resources, the *NRM Act* distinguishes between prescribed and non-prescribed water resources. A prescribed water resource is not defined in the *NRM Act*, instead it is declared by the Governor via the regulations.¹⁸³ For example a number of prescribed water resources have been declared since the *NRM Act* came into force including watercourses in the Western Mount Lofty Ranges¹⁸⁴ and the wells area in the Mallee Proclaimed Region.¹⁸⁵ Generally speaking prescribed water resources attract more regulation in terms of permits and licences than non-prescribed water resources.

There is a requirement under the *NRM Act* that the State and Regional NRM plans must include information such as the state and condition of natural resources.¹⁸⁶ Water allocation plans work in conjunction and should be consistent with regional NRM plans¹⁸⁷ and must include inter alia an assessment of the quantity and quality of

¹⁷⁸ *Natural Resources Management Act 2004* (“*NRM Act*”) s 30(2)(c).

¹⁷⁹ *NRM Act* s 25(4)(a).

¹⁸⁰ *NRM Act* s 3.

¹⁸¹ *NRM Act* s 3.

¹⁸² *NRM Act* s 3.

¹⁸³ *NRM Act* s 125.

¹⁸⁴ *Natural Resources Management (Western Mount Lofty Ranges – Prescribed Watercourses) Regulations 2005*.

¹⁸⁵ *Natural Resources Management (Mallee Prescribe Wells Area) Regulations 2005*.

¹⁸⁶ *NRM Act* s 74(2) and (3).

¹⁸⁷ *NRM Act* s 76(5).

water needed by ecosystems that depend on that water resource.¹⁸⁸ How such factors are to be assessed varies according to the relevant NRM region and the water resources it contains. Furthermore, water allocation plans are required to take into account the cumulative effect of taking water from a water course if that would detrimentally affect the quantity or quality of water from another water course.¹⁸⁹

The importance of the River Murray is addressed in the *NRM Act*. Section 6(1) provides that one of the objectives of the Act is “to ensure that all reasonable and practicable measures are taken to protect, restore and enhance the River Murray in recognition of its critical importance to the South Australian community and its unique value from environmental, economic and social perspectives and give special acknowledgement to the need to ensure that the use and management of the River Murray sustains the physical, economic and social well being of the people of the State and facilitates the economic development of the State.” According to the principles of ecologically sustainable development, long term and short term economic, environmental, social and equity factors should be considered.¹⁹⁰

The *NRM Act* identifies various issues specific to the Murray that should be addressed, which include:

- The protection, maintenance or restoration of key habitats and ecosystems generally;¹⁹¹
- That the natural flow regime of the river system are reinstated and maintained;¹⁹²
- That water quality for the purposes of ecological processes is achieved, including minimising the impact of salinity levels,¹⁹³ and
- That the importance of the health of the river to the economic, social and cultural prosperity of the communities that rely on it is recognised and proper management of the system is in place.¹⁹⁴

To the extent that a NRM plan or water allocation plan applies to the Murray-Darling Basin or in relation to the River Murray, the plan should seek to further the objects and objectives of the *River Murray Act 2003*.¹⁹⁵

The identification of system requirements for different community values and priorities

The *NRM Act* deals with general rights in relation to water use particularly for landowners or occupiers. For example, a person who has lawful access to a watercourse, lake or well has a general right to take water from that resource,¹⁹⁶ unless that water resource is prescribed under the regulations in which case an authorisation, permit or licence is granted under the *NRM Act*.¹⁹⁷ No authorisation,

¹⁸⁸ *NRM Act* s 76(4).

¹⁸⁹ *NRM Act* s 76(5).

¹⁹⁰ *NRM Act* s 6(2)(b).

¹⁹¹ *NRM Act* s 7(2).

¹⁹² *NRM Act* s 7(3)(a).

¹⁹³ *NRM Act* s 7(4).

¹⁹⁴ *NRM Act* s 7(5).

¹⁹⁵ *NRM Act* s 87.

¹⁹⁶ *NRM Act* s 124(1).

¹⁹⁷ *NRM Act* s 124(3), 128.

permit or licence is required in relation to prescribed water resources if the water is used for domestic purposes or for watering stock.¹⁹⁸

Trade-off decisions between social, environmental and economic values to be transparent

In terms of water allocation plans, there must be a balance between the environmental, social and economic needs for water and sustainable rate of take.¹⁹⁹ One of the objects of the *NRM Act* is to ensure that ecologically sustainable development is undertaken according to a number of principles including that decision-making processes should integrate long term and short term economic, environmental, social and equity considerations.²⁰⁰

The implementation of environmental aspects of water plans, and for them to improve the environment

Under section 76 a water allocation plan must include or address such things as:

- An assessment of the quantity and quality of water needed by ecosystems;²⁰¹
- Achieving an equitable balance between environmental, social and economic needs for water and sustainable rate of take;²⁰²
- Assessing the capacity of resource to meet demands for water,²⁰³ and
- Identifying and assessing methods for conservation, use and management of water in an efficient and sustainable manner.²⁰⁴

How this is implemented in practice is another matter and is something that relies upon matters explicitly stated in plans for each NRM region.

Future water options are not compromised by today's decisions

The objects of the *NRM Act* provide that ecologically sustainable development should be achieved through consideration of a number of principles including that the present generation should ensure that the health, diversity and productivity of the natural environment is maintained or enhanced for the benefit of future generations.²⁰⁵ To achieve the goal of sustainable water use the *NRM Act* contains specific provisions that must be included in a water allocation plan such as:

- Determining a consumptive pool for the particular resource;²⁰⁶
- Setting out principles to ensure that the rate of taking and the use of water is sustainable,²⁰⁷ and
- In providing for the allocation of water, that present and future needs of the occupiers of land are taken into account, in relation to the existing

¹⁹⁸ *NRM Act* s 124(4) and (6).

¹⁹⁹ *NRM Act* s 76(4)(b).

²⁰⁰ *NRM Act* s 7(3)(a).

²⁰¹ *NRM Act* s 76(4)(a).

²⁰² *NRM Act* s 76(4)(b)(i).

²⁰³ *NRM Act* s 76(4)(d).

²⁰⁴ *NRM Act* s 76(4)(e).

²⁰⁵ *NRM Act* s 7(3)(d).

²⁰⁶ *NRM Act* s 76(4)(ab).

²⁰⁷ *NRM Act* s 76(4)(b)(ii).

requirements and future capacity of the land and the likely effect of those provisions on the value of the land.²⁰⁸

Additionally, environmental water requirements must be met in order to sustain the ecological values of ecosystems that depend on the water resources, including their processes and biodiversity.²⁰⁹

If in the opinion of the Minister administering the *NRM Act* there are concerns about the inadequate supply or overuse of water, the Minister may prohibit or restrict the taking of water, limit the quantity of water that may be taken, or direct that dams and reservoirs be modified to let water pass through.²¹⁰ Some factors that the Minister may consider include:

- If the rate at which water is taken from a water resource (whether prescribed or not) is such that the quantity of available water can no longer meet demand, is affecting the quality of water, or is having a serious effect on the water resource;²¹¹
- If the rate at which water is taken from a well is such that the underground aquifer is likely to collapse or suffer damage;²¹² and
- If the rate at which surface water is taken is such that it can no longer meet demand and is having a serious effect on the water resource.²¹³

For all of these factors the Minister must take into account the need for water of ecosystems that depend on that water resource.²¹⁴ The Minister may serve a notice on a person or direct that particular action be taken if the Minister is of the opinion that the taking of water is, or is likely to cause damage to an ecosystem.²¹⁵ Failure to comply constitutes an offence, though this is expiable.²¹⁶

***For more information in relation to this submission please contact
Nicola Rivers, Law Reform Director (EDO Victoria) on nicola.rivers@edo.org.au
or
(03) 8341 3100.***

²⁰⁸ *NRM Act* s 76(4)(c).

²⁰⁹ *NRM Act* s 76(8a).

²¹⁰ *NRM Act* s 132(1)(d), (e), (f).

²¹¹ *NRM Act* s 132(1)(a).

²¹² *NRM Act* s 132(1)(b).

²¹³ *NRM Act* s 132(1)(c).

²¹⁴ *NRM Act* s 132(2).

²¹⁵ *NRM Act* s 132(5).

²¹⁶ *NRM Act* s 132(7).