NSW EDO
DEFENDING THE ENVIRONMENT
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Water Reform Action Plan Taskforce
NSW Department of Industry
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MLC Centre
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Submitted online

To Whom It May Concern,

NSW water metering framework and Draft Water Management (General) Amendment (Metering) Regulation 2018

EDO NSW welcomes the opportunity to comment on the NSW water metering framework (**Metering Framework**) and Draft Water Management (General) Amendment (Metering) Regulation 2018 Regulation (**Draft Regulation**). We also wish to congratulate the Water Reform Action Plan Taskforce on its work to date in relation to metering, which is fundamental to the success of any water management regime.

By way of background, EDO NSW is a community legal centre specialling in public interest environmental law. We have many years' experience advising a diverse client base – including Traditional Owners, farmers, community groups and peak conservation organisations – about water laws and policies at both a State and Commonwealth level. Our legal work is evidence-based and where appropriate informed by experts in intersecting disciplines, Traditional Owners and landholders with experience managing their properties in a variable climate.

As lawyers, our feedback will focus on the Draft Regulation, of which we are broadly supportive. We do, however, wish to comment briefly on the following five matters:

- ***Temporary exemptions in high risk water sharing plan areas***
- ***Floodplain harvesting***
- ***Evidence-based metering exemptions***
- ***Stock and domestic use***
- ***Modelling review***

1. Temporary exemptions in high risk water sharing plan areas

First, the mandatory metering condition provided for in cl. 229 will not apply to the water sources listed in cl. 230(1) until 1 December 2020, except in relation works which authorise the use of a pump that is greater than 500mm in diameter. In these instances, cl. 230(2) provides for the mandatory metering condition to apply from 1 December 2019.

EDO NSW supports a risk-based, transitional period to allow water users time to adapt to the new framework. We do note, however, that a number of the water sources to which the temporary exemption provided for under s. 230(1)(a) and (b) applies were characterised as

'high risk water sharing plan areas' by the Department of Industry in the 'Water take measurement and metering' consultation paper it published in March 2018.[1] Assuming the majority of pumps in these water resource areas exceed 500mm, delaying the commencement of the metering condition to 1 December 2020 or 1 December 2021 is not unreasonable.

In order to understand whether this is the case, we undertook to examine the works approvals attached to all licences[2] in four water sharing plan areas classified as high-risk: the Barwon-Darling Unregulated and Alluvial Water Sources; the Macquarie and Cudgegong Regulated River Water Source; the Upper Namoi Regulated Rivers Water Source; and the Gwydir Regulated River Water Source.[3] These four areas are currently subject to the December 1, 2020 commencement date. In summary, our analysis indicates that a significant number of pumps in these water sources are *below* 500mm. We can provide the Department with the data sets we generated if this would be useful.

This in turn suggests that there is scope to consider whether – in keeping with a risk-based approach – it is appropriate to delay the commencement of the mandatory metering condition to 1 December 2020 or 1 December 2021 in all of the high-risk areas included in cl.230(1). We make this comment against the backdrop of Basin Plan implementation, water shortage due to drought and climate change, and broader community expectations regarding metering, compliance and enforcement.[4]

2. Floodplain harvesting

Second, we note that water taken pursuant to a floodplain harvesting licensing is listed as a permanent exemption under cl. 231(f). We understand that the Department is working on a suite of alternative measurement methods to measure water taken from overland flows. However, these methods are generally considered to be unreliable (although we acknowledge and support the need for ongoing research and development, in particular in relation to the use of remote sensing technology). Conversely, it is possible to measure some overland flow with a meter (for example overland flow that is delivered into an on-farm storage via channels).

These observations are consistent with the comments and recommendations of Professor Richard Kingsford in the submission he prepared on behalf of the Centre for Ecosystem Science at the University of New South Wales regarding the proposed licensing framework for floodplain harvesting.[5] Specifically, Professor Kingsford noted that 'all floodplain harvesting works need to be licensed and metered.'[6] Professor Kingsford further noted that

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[1] Department of Industry, *Water take measurement and metering*, March 2018. Pp. 8,9.
[2] Excluding domestic and stock and groundwater licences, respectively.
[3] All data obtained from the NSW Water Register.
[4] We note that it may (in certain circumstances) be difficult for the Natural Resources Access Regulator to satisfy the criminal burden of proof with respect to certain offence provisions in the WM Act in the absence of accurate metering data. This means that it is essential that accurate, tamper-proof meters are installed as soon as possible.
[5] Centre for Ecosystem Science, University of NSW, *Submission on Implementing the NSW Floodplain Harvesting Policy and Better Management of Environmental Water - Consultation papers*. 2018. Available online: https://www.ecosystem.unsw.edu.au/files/Centre%20for%20Ecosystem%20Science_Floodplain%20harvesting%20implementation%20and%20better%20management%20of%20environmental%20water%20consultation%20papers.pdf
[6] Professor Kingsford has suggested the use of a second lift pump for this purpose, with other forms of stored take subtracted from the metered volume of overland flow. See Ibid, p. 8.

the use of remote sensing technology should be used to complement metering.[7] We therefore consider it unwise to automatically impose a permanent exemption with respect to floodplain harvesting and would recommend that the Department reconsider its position in relation to this matter.

3. Evidence-based metering exemptions

Third, cl. 232 empowers the Minister to exempt exempt the holder, or a class of holders, from complying with the mandatory metering equipment condition, if the Minister is satisfied that it is not possible for water taken using a water supply work to be measured by metering equipment. While we do not consider this clause to be unreasonable, we would recommend adding an objective element requiring the Minister to be satisfied 'on the basis of best-available evidence'. This would help to avoid undue speculation regarding the legitimacy of the exemption.

Furthermore, we consider it vital that evidence supporting such a decision be published on the Department's website (together with the decision itself, which we note is already provided for under cl. 232(4)). Again, the provision of this information would avoid unnecessary speculation regarding the validity of the decision and to that extent help to rebuild trust in water-related decision-making processes. We further recommend that consideration be given to the inclusion of a sub-clause requiring the Minister to revoke the exemption in the event that technology is developed allowing the water take in question to be measured.

4. Stock and domestic use

Fourth, while we understand that it is beyond the scope of the Draft Regulation to address stock and domestic use, we have been informed that the majority of bores in NSW are constructed for this purpose.[8] We would therefore recommend that consideration be given to whether or not metering is required to ensure that this take complies with the 'reasonable use guidelines' which are in development (noting that any such guidelines should be mandatory and legally enforceable).

5. Modelling review

Finally, the Draft Regulation is underpinned by modelling which found that the infrastructure-based threshold set out in cl. 231(1)(b) and (c) would result in 95 percent of extractions being metered. As water markets are inherently dynamic, we would recommend that modelling be undertaken at the review date in five years to ensure that these thresholds are still relevant and capable of achieving a minimum of 95 percent coverage.

If you require any further information, please contact EDO NSW on 9262 6989 or emma.carmody[a]edonsw.org.au.

Kind Regards,

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[7] Ibid, pp. 8 and 9.