

29 November 2019



Director
Murray-Darling Basin Inquiry
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

[Submitted online](#)

Dear Director

Submission to Inquiry into water markets in the Murray-Darling Basin

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact upon people who are marginalised and facing disadvantage. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training. The Energy + Water Consumers' Advocacy Program represents the interests of low-income and other residential consumers, developing policy and advocating in energy and water markets.

PIAC welcomes the ACCC inquiry into the operation of water markets in the Murray-Darling Basin (MDB). MDB water markets are intended to operate to support the MDB plan and the *Water Act 2007* (Cth) (the Water Act), and provide a framework for efficient and productive distribution and use of water resources within the sustainable environmental limits of the MDB.

Notwithstanding the impacts of the current severe drought, there is overwhelming evidence that the market, and the plan and legislative framework it is linked to, has failed to deliver upon its intent. PIAC hopes the Inquiry will provide an opportunity to address the flaws that undermine its ability to drive efficient, sustainable outcomes.

PIAC is not a direct market participant. We have confined our comments to Issue 5 as we consider this a key contributor to the failure of the market to deliver the intended outcomes.

Issue 5 – Competition and market outcomes

PIAC notes that the Issues Paper explains that the MDB water markets are a 'cap and trade' system which rely upon:

- Clearly defined cap(s) on the available resources
- Clearly defined, legally secure and tradeable water rights
- Robust and functioning registers of water ownership and trade
- Sound governance and regulatory arrangements, including clearly defined water trading rules

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- Comprehensive compliance and enforcement regimes, supported by regular and reliable water use metering and water accounting frameworks, together with adequate resourcing.

The recent Royal Commission into the Murray Darling Basin (the Royal Commission), and a number of Commonwealth and State investigations and audits, have highlighted fundamental failures relating to the definition and formulation of caps, governance and regulatory arrangements, and compliance and enforcement regimes.

PIAC considers these to be fundamental flaws that have led to failed market outcomes, which compromise both the ability of the MDB plan to deliver in its intent, and the sustainability of the basin itself. The ‘caps’ define the available resources to be distributed and traded by the market. They are a crucial element defining the scope of the market, and a key indicator of the performance of the market and the plan as a whole.

PIAC highlights the findings of the Royal Commission and the expert opinion of the Wentworth Group of Concerned Scientists and others, as evidence that flaws in the formulation, definition and operation of ‘caps’ have undermined the potential for the market to deliver its intended outcomes.

The sustainable diversion limit (SDL) and Ecologically Sustainable Level of Take (ESLT) act as the overall cap, and are set for the Basin as a whole, and its constituent catchments, in the Basin Plan made under the Water Act. The SDL limits the amount of both surface and ground water that may be extracted from the Basin. It is the basis for buybacks and the acquisition of water entitlements and is the key determinant in setting the parameters for supply to which the water market and water trading respond. The methodology for setting the SDL and determining the ESLT to be allocated to entitlements annually, is fundamentally flawed. Specifically:

- It is not based upon the best available science. The Murray Darling Basin Authority’s own scientific models for the needs of the system involved SDL that returned between 3,856 and 6,983 GL of flows to the river. Despite this, the agreed plan in 2012 was based upon returning between 2,750 and 3,200GL by 2024¹. The Royal Commission found that, contrary to the specific stipulation of the Water Act, a ‘triple bottom line’ assessment had been employed, compromising the scientific rigour and objectivity of the SDL and ESLT framework. This led to an arbitrarily reduced ‘cap’ and to alterations to that cap over time that responded to political imperatives, rather than objective, scientific assessment of the sustainable limits of the basin.²
- It is ‘static’ and lacks a framework to incorporate and adjust to the impacts of climate change on the basin. It is also unable to account for material changes in the use of allocations in the basin, for instance the shift from crops that are more adaptable to fluctuating allocations, to nuts (particularly almonds) that need more fixed allocations and could require 100% of available water allocations in dry years³. Such an outcome is unsustainable.
- It is not transparent, assessable or independently audited. Audits of actual data on environmental flows, allocation extractions, and the impact upon the sustainability of the basin and its constituent catchments are not completed. The Royal Commission and others

¹ Wentworth Group of Concerned Scientists, *Submission to the Murray-Darling Basin Royal Commission*, 21 May 2018, 1.

² Commissioner Brett Walker SC, [Murray Darling Basin Royal Commission Report](#), January 2019, 24.

³ The Australia Institute, *South Australian Select Committee on the Murray Darling Basin: submission to the inquiry into findings of the Murray Darling Basin Royal commission and productivity commission*, September 2019, 7.

have highlighted the lack of transparent access to modelling and decision making processes in relation to the setting of ESLT/SDLs, or those processes which alter them through interpretation or revision, including the implementation of 'supply measures'. Without an independent audit function, like that previously undertaken by the National Water Commission, these processes remain opaque and undermine faith in the market built upon them.

The Royal Commission made a number of findings in relation to these and other issues impacting upon market 'caps', their formulation, governance, regulation and compliance. It concluded that the flaws were so egregious as to represent maladministration, neglect, and misleading and unlawful conduct.⁴

The Issues Paper asks stakeholders to consider the extent to which the objectives of water markets have been achieved. On current evidence that the basin is on the brink of collapse, PIAC considers the market to have failed to deliver efficient and sustainable water use outcomes. The market 'caps' and the governance and regulatory arrangements by which they are developed, implemented and updated, are fatally compromised.

Without these key foundations it is clear the market is not operating within the system's sustainable limits. It is hard for any market participant to have faith in the objectivity of the processes by which the market's parameters are determined. More detailed assessments of the efficiency of distribution and use are difficult where it is not possible to have confidence in the figures relating to allowed extraction and usage traded by the markets.

Urgent reform of the framework of sustainability, governance, regulation, monitoring and compliance is needed in order to ensure that the MDB water markets operate within the hard parameters of sustainability intended in the Water Act. To this end PIAC supports the findings of the Royal Commission and recommends the ACCC give serious consideration to its recommendations. In addition, PIAC highlights the need for the following:

- An immediate independent audit of volumes of water recovered, extracted and used. In order for the market to function, all participants must have faith in the veracity of extractions and trades.
- The creation of a body (similar to the National Water Commission) to undertake monitoring and audit of the implementation of the basin plan and the operation of its constituent plans and markets. This body must be independent of the MDB Authority and basin governments.
- The immediate and transparent re-determination of the ESLT and SDLs according to the best available science, with clear and transparent mechanisms for regular update in response to climate change and drought and their impacts on individual catchments and the basin as a whole.
- The Basin-wide implementation of the 'Accounting for Nature'⁵ model of reference benchmarking at a catchment level. This system can be implemented alongside the MDB Plan, contributing to the ESLT/SDL formulation and operating as a consistent, transparent and adaptable link between the operation of the plan and MDB markets, and the catchments to which they relate. It will assist in adjusting the parameters of the market to ensure that it continues to operate within the sustainable limits of catchments within the basin.

⁴ Above, n2, 24, 52-70.

⁵ Wentworth Group of Concerned Scientists. [Accounting for Nature: a scientific method for constructing environmental asset condition accounts](#), November 2016.

Continued engagement

PIAC would welcome the opportunity to meet with the ACCC and other stakeholders to discuss these issues in more depth.

Yours faithfully

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