

Submission to the Legal and Constitutional Affairs Committee Inquiry

Provisions of the Water Act 2007

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1. INTRODUCTION

The NSW Farmers' Association ('the Association') is Australia's largest state farming organisation, representing the interests of the majority of commercial farm operations throughout the farming community in NSW. Through its commercial, policy and apolitical lobbying activities it provides a powerful and positive link between farmers, the Government and the general public.

The Association welcomes the opportunity to provide input to the *Legal and Constitutional Affairs Committee Inquiry into the Provisions of the Water Act 2007*.

The Water Act 2007 has become a topic of extreme contention in the Basin Planning Process and is the subject of great uncertainty. It is the Association's sincere hope that this Inquiry is able to shed some light on this issue and provide some certainty moving forward.

The following position statement was prepared by the Association June 2010 after it had become abundantly clear that we had serious concerns with the MDBA approach to planning. The position statement outlines the planning process the Association believes is required to achieve a balanced outcome genuinely reflective of triple bottom line planning principals, with equal consideration of industry, community and the environment.

Clearly, the MDBA has fallen far short of the mark in terms of planning in this way. It is our submission that – in assessing the Provisions of the *Water Act 2007* – this Committee first gives close consideration to what type of planning process is in the interests of the entire Basin. Then, and only then, is it appropriate to consider whether or not the provisions of the Act are conducive to delivering this process.

Basin Plan Position Statement

The Association is committed to working with the MDBA and Government on water reforms that embrace triple bottom line sustainability principles. However, the Association is greatly concerned that the Murray Darling Basin Authority's approach to developing the Murray Darling Basin Plan does not embrace these principles.

The Association believes that the current planning process is flawed. A sustainable outcome for the Basin demands:

- *A collaborative planning process that engages local expertise and the farm sector at valley scale in a process of optimising water allocation;*

- *Explicit management of the social and economic impacts of any reductions of water available for agricultural production, or the security of that water;*
- *Integration of engineering works, specific watering strategies and land management practices in achieving the Basin's environmental water requirements to ensure efficient and effective use of environmental water; and*
- *Consideration of tradeoffs between environmental, economic and social needs, as required by the National Water Initiative.*

If the current legislation does not require the MDBA to plan in this way, then it is the Association's view that the legislation must be changed.

We agree that water planning within the Basin must be improved. However, the new Basin Plan must be developed collaboratively with the farming communities that depend on this water for their livelihoods. This process must include careful consideration of the economic consequences to Australia of damaging the production capacity of our most important and productive agricultural system.

The current planning methodology involves determining how much water is required for the environment and then allocating what remains between the other water users in the Basin. This process bypasses the cost benefit analysis necessary to optimise triple bottom line outcomes; only one third of the picture is visible. An informed discussion about how much water should be allocated to different environmental needs in the Basin cannot be had without a clear understanding of social and economic consequences of removing this water from its current uses.

The Basin planning process has coincided with the worst drought in recorded history and on the basis of scientific modelling regarding future water inflows that is subject to low statistical confidence levels. All parties acknowledge that predictive science is uncertain, but whilst a precautionary approach is being taken with regard to the environmental values in the Basin the same cannot be said for social and economic values.

The current planning regime risks over-regulating environmental water to produce outcomes that do not reflect the natural environmental characteristics of the Basin; a system well adapted to long periods of dryness. Far less flexibility exists for irrigation businesses that have been founded on the basis of a secure share of regulated water supply. While environmental systems in the Basin may rebound

quickly following extended dry periods, rural and regional communities once dislocated will take generations to recover or may result in a population shift to larger regional centres, coastal areas or capital cities.

Maintaining the capacity of the Basin to secure Australia's food requirements while meeting the needs of increasingly valuable food export markets must surely be a national priority. In 2005-06, 39% of the gross value of Australia's agricultural production came from the Basin with a value of \$38.5 billion (ABARE, 2008).

The consequences of the Basin planning process for food security need careful consideration. Global demand for food is increasing creating both threats and opportunities for Australia in the medium and long term. The Australian community needs to understand that policy decisions that reduce productive use of water resources affect not just farmers and farming communities, but have strategic implications that go beyond purely environmental matters.

We call on all Australians to reflect on the economic and social consequence of the Basin Plan. All due care must be taken to ensure that our farming communities and Australia's competitive advantage in global markets for food and fibre are not sacrificed for the sake of fulfilling political agendas: there is simply too much at stake to get this wrong.

2 GENERAL COMMENTS

There has been a lot of contention surrounding the *Water Act 2007* and particularly, whether it is capable of achieving the necessary balance to allow an equal weighting of social, economic and environmental outcomes – a triple bottom line approach to planning.

No one is suggesting the Act does not require consideration of social and economic factors, clearly it does, the debate and uncertainty relates to whether or not the environment has primacy under the Act, and most importantly, whether a balanced approach to planning is required.

Clearly the 'Guide to the Proposed Basin Plan' has an environmental focus; this is simple fact and broadly accepted. The reason for this environmental focus can be directly related to the MDBA's interpretation of the *Water Act 2007*. It is therefore understandable that there is a lot of confusion and concern about the Act, and whether it is responsible for the MDBA's planning approach, which failed to adequately recognise social and economic values in Guide.

The Federal Water Minister, the Hon Tony Burke MP, clearly believes that he can deliver a balanced planning process, and ultimately, a balanced outcome, within the terms of the current Act. The Association is supportive of the Minister's attempts to achieve this objective, but, ultimately, it is the *Water Act 2007* that sets out the process required for the development of the Basin Plan.

2.1 *Current Interpretations*

The Australian Government Solicitor (AGS) provided the following advice to the Minister on the *Water Act 2007*:

"The overarching objective of the Act and the Plan is to give effect to relevant international agreements, and this reflects the fact that the provisions of the Act relating to the Basin Plan are, to a large extent, supported by the treaty implementation aspect of the external affairs power in the Commonwealth Constitution. The agreements are international environmental agreements including the Convention on Biological Diversity and the Ramsar Convention relating to wetlands.

The international agreements themselves recognise economic and social factors, and their relevance to decision making.

The *Water Act* further makes clear that *in giving effect to those agreements the Plan needs to optimise economic, social and environmental outcomes*. Therefore, where a discretionary choice must be made between a number of options the decision-maker should, having

considered the economic, social and environmental impacts, choose the option which optimises those outcomes [emphasis added].”¹

However, Foundation Director of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales, Professor George Williams’ submission to the House of Representatives Inquiry casts doubt over whether the Act, even within the construction provided within the AGS advice, is balanced with regards to the decisions to be undertaken in developing the plan.

“As the AGS advice stated, both Conventions ‘establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allow consideration of social and economic factors’.

In summary, the Water Act, both as to its own terms and when read in light of its constitutional underpinnings, recognises that a Basin Plan must be prepared to give effect to the relevant international conventions. In doing so, *social and economic factors must also be taken into account. However, these latter factors cannot be given such weight as would prejudice the faithful implementation of the international environmental conventions upon which the validity of the Act depends* [emphasis added].”²

Professor Williams believes the *Water Act 2007* suggests a clear path for the construction of the Basin Plan as follows:

“First, the Plan must be prepared to implement the relevant international conventions. Second, in doing this, some social and economic factors can be taken into account in the meeting of the core environmental objectives. Third, *once the threshold of compliance with the international conventions has been met, social and economic factors may generally be taken into account to the maximum remaining extent possible* [emphasis added].”³

To the lay person, the process outlined by Professor Williams above would suggest the *Water Act 2007* is not balanced. Most concerning for the Association is that the planning process outlined in the introduction of this submission is unlikely to be possible if this interpretation is correct.

The Association believes a balanced, triple bottom line planning process requires consideration of tradeoffs between environmental, economic and social needs. This is the process required by the National Water Initiative (NWI) which states:

¹ Australian Government Solicitor advice to Minister Burke on- The role of social and economic factors in the Basin Plan

² Mr Paul Kildea and Professor George Williams submission to the House of Representatives Standing Committee on Regional Australia

³ Mr Paul Kildea and Professor George Williams submission to the House of Representatives Standing Committee on Regional Australia

*Decisions about water management involve balancing sets of economic, environmental and other interests.*⁴

The NWI, in discussing the requirement for an intergovernmental agreement on the Murray Darling Basin, states:

*The MDB Intergovernmental Agreement will be consistent with the objectives, principals and actions identified in this Agreement.*⁵

Clearly, if the *Water Act 2007* does not allow economic and environmental interests to be balanced it is not consistent with the objectives on the NWI agreement. This is the core of the issue and if this is the finding of the Committee, the Association believes there is no option but for the Act to be changed. This position is supported by the Productivity Commission report into Market Mechanisms for Recovering Water in the Murray Darling Basin, which states:

*The value people place on environmental outcomes, the opportunity cost of forgone irrigation, and the role of other inputs, such as land management, must also be considered. If the Water Act 2007 precludes this approach, it should be amended...*⁶

The Australian Network of Environmental Defender's Office are very clear in their interpretation of the *Water Act 2007* stating-

"Current suggestions that social, economic and environmental considerations are to be balanced against each other in the Basin Plan are incorrect and not supported by the Water Act."

And further:

*"Limiting consideration to the lower range of 3000-4000GL only will not meet the requirements of the Act..."*⁷

This interpretation is particularly concerning as it points to the underlying issue of a potential legal challenge to Basin Plan should the Minister look to adopt an approach that is not supported by the Act. Continued legal uncertainty is in no one stakeholder's interest, there is widespread support for a balanced planning process, if the Act does not allow this, it must be changed.

In preparing for this submission, the Association reviewed a submission to the inquiry by Professor John Briscoe from Harvard University.⁸ A recognised international water

⁴ Intergovernmental Agreement on the National Water Initiative, paragraph 2.

⁵ Intergovernmental Agreement on the National Water Initiative, paragraph 14.

⁶ Productivity Commission report into Market Mechanisms for Recovering Water in the Murray Darling Basin

⁷ Australian Network of Environmental Defender's Offices submission to the House of Representatives Standing Committee on Regional Australia

expert, Professor Briscoe provides unique insight into this discussion. Furthermore, as a member of the High-Level External Review Panel convened by the MDBA to review the draft Guide to the Basin Plan, Professor Briscoe has had exposure to the process to which few others can compare.

Professor Briscoe's submission is powerful in summarising the current situation and, most importantly, in drawing out the question, *what is it exactly that we are attempting to achieve in this process? And does the Water Act 2007 allow us to achieve it?* The Association commends this submission to the Committee on this basis.

The Association is seeking clarity in what is being sought to be undertaken here by the MDBA, above all else, and it is our submission that this Committee has a unique opportunity to provide this clarity by addressing the following basic questions-

- Does the *Water Act 2007* allow Minister Burke to deliver a basin plan that gives equal weighting to social, economic and environmental factors in the Basin? YES or NO, and
 - If yes, outline how this balance can be delivered and why other interpretations are incorrect; or,
 - If no, outline exactly what changes would be required to the Act to ensure this balance is achieved.

In adding clarity to this discussion it is critical that the findings of this Committee are both unified and specific as possible, otherwise the Committee will simply add another layer to the uncertainty that has beset this discussion for the past twelve months.

⁸ Professor John Briscoe submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Provisions of the Water Act 2007

3 TERMS OF REFERENCE

The Terms in Part 1 of the Terms of Reference for this inquiry are the specific questions the Committee must answer and the only submission the Association makes is that the Committee must first consider and outline the process that it considers to be reflective of a 'balanced planning process', and then addresses each Term with this process in mind.

The Association points the Committee to the Association's 'Position Statement' in the introduction of this submission as a framework for the balanced process we believed is required.

3.1 That in conducting its inquiry, the committee should consult those with particular legal expertise in the area of water.

This Term of Reference, in the Association's submission, is the single most critical Term in the inquiry. To provide the clarity that will allow the planning process to continue with any confidence, it is critical that this Committee consult all legal experts in the field of constitutional and water policy law.

Furthermore, in providing its report the Committee must attempt to provide recommendations that address the commonly held positions on this issue. Where particular interpretations of the Act are determined to be out of line with the consensus of legal opinion this must be explained.

It is the Association's submission that the value of this Inquiry to the entire Basin Planning Process will be directly related to the amount of detail that is provided around the Terms of Reference in Part 1 of the Inquiry. That this detail is solidly based in consultation with legal experts – as required in Part 2 of the Terms – will ensure clarity in regard to where the process can go from here.

4 CONCLUSION

A lot of time could be spent discussing the different interpretations of the Act, the reasons we ended up with the Act, and the political realities of changing the Act. Ultimately, these discussions are only a distraction from what is a very simple question.

Does the Water Act 2007 allow the Minister to deliver a balanced Basin Planning Process, and ultimately, a balanced Basin Plan?

To answer this question it is critical that the Committee first establish what this balanced process would look like. The Association has very clear ideas on this and we encourage this Committee to consider what is truly in the best interests of Australia in coming up with this position.

After that it is a very simple yes or no, followed by a detailed explanation of this response and, if the Act is found not to be balanced, recommended changes that would allow this balance to be achieved.

The Association encourages this Committee to look beyond politics and consider the planning process that is required to achieve a sustainable and vibrant Murray Darling Basin, in the interest of all Australians.