



District Council 3  
March 2011

**SUBMISSION  
TO  
THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS  
COMMITTEE INQUIRY INTO  
PROVISION OF THE WATER ACT 2007**

**MARCH 2011**

**By**

**United Dairy Farmers of Victoria District Council 3**

The United Dairy Farmers of Victoria District Council 3 covers the following areas:  
Benalla, Cobram, Katandra, Invergordon, Katunga, Nathalia and Strathmerton.

We are all volunteers within the District Council and work to further the issues of our  
local dairy farming community.

## Introduction:

The United Dairy Farmers of Victoria (UDV) District Council 3 welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Provision of the Water Act.

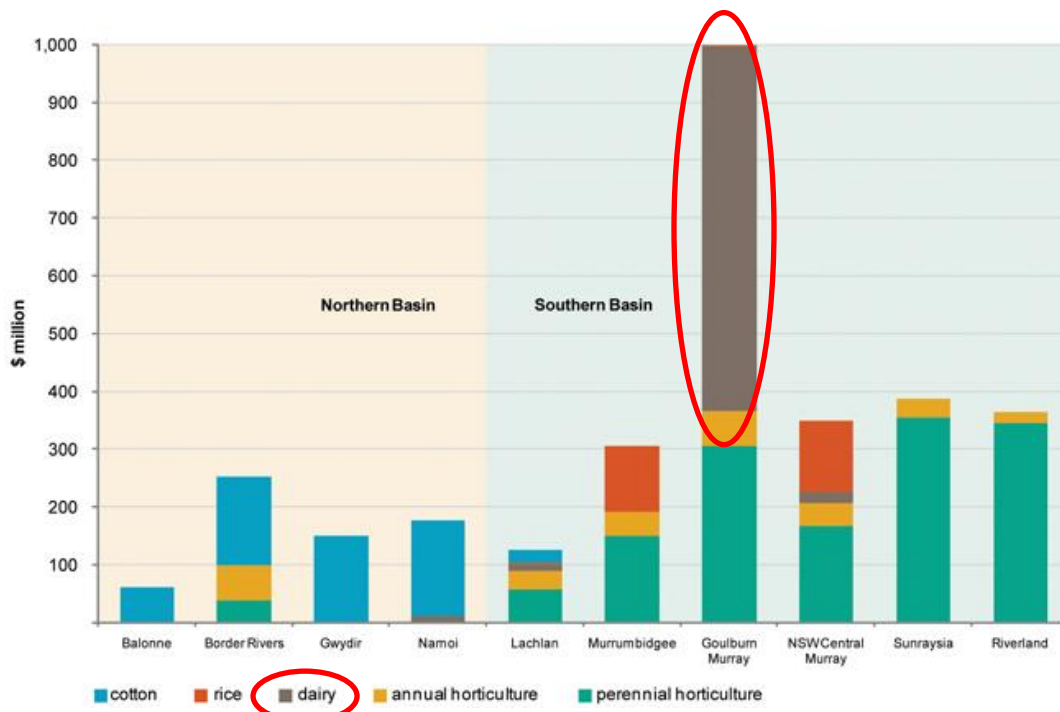
The dairy industry in northern Victoria is the largest dairying region in the Murray Darling Basin and supplies over 20% of Australia’s milk. Milk production is focused on manufactured products, of which, a large proportion is annually exported.

The dairy industry in the Victorian Basin area covers the Central Murray, Goulburn, Broken, Campaspe and Kiewa river regions.

There are 1,464 dairy farms in the region which produced 1.9 billion litres of milk in 2009/10 from 380,000 cows. The milk is supplied to fourteen factories.

The MDBA in the ‘Guide to the Proposed Basin Plan’ (Pg 85) also highlight the importance of dairy within the Victorian Goulburn and Murray regions.

The graph below highlights the overwhelming majority of the dairy industry being located in the Goulburn and Murray regions.



**Background:**

The Water Act 2007 (Cth) (the Act) is one of the outcomes of the '10 Point Plan for Water Security' announced by the then Prime Minister, John Howard, on 25 January 2007. The key focus of the plan was the reform of the Murray-Darling Basin (MDB) arrangements. The Commonwealth sought:

- to take control and be responsible for water management in the MDB;
- agreement from the Basin governments to transfer *all* of their powers in relation to the Murray-Darling Basin Commission (MDBC)
- to reconstitute the MDBC as a Commonwealth Government agency reporting to a single minister, with responsibility for setting a sustainable cap.

Negotiations in 2007 between the Basin State Governments ultimately failed and the proposed referral of State powers with respect to the MDB was not achieved.

Issues with the Water Act:

As no State referrals of legislative power occurred, the MDB Agreement 1992 and the MDBC remained in place in the same form. The Act did not reconcile the roles of the MDBA and the Basin Plan with that of the MDBC and the Agreement *and* The Basin Plan provisions of the Act relied mainly on environmental treaties powers, rather than on a referral of State legislative power with respect of all water resource matters in the Basin.

Negotiations re-commenced and in 2008 which resulted in the states entering into "The Agreement on Murray- Darling Basin Reform". The Agreement resulted in the a limited referral of State legislative powers to the Commonwealth Parliament. This referral enabled the Commonwealth to enact specific amendments to the Water Act 2007, including the transfer of current powers and functions of the MDB Commission and the MDB Ministerial Council to the MDB Authority, and a new Ministerial Council and the Basin Officials Committee was formed.

The resulting Water Amendment Act 2008 (Cth) amended the Water Act 2007 (Cth). The provisions of the Water Act 2007 (Cth) commenced on 3 March 2008.

### **ENVIRONMENTALLY SUSTAINABLE LEVEL OF TAKE:**

Section 4 of the Water Act 2007 includes the key definitions that are to be used in interpreting the objects of the legislation. The most important definition is that concerning the environmentally sustainable level of 'take; or extraction. The legislative definition is as follows:

*'environmentally sustainable level of take for a water resource means the level at which water can be taken from that water resource which, if exceeded, would compromise:  
Key environmental assets of the water resource; or;  
Key ecosystem functions of the water resource; or;  
The productive base of the water resource; or  
Key environmental outcomes for the water resource.'*

This provides little clarification about how the Sustainable Diversion Limit will be defined, or how decisions will be made about what are key environmental assets or outcomes or what constitutes a compromise.

The premise of 'compromising' the environment assumes there is an objective and pure starting point, where the environment should not be compromised. It is too broad and leads not only to a significant bias towards the environment, but also a high level of uncertainty and is therefore vulnerable to legal challenge.

The definition of 'environmentally sustainable level of take' and 'to give effect to relevant international agreements' is too broad and ill defined. It could essentially mean all water would need to go to the environment.

**Recommendation: That the Committee examines definitions in the Act regarding 'environmentally sustainable level of take'**

### **NATIONAL INTEREST VS INTERNATIONAL AGREEMENTS:**

Section 3, Clause a, of Act specifies its object as:

*'to enable the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources in the national interest'*

Clause b also states a further object as:

*"to give effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources) and, in particular, to provide for special measures in accordance with those agreements, to address the threats of the Basin resources"*

There is potential for these two clauses to be conflicting. Giving effect to some international agreements may not be in the national interest. Furthermore the term 'national interest' is vague and no clear definition is provided in the Act.

**Recommendation: That the Committee examines definitions in the Act regarding 'national interest' and 'international agreements'.**

### **SOCIAL AND ECONOMIC CONSIDERATIONS:**

The Act appears to put the environment first and foremost. It should provide a balance between environmental, economic and social considerations.

The dairy industry has worked cooperatively within Victoria and other basin states to provide water for the environment through The Living Murray, Snowy and now NVIRP. Our involvement in these processes has always been to try and achieve necessary environmental gains because these would help the dairy industry and our communities. The single environmental focus of the Act takes away from the philosophy that ‘we are all in this together’.

Clause c and d of section 3 states:

*(c) in giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimizes economic, social and environmental outcomes; and*

*(d) without limiting paragraph (b) or (c):*

- (i) to ensure the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused; and*
- (ii) to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin (taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity); and*
- (iii) subject to subparagraphs (i) and (ii)—to maximise the net economic returns to the Australian community from the use and management of the Basin water resources:*

It is clear here that the Acts first requirement is to meet international environmental obligations. There is no ‘requirement’ to meet social and environmental outcomes; rather the act suggests that they must be ‘promoted’.

While clause d (i, ii and iii) outlines the return to sustainable levels of extraction, restoration of ecological values and maximization of net economic returns to the Australian community, these are all subject to clauses b and c (international agreements).

Unfortunately, there is no legislative requirement to consider social and economic implications when ‘sustainable levels of extraction’ are determined. This leaves irrigation communities with no clear certainty over their future as environmental needs come first.

The primacy of the environment is highlighted again in Section 21 where it details the general basis on which the Basin plan is to be developed; it states:

- (1) *The Basin Plan (including any environmental watering plan or water quality and salinity management plan included in the Basin Plan) must be prepared so as to provide for giving effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources).*
- (2) *Without limiting subsection (1), the Basin Plan must:*
- (a) *be prepared having regard to:*
    - (i) *the fact that the use of the Basin water resources has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity; and*
    - (ii) *the fact that the Basin water resources require, as a result, special measures to manage their use to conserve biodiversity; and*
  - (b) *promote sustainable use of the Basin water resources to protect and restore the ecosystems, natural habitats and species that are reliant on the Basin water resources and to conserve biodiversity.*
- (3) *Without limiting subsection (1), the Basin Plan must also:*
- (a) *promote the wise use of all the Basin water resources; and*
  - (b) *promote the conservation of declared Ramsar wetlands in the Murray-Darling Basin.*
- (4) *Subject to subsections (1), (2) and (3), the Authority and the Minister must, in exercising their powers and performing their functions under this Division:*
- (a) *take into account the principles of ecologically sustainable development; and*
  - (b) *act on the basis of the best available scientific knowledge and socio-economic analysis; and***
  - (c) *have regard to the following:*
    - (i) *the National Water Initiative;*
    - (ii) *the consumptive and other economic uses of Basin water resources;*
    - (iii) *the diversity and variability of the Basin water resources and the need to adapt management approaches to that diversity and variability;*
    - (iv) *the management objectives of the Basin States for particular water resources;*
    - (v) *social, cultural, Indigenous and other public benefit issues;*
    - (vi) *broader regional natural resource management planning processes*

Socio-economic factors are again placed below environmental considerations and are subject to those considerations.

**Recommendation: That the Committee examines how the Act can better balance social, economic and environmental outcomes**

## WATER QUALITY AND SALINITY MANAGEMENT PLANS:

There is a requirement for the Basin Plan to contain a water quality and salinity management plan under sections 22 and 25. Section 25 states:

- 1) *The water quality and salinity management plan must:*
  - (a) *identify the key causes of water quality degradation in the Murray-Darling Basin; and*
  - (b) *include water quality and salinity objectives and targets for the Basin water resources.*
  
- (2) *Without limiting paragraph (1)(b), a salinity target referred to in that paragraph:*
  - (a) *may specify the place at which the target is to be measured; and*
  - (b) *may specify a target in terms of a particular level of salinity being met for a particular percentage of time.*
  
- (3) *In exercising their powers and performing their functions under this Division in relation to the water quality and salinity management plan, the Authority and the Minister must have regard to the National Water Quality Management Strategy endorsed by the Natural Resource Management Ministerial Council*

These points are largely duplicated in existing regulatory arrangements:

- Victoria manages drinking water quality through the *Safe Drinking Water Act 2003*;
- The management of dryland and irrigation salinity is governed by the 15 year Basin Salinity Management Strategy;
- Water Quality from farms and drains in the GMID is managed through the Irrigation and Drainage Memorandum of Understanding that also involves Catchment Management Authorities, Goulburn Murray Water and the Victorian Department of Sustainability and Environment.

The practical implications and benefits of the Water Quality and Salinity Management Plan (WQSMP) remain unclear.

The WQSMP section in the Act (section 25) provides for very broad application of water quality targets. The Guide has used these undefined powers to set water quality targets for a wide range of purposes (aquatic ecosystems of high conservation sites and other regional sites, raw drinking water, irrigation water and recreational water). How these targets will be enforced and how they will interact with current state legislation and arrangements is unclear.

The dairy industry has worked cooperatively with CMAs and DPI (funded by state and Commonwealth programs) for many decades to achieve a range of catchment water outcomes, including outcomes related to water quality. Our work has included investing much private funds into changing farm infrastructure and management practices. Again, with social, economic and environmental outcomes. For example:

- catchment salinity programs to make Victoria accountable under the Basin Salinity Management Strategy
- catchment nutrient programs coordinated through the Irrigation and Drainage Memorandum of Understanding (EPA, DSE, CMAs and G-MW)
- where required licensing of effluent through Environment Protection Act

These arrangements, other legislated obligations under the Safe Drinking Water Act 2004, have been working effectively. Introducing another layer of legislation under the Water Act 2007 without clear explanations of how arrangements will synthesize with state legislation creates great uncertainty for dairy businesses.

There needs to be a much clearer explanation of the where current arrangements are not working and how this could be addressed before appropriate targeted legislation can be designed to improve the issue of water quality

**Recommendation: That the Committee examines duplication of State arrangements regarding water quality and salinity with those outlined in the Act.**

#### **SEPARATION OF POLICY, REGULATION AND SERVICE DELIVERY:**

The separation of functions and powers is a fundamental plan in good regulatory policy and avoids conflict of interest. To deliver confidence in business planning we believe the separation of powers should occur wherever possible to avoid unnecessary conflicts of interest.

The 1994 CoAG Water Reform Framework contained a key proposal for institutional reform: CoAG agreed to

*“the principle that, as far as possible, the roles of water resource management, standard setting and regulatory enforcement and service provision be separated institutionally”.*

COAG reflected this position into the Intergovernmental Agreement on a National Water Initiative (NWI), which was signed on 25 June 2004. Clause 74 of the NWI provides that

*“The Parties agree that as far as possible, the roles of water resource management, standard setting and regulatory enforcement and service provision continue to be separated institutionally”.*<sup>1</sup>

Unlike the 1994 Council of Australian Government reforms and the 2004 National Water Initiative the Water Act appears to fail to clearly separate powers and functions. For example under the Water Act it appears that the MDB Authority will set policy through development of the Basin Plan, make and enforce rules for water resource management through their role in specifying the contents of water resource plans and accrediting water resource plans and operating the River Murray. The MDB Authority also has a role in monitoring and evaluation of

<sup>1</sup> [see <http://www.nwc.gov.au/resources/documents/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>]



Basin Plan implementation. Such a concentration of power allows for numerous conflicts between the various levels of decision making. It also means many significant decisions will be made by people a long way removed from water users, planners and managers.

These arrangements are particularly unsuitable if they lead to hidden changes to nature of water entitlements. This has been proposed in the Guide the Proposed Basin Plan where accreditation tests that would lower allocations in dry periods are documented on page 1129 of the technical background documents.

**Recommendation: That the Committee examines how the Act could better reflect the functions and powers of the MDBA to avoid conflicts of interest**

#### **ACCOUNTABILITY SKEWED TO THE COMMONWEALTH:**

##### CEO Appointment:

Section 178 outlines the appointment of authority members, of which the Chief Executive Officer (CEO) is appointed by the Governor General along with other Board members.

Good governance would see the CEO accountable and appointed by the Board. Section 184 outlines even further the requirement of the CEO to keep the minister informed.

*“The CEO must keep the Minister informed of the general operations of the Authority in respect of the performance of the Authority’s functions; and*

*“Give the Minister such report, documents and information in relation to those operations as the Minister requires”.*

##### National Water Commission Audits

Section 87 outlines the power of the National Water Commission to conduct audits, the Act states:

*(1) The National Water Commission may audit the effectiveness of the implementation of the Basin Plan and the water resource plans.*

*(2) In carrying out an audit, the National Water Commission must take into account such matters (if any) as are specified in the regulations.*

States should be accountable to their own water users and there is no acknowledgement of how such large scale national audits will be translated back to the actual water users.

Section 71 only sees the states having to report to the Murray Darling Basin Authority. Again states should be accountable to those who use the water.

**Recommendation: That the Committee examines how accountability in the Act can be better balanced between the States and Commonwealth.**

**Potential for Legal Challenge/ Jurisdictional Inconsistencies:**

The Act appears to be inherently uncertain. Effective planning for dairy businesses relies on legal certainty around entitlements to water and how water is managed. The dairy industry in Northern Victoria is the largest dairying region in the Basin, this is because Northern Victoria has very secure and reliable water products.

Uncertainty in statutory interpretation and application leads to legal challenges to decisions made under those Statutes. A common criticism of the Act as it is currently framed is that it is vulnerable to many legal challenges due to its broad scope and reference to terminology that is not well defined. Some examples include:

- the imposition of an SDL (section 23) – what is a ‘sustainable level of take’?
- the accreditation or refusal to accredit a water resource plan ( section 55) – determining whether the WRP is consistent with the WRP
- the decision to exercise a ‘step in’ power by the Minister (section 73) – unclear how Commonwealth step in powers will be resolved with state legislation.
- the assignment of risk (section 77) – application of new knowledge in unclear.

**Recommendation: That the Committee examines areas of the Act that may lead to legal challenge.**

## COMPULSORY ACQUISITION VS RISK ASSIGNMENT:

On the 10<sup>th</sup> February 2011, Tony Burke warned in Parliament that that the government could be forced to compulsorily acquire water entitlements if the Murray-Darling reform process is delayed.

He stated:

*“ That means they have created a situation whereby being negligent in buyback in the coming years, they would land Australians in a situation of potential compulsory acquisition in eight years’ time.”*

This statement is contrary to the Water Act, section 255 (Pg 259) where compulsory acquisition is ruled out.

*“To avoid doubt, nothing in:*

- a) This Act; or*
- b) The regulation; or any other instrument made under this Act;*
- c) Any other instrument made under this act:*  
*Authorizes or allows the Commonwealth, the Authority, the Commonwealth Environmental Water Holder or any other agency of the Commonwealth to compulsorily acquire a water access right or an interest in a water access right”.*

Despite such form claims in the act that Compulsory acquisition is not possible, it remains unclear how this works within the risk assignment framework. Changes in Government policy under the risk assignment process could essentially result in compulsory acquisition.

Our District Council strongly opposes the Compulsory Acquisition of water.

**Recommendation: That the Committee examines how issues regarding risk assignment and compulsory acquisition can be resolved within the Act.**