



# **Submission to the Senate Legal and Constitutional Affairs Reference Committee**

## ***Provisions of the Water Act 2007***

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## **Cotton Australia**

Cotton Australia is the key representative body for the Australian cotton growing industry. It helps the industry work together to be world competitive, sustainable, and also tell the good news about the industry's achievements. Cotton Australia determines and drives the industry's strategic direction, retaining its strong focus on R&D, promoting the value of the industry, reporting on its environmental credibility, and implementing policy objectives in consultation with its stakeholders.

Cotton Australia works to ensure an environment conducive to efficient and sustainable cotton production. It has a key role in Best Management Practices (MyBMP), an environmental management program for growers. This work has seen a significant improvement in the environmental performance of the industry, with huge improvements in water use efficiency, significant reductions in pesticide use, and millions of dollars invested into R&D.

Cotton Australia welcomes the opportunity to provide this submission to the Senate's Legal and Constitutional Affairs Reference Committee Inquiry into the *Provisions of the Water Act 2007*.

While Cotton Australia does not have the capacity to provide definitive legal advice, it will use this opportunity to raise a number of significant issues which it believes should be considered by the inquiry and ultimately result in amendment of the Water Act 2007.

Cotton Australia is a member of the National Farmers Federation, the National Irrigator's Council and the New South Wales Irrigators Council, and while it has endorsed the above organisations' submissions to the inquiry, should there be any discrepancy between the content of their submissions and this submission, Cottons Australia's position is the one outlined in this paper.

## **General Comments**

Cotton Australia, like many stakeholders, believes that the basis of the Basin Plan - the 2007 Water Act – is a flawed piece of legislation, and therefore any Basin Plan that is derived from the Act, as it stands, will be a flawed plan.

It is Cotton Australia's view that the Act does not allow the intention of the 2004 National Water Initiative (NWI) to use of the Basin's water resources to "optimise economic, social and environmental outcomes."

Instead we have an Act that plays lip-service to the NWI in its objectives, but then clearly prioritises environmental outcomes over social and economic outcomes in its body.

This is not only Cotton Australia's interpretation but also that of the MDBA's former Chairman Mike Taylor, and the former CEO of the National Water Commission Ken Matthews, who have both publicly stated that a Basin Plan, constrained by the Water Act, will not be compliant with the NWI.

The MDBA has also publicly stated on a number of occasions that the Act did not allow it to fully consider the social and economic outcomes when determining the environmental water requirements of the Basin.

### ***Recommendation 1***

*That the Inquiry explicitly recommend to the Government that the Commonwealth Water Act be amended so that it must give equal regard to the social, economic and environmental consequences of any proposed feature of the Basin Plan.*

Cotton Australia is very aware of Minister Burke's and MDBA Chairman Craig Knowles' assurances that they can deliver a balanced Basin Plan.

Cotton Australia will work with both the Government and the Authority to try to deliver on this commitment, however, these assurances do not take away from the fact that the Act must be amended to ensure a balance plan is delivered no matter who the personalities are who have been charged to deliver it.

While the lack of consideration given to the socio-economic consequences of the Basin Plan, as proposed in the Guide, is a fundamental flaw, Cotton Australia would argue that an even greater flaw is the fact that the Act effectively only gives the MDBA one tool to meet the environmental needs of the Basin – volumes of water (and to a lesser degree – water release timing).

Cotton Australia knows that environment is best enhanced with integrated natural resource management; and a simplistic “just add water” approach will invariably fail to optimise social, environmental and economic outcomes, and could quite conceivably lead to environmental degradation.

Cotton Australia proposes a sound Basin Plan would:

1. Clearly identify the environmental, social and economic priorities at an individual catchment level, including development and acceptance of measurable targets.
2. Identify a range of actions/management regimes that could be applied, allowing a genuine choice to optimise the social, economic and environmental outcomes.
3. Initiate selected actions/management regimes, utilising a continuous cycle of adaptive management improvement.
4. Have regular and transparent measurement and reporting of performance against the targets.

By way of example, an identified target may be to restore native fish numbers in a particular stretch of river.

The current Basin plan approach would be limited to two responses – additional water flow and release timing.

However, if the water is to be released from the bottom of a deep storage (for example a headwater storage with no multi-level off-takes), it is highly likely that no matter how much additional water was released, it would be too cold to allow for successful fish breeding.

Under this scenario, the provision of the additional water would come at a great social and economic cost, but would provide no environmental benefit.

A more holistic approach might involve the addition of a lesser amount of water, the construction of a multi-level off-take allowing temperature control of water release, the construction of fish ladders and the re-snagging of sections of the stream.

This approach is likely not only to significantly increase native fish breeding, but could come at a much lower social and economic cost to the catchment community.

The approach described above would require genuine co-operation between all levels of Government, but offers a much greater chance of ensuring genuine environmental gains, while optimising the social and economic health of the catchment community.

## ***Recommendation 2***

*That the Inquiry recommends to Government that the Water Act and/or the Murray-Darling Basin Inter-Governmental Agreement be amended to allow the Basin Plan to ensure the holistic management of the Murray-Darling Basin.*

Cotton Australia does not have either the expertise or the resources to provide detail legal advice on specific changes required. However, it will later in this submission identify a number of sections in the Act that are of concern.

Cotton Australia would strongly urge the Committee to seek detailed professional advice on how the Act could be amended so as to ensure the deliver of a balanced, holistic Basin Plan.

Cotton Australia is aware of the potential risks associated with the Water Act being opened to amendment. There is the possibility of the Australian Parliament pursuing widespread amendments, which could conceivably lead to less balanced outcomes, and an Act even more focused on the environment.

However, Cotton Australia strongly argues that this risk is largely mitigated if the Government and Opposition take a bi-partisan approach to amendment, and limit changes to only those that will help to deliver the balanced and holistic Basin Plan that both the Government and Coalition profess to wanting to achieve.

## **Specific Areas of Concern**

### ***Section 3 – Objects***

*The objects of this Act are:*

*(a) to enable the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources in the national interest; and*

*(b) 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 to the Basin water resources; and*

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

*(e) to improve water security for all uses of Basin water resources; and*

*(f) to ensure that the management of the Basin water resources takes into account the broader management of natural resources in the Murray-Darling Basin; and*

*(g) to achieve efficient and cost effective water management and administrative practices in relation to Basin water resources; and*

*(h) to provide for the collection, collation, analysis and dissemination of information about:*

*(i) Australia's water resources; and*

*(ii) the use and management of water in Australia.*

The highlighted section 3 D (iii) by using the words subject to paragraphs (i) and (ii) clearly shows that maximising net economic gains to the Australian community can only be considered after the Sustainable Diversion Limit (SDL) has been set at a level to to fully protect and restore the environmental assets.

To put it in layman terms, first of all the Act requires the plan to identify how much water is required by the environment to protect and restore it, and then and only end, can the Plan contemplate how that SDL can be supplied at the least social and economic cost to the Australia community.

This position is further emphasised in **Section 21**

### **General basis on which Basin Plan to be developed**

#### *Basin Plan to implement international agreements*

*(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.*

*Note: See Articles 7 and 8 of the Biodiversity Convention.*

*(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.*

*Note: See Article 3 of the Ramsar Convention.*

*Basis on which Basin Plan to be developed*

*(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;*

*(vii) the effect, or potential effect, of the Basin Plan on the use and management of water resources that are not Basin water resources;*

*(viii) the effect, or the potential effect, of the use and management of water resources that are not Basin water resources on the use and management of the Basin water resources; and*

*(ix) the State water sharing arrangements.*

*Note 1: Paragraph (b): the best available scientific knowledge includes the best available systems for accounting for water resources.*

*Note 2: An example of a management objective referred to in subparagraph (c)(iv) might be preservation of the natural values of a river system through no development or minimal development.*

*Note 3: See also subsection 25(3) (which deals with the water quality and salinity management plan).*

*Basin Plan not to reduce protection of planned environmental water provided for under existing State water management laws*

*(5) The Basin Plan must ensure that there is no net reduction in the protection of planned environmental water from the protection provided for under the State water management law of a Basin State immediately before the Basin Plan takes effect.*

*Basin Plan not to be inconsistent with Snowy Water Licence*

*(6) The Basin Plan must not be inconsistent with the provisions of the licence issued under section 22 of the Snowy Hydro Corporatisation Act 1997 of New South Wales.*

*(7) In applying subsection (6), a variation of the licence after the commencement of Part 2 of this Act is to be disregarded unless the variation is prescribed by the regulations for the purposes of this subsection.*

Once again the highlighted sections demonstrate that only after the Basin environmental requirements have been identified and accounted for, can the Basin Plan consider the social and economic impacts. Sub-sections 1,2, & 3 are all about the environment, and sub-section 4 is limited by the clear instruction that its requirements are subject to the requirements of sections 1,2, & 3 being fully met.

Section 22 which deals with the mandatory content of the Basin Plan has no requirements for the consideration, or detailing of the social and economic consequences of the Plan. In fact, its only social and economic requirements are to detail the social and economic circumstances of the Basin communities dependent on the Basin water resources.



Section 23 (10) specifically prohibits the Basin Plan from making any provisions that does not directly relate to volumes and timing of water releases.

## **Section 23 (10)**

*(10) A provision of the Basin Plan has no effect to the extent to which the provision directly regulates:*

*(a) land use or planning in relation to land use; or*

*(b) the management of natural resources (other than water resources);*  
*or*

*(c) the control of pollution*

While Cotton Australia would concede that there may be some difficulty in the Act governing issues that may more generally fall within the responsibilities of the States, it see that this section effectively prohibits a sensible and holistic management of the Basin's natural resources.

This submission has already outlined the folly of the Act's "just add water approach", with its example of attempting to increase native fish numbers.

As earlier advised Cotton Australia cannot provide detailed legal advice, and does not submit that the specific sections of the Act highlighted above represent a detailed analysis of the Act's shortcomings, but it does believe they give a fair indication of the very real concerns Cotton Australia has about the Act.

Cotton Australia and its members need confidence that the Act cannot only deliver a balanced (social, economic, and environment) and holistic (fully integrated catchment management) Basin Plan, but that Plan can withstand any potential High Court challenges.

Cotton Australia challenges this inquiry to fully consider "if the Act is not amended, and the Minister and the Parliament delivers what they believe is balanced Basin Plan, would the Basin Plan survive a High Court challenged based on the argument that the Act (as it stands today) gives primacy to environmental outcomes".

### ***Recommendation 3***

*That this inquiry fully examine whether a Basin Plan written in a manner consistent with giving equal weighting to environmental, social and economic outcomes, would be likely to survive a High Court challenge that the Act (as it stands today) gives primacy to environmental outcomes.*

### **Conclusion**

Cotton Australia is supportive of a Basin Planning process that delivers robust Basin Plan that is balanced and holistic.

It is heartened by the assurances of the Minister for Water and the Chair of the MDBA that they are determined to deliver a balanced (and to a greater or lesser extent a holistic) Basin Plan.

However, Cotton Australia is not convinced that the Water Act provides the foundation for the delivery of such a Plan in a manner that would allow it to withstand a High Court challenge.

Therefore, Cotton Australia believes this inquiry provides an opportunity for the Australian Government to closely examine the Water Act, and make constructive recommendations for amendments that would ensure the outcomes by the Minister and the MDBA Chairman can be legally delivered.

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