



Water Act Review Secretariat
Water Reform Division
Department of the Environment
wateractreview@environment.gov.au
GPO Box 787
Canberra ACT 2601

7 July 2014

Submission to the review of the *Water Act (2007)*

The Australian Conservation Foundation (ACF) stands for ecological sustainability. We get to the heart of environmental problems by tackling the underlying social and economic causes. We work across society to influence urgent, transformative action to deliver lasting change on the scale required to secure a sustainable environment. We bring people together to champion the true value of our environment and its critical role in sustaining all other systems and in achieving human wellbeing.

The ACF has been active in advocating for a healthy Murray Darling Basin for several decades, working towards improving the outcomes of the Basin Plan and ensuring that environmental water – water that has been set aside for the environment – is used as efficiently and effectively as possible.

The ACF views the Water Act 2007 (the Act) as a substantial achievement and a strong contribution towards addressing historic over allocation of water resources within the Murray Darling Basin. While the Water Act is a pivotal and ground-breaking first step, the gestation of the Basin Plan was protracted and thus its implementation delayed. The intention of section 253 of the Act, which commits to this review, is to reflect on progress made to date by governments and stakeholders towards achieving the objects of the Act. To go any further, to reopen the objects or core elements of the Act, would risk further delays and destabilisation. Furthermore, given the delays that have occurred, it is too early to make a meaningful or conclusive assessment of whether the Act can achieve its objects. ACF strongly supports the objects and core elements of the Act in their current form and believes now is not an opportune time to alter them. Rather, it is clear that the success or otherwise of the Water Act depends in large part on the implementation decisions that will be made by basin governments and stakeholders in the next few years, and the review should make clear findings in this area.

Summary of key points

- The current objects of the Water Act are sound and should not be changed. They adequately reflect the need to return the Basin to sustainable levels of water use and acknowledge that there has been historic over-allocation of water resources within the basin.
- It is critical that sufficient organisational capacity and expertise in water management and monitoring is maintained across the Basin States and the Commonwealth as the Basin Plan is implemented. In this regard, the National Water Commission (NWC) plays an important role in monitoring and auditing the implementation of the Basin Plan. The NWC has specific obligations under the Water Act and should not be abolished unless it is replaced with an institution with similar independence and expertise.
- Putting a cap on water purchases well below the average Sustainable Diversion Limits (SDL) and prioritising infrastructure investment above direct intervention in the water market will increase the risk of the Basin Plan failing to achieve its aims.
- The Commonwealth and states should maximise the environmental outcomes derived from all classes of water through increased accountability for planned environmental water, optimised river operations and synergising the delivery of consumptive water with both rules based and held environmental water.
- SDL adjustments through supply measures should only be considered in the context of how to achieve the best possible environmental outcomes. The methodology for measuring equivalence of supply measures is not sufficiently tested or mature enough to provide any confidence in the robustness of the approach. It is also important that supply measure SDL adjustments do not erode volumes of flow necessary to achieve environmental outcomes and floodplain connectivity.
- There has been a strong focus on SDL adjustments through supply measures by Basin States, however, the ACF has seen little evidence of progress on the recovery of the additional 450 GL through efficiency measures and it is important that this work is prioritised accordingly.
- Existing legislative protections under Section 105 and 106 of the Act must not be weakened. Specifically Section 106 of the Act should be amended to include a statement to clarify that the Commonwealth Environmental Water Holder (CEWH) cannot use proceeds of trade to pay for works, fees, delivery charges, administration and operating costs, monitoring and evaluation, and complementary environmental restoration projects.
- The Water Act should also be amended to establish the CEWH as an independent statutory authority, consistent with the recommendations of the House of Representatives Inquiry into the impact of the Murray-Darling Basin Plan in Regional Australia¹.

¹ Recommendation 20 - House of Representatives Standing Committee on Regional Australia, 2011 - *Inquiry into the impact of the Murray-Darling Basin Plan in Regional Australia* - http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ra/murraydarling/report.htm

- Basin States and the Commonwealth need to respond to instances where cost barriers are preventing environmental water delivery, such as state based fees and charges for the delivery of large volumes of environmental water, and ensuring local managers have sufficient resources to deliver water.
- The Water Act should be amended to give greater recognition to the rights and interests of Indigenous communities within the Basin.

Basin Plan

Management objectives and outcomes of the Basin Plan

It is far too early to determine whether the objectives and outcomes of the Basin Plan are being met. Meaningful reform requires well thought out and resourced implementation. In broad terms the success of the Basin Plan will require serious commitment by all basin governments to root-and-branch reform of how rivers are run, including through ensuring physical and policy constraints are suitably addressed and that both environmental and consumptive water flows are managed in a way that maximises environmental benefits. It will also require strong resolve from governments across Basin States to maintain sufficient organisational capacity and expertise in water management and monitoring. This is needed to ensure that water is managed in a manner that can actually benefit the environment as well as provide for sustainable communities and regional economies over the long term. In this aspect the Commonwealth has been, and must continue to be, a leader. The development of the Water Act was a historic achievement. It addressed the tragedy of the commons that plagued the management of the Murray Darling Basin. The Commonwealth's role in addressing this issue should never be understated or underestimated.

The Commonwealth and states should maximise the environmental outcomes derived from all classes of water through increased accountability for planned environmental water, optimised river operations and synergising the delivery of consumptive water with both rules based and held environmental water. With a now substantial portfolio of held environmental water in place, it is important to consider how this more actively managed water interacts with other classes of water. In some cases, environmental water provided for under water resource plans is substantial and in many catchments reflects a volume greater than that of held water, however accountability for the delivery of this water is inadequate. In addition, delivery of consumptive water and operation of storages and weir heights can be optimised for better environmental outcomes. The transition to accredited Water Resource Plans provides one important opportunity to enhance the overall coordination between all classes of water, and increase accountability for delivery of planned environmental water. Other opportunities to embed environmental objectives in river operations should also be pursued.

Long term average sustainable diversion limits

The decision to reduce diversion limits by only 2750 GL was essentially a political compromise. MDBA modelling showed this volume of additional environmental water is unlikely to be sufficient to maintain the health of the Basin's rivers, wetlands and underground aquatic ecosystems with enough confidence to give effect to the objects of the

Act². This decision means that the current SDLs can, at best, maintain large parts of the system in the lower bounds of environmental health and that even this outcome sits within a moderate risk category for failure. Imposing a 1500 GL cap on water buy-back by the Commonwealth could exacerbate this situation because it necessitates a slowing in the pace of recovery, and creates greater cost pressures on the recovery effort. The provision of voluntarily purchased water is the most efficient and timeliest way to deliver outcomes within the Basin, as acknowledged by the Australian Productivity Commission³. Putting a cap on water purchases well below the SDL limits and prioritising infrastructure investment above direct intervention in the water market will put at risk the effectiveness of the Basin Plan in achieving its environmental aims. This will particularly be the case if previously stressed ecosystems in the Basin, such the Coorong, experience renewed drought before the full water recovery target has been achieved.

While the current SDL are a compromise, the future of the SDL is more worrying. It is questionable whether SDL adjustments, which are enabled in the Water Act under section 23A and section 23B, will align with the objects of the Act. The proposed SDL adjustments through supply measures, such as infrastructure works, will result in less water being available for the environment overall. This approach involves inherent trade-offs in environmental assets and will ultimately lead to reductions of volumes of water available for floodplain and ecosystem connectivity.

Environmental works as supply measures should only be considered in the context of how best to achieve environmental outcomes, including flow regime outcomes and the volumes necessary to achieve those outcomes. It has been demonstrated that works and measures designed to deliver environmental water 'more efficiently' can lead to negative environmental impacts and do not provide the many environmental benefits that are derived from overbank flows⁴.

The methodology for measuring the ecological equivalence of supply measures is not sufficiently tested or mature enough to provide confidence in the robustness of the approach. Problematically, the equivalency methodology that is being developed is not intended to be used to determine the value of these trade-offs until after business plans are approved to be funded under Phase 2. This creates an environment whereby the business plan approval for SDL adjustments through supply measures will occur prior to a final and conclusive comparative scientific analysis. This will raise expectations that any supply measures progressed through Phase 2 will be approved, even where an equivalency analysis demonstrates that environmental outcomes may be insufficient to warrant government investment or justify the project proceeding. Such an approach will make objective policy decision making more difficult and may lead to undue pressure to approve supply measures in the absence of equivalent ecological outcomes.

² Wentworth Group of Concerned Scientists, October 2012 - Does a 3,200gl reduction in extractions combined with the Relaxation of eight constraints give a healthy working Murray-Darling Basin River System?

³ Productivity Commission, March 2010 - Market Mechanisms for Recovering Water in the Murray-Darling Basin, Final Report,

⁴ Pittock, J, Finlayson, M & Howitt, J, 2012 - Beguiling and risky: Environmental works and measures for wetlands conservation under a changing climate, *Hydrobiologia*, vol. 11 Sep 2012.

Any potential supply measures will also fall out of scope of many of the assurance frameworks that govern the provision of environmental water by the CEWH under the Basin Plan and Act. The Act places a positive obligation on the CEWH to use its water entitlements for the benefit of the environment, consistent with the Basin Plan. Similarly the monitoring and reporting requirements of the CEWH are mandated under the Act. Environmental works resulting from SDL adjustments, however will only be subject to monitoring and reporting requirements under business plan contracts, which will not have equivalent obligations or oversight to the management of held water.

The cost effectiveness of favouring infrastructure over held water for meeting the SDL also needs to be more closely examined. Infrastructure, such as weirs and regulators, age and depreciate in value over time in contrast to water entitlements, which generally appreciate in value. While it might seem cheaper today – the infrastructure legacy will be one that needs continual renewal. Operational and management costs, not just capital costs, need to be factored into any supply measure business plan assessments, and better frameworks for evaluating value for money in funding decisions are needed.

While supply measures are cause for concern, the ACF has seen little evidence of progress on the recovery of the additional 450 GL through efficiency measures. This is a critical part of the overall strategy for the health of the basin's ecosystems and needs to be progressed as a priority alongside other measures by basin governments. The imperative for this work is heightened in the context of the 1500 GL cap on water purchases imposed by the Commonwealth.

Targets in the Basin Plan

It is generally too early to say whether the targets outlined in Schedule 7 of the Basin Plan are being met. Schedule 7 generally specifies that there will be no loss or degradation of water connectivity, floodplain condition and other environmental assets and ecosystems within the basin prior to 2019, from which time there should be improvements in these indicators. With a 1500 GL cap on water purchases and significant time delays in realising any environmental gains from infrastructure works that will deliver improved ecosystem outcomes, it is difficult to envisage that there will be no loss or degradation of ecosystem function as required in Schedule 7 between now and 2019.

Water information systems and National Water Accounts

The closure of the National Water Commission (NWC) as part of the 2014 federal budget is highly concerning and should not proceed unless it is replaced with an institution with similar independence and expertise. The role of the NWC is an important one and clearly articulated within the Act. The proposed closure also occurs at a time when most other Basin jurisdictions are reducing resources for environmental management portfolios and contributions toward the MDBA.

No useful information has been put forward by the Commonwealth as to how the obligations and functions currently completed by the NWC, stipulated under Part 3 and Part 5 of the Act, will be fulfilled in an independent and judicious manner. The closure of the NWC also comes at a time when the work of the MDBA will be increasing with assessments of WRP across the jurisdictions and the implementation of the Basin Plan. It would also be wholly inadequate for the monitoring and audit functions of the NWC to be handed to the Department of the Environment. Neither the Department, nor the MDBA are well placed to audit their own compliance with implementation aspects of the Water Act or Basin Plan. This is especially the case in the context of substantial resource and staffing reductions that the Commonwealth environment portfolio currently faces. This overall weakening of public institutional capacity at both the Commonwealth and State levels will have very serious consequences for future monitoring, auditing and evaluation of the Basin Plan.

The ACF has concerns over the future capacity for monitoring and auditing activities within the Basin and what this may mean for the implementation of the Basin Plan over the next decade. The primary purpose of monitoring and evaluation must be to inform future management decisions within the Basin through an adaptive management framework. This can only be achieved if agencies are sufficiently resourced and there is an imperative placed on the collection and integration of meaningful data and information into decision making. The MDBA and CEWO should be commended for the investments made to date in their monitoring frameworks. The current CEWO Long Term Intervention Monitoring program should be built upon, and embedded in, an adaptive management framework with secure funding. Additionally, the water information provisions under Part 7 of the Act should be retained, particularly the additional functions for the Bureau of Meteorology listed in section 120. Independent nationwide water information that is comparable across jurisdictions is a crucial requirement for auditing the Basin Plan and assessing the effectiveness of the SDL.

Effectiveness of the Act in achieving its objects

The current objects of the Act are sound and should not be changed. They adequately reflect the need to return the Basin to sustainable levels of water use and acknowledge that there has been historic over-allocation of water resources within the basin. The objects of the Act prioritise the restoration of the river and floodplain ecosystems within the Murray-Darling Basin, while recognising that improving ecosystem health will generate benefits for all basin users.

The objects of the Act also aim to ensure that water resources in the Basin are managed to optimise environmental, social and economic outcomes as well as maximising net economic returns, however these are subsidiary objectives to those relating to the restoration of the Basin to a sustainable footing. For example the Act acknowledges maximising social and economic benefits (section 3(c)) is subject to relevant international agreements (section 3(b)), such as the Ramsar convention, and that maximising net economic returns (section 3(d)(iii)) is subject to returning the Basin to environmentally sustainable levels of extraction (section 3(d)(i)) and protecting and restoring ecological values (section 3(d)(ii)).

ACF supports the use of trade by the CEWH within the current limitations provided by the Act. Environmental water entitlements are an artefact of the consumptive water framework and as such it is inevitable that allocations against these entitlements will not always be available at a time and location that allows maximum environmental benefit. Countercyclical and inter-valley trade are examples of where trade can be an efficient management tool that allows the CEWH to maximize the environmental benefit derived from its portfolio, whilst also delivering improved outcomes for other water users. As levels of trade increase, enhanced transparency measures will be required to ensure stakeholder confidence is retained

The objects of the Act explicitly seek to protect, restore and provide for the ecological values and ecosystem services of the basin and ensure there are sustainable levels of take. The ability to achieve these objects would be threatened by any relaxation of the restrictions on trade by the CEWH contained in section 106 so as to allow other trade to be conducted for additional purposes, such as funding non-flow activities or to increasing consumptive water availability.

Relaxing section 106 requirements may result in perverse incentives for the CEWH to trade out of the environmental pool to cover overhead costs or important non-flow activities, particularly if future budgets provide insufficient resources to the CEWH and other agencies to cover these costs. Sustained trade out of the environmental pool would result in a reduction of long-term water availability for the environment and an effective increase in SDLs which already represent a substantially compromised environmental outcome for the basin. Modelled outcomes for both a 2750 GL Plan or a 3200 GL Plan are in the lower bounds of ecological health in most areas of the basin and these amounts may result in exceedances in acceptable ecological limits in several Ramsar listed wetlands⁵. Any potential reduction in this volume of held environmental water will even further reduce the potential ecological outcomes that can be achieved under the Basin Plan.

It is imperative that existing legislative protections such as section 105 and 106 of the Act not be weakened. Specifically section 106 of the Act should be amended to include a statement to clarify that the CEWH cannot use proceeds of trade to pay for works, fees, delivery charges, administration and operating costs, monitoring and evaluation, and complementary environmental restoration projects. This should be accompanied by ensuring adequate resourcing is provided for all essential non-flow activities that may be incurred by the CEWH. In order to promote transparency and understanding of trades, the CEWH should also include in its annual report the basis for any trading decisions and the longer term environmental benefit of any trades (i.e. how the trade and subsequent re-investment benefited the environment).

⁵ J. Le Nauze and E. Carmody Will the Basin Plan uphold Australia's Ramsar Convention obligations? http://www.edonsw.org.au/will_the_basin_plan_uphold_australia_s_ramsar_convention_obligations

The CEWH provides one of the most critical roles in restoring the Basin's health. In order to do this the CEWH must exist at arm's length from Government and beyond the remit of political interference. This was supported by the recommendations of the House of Representatives Standing Committee on Regional Australia Inquiry into the Murray Darling Basin, which recommended the CEWH be established as an independent body⁶. It is imperative that the independence of the CEWH be maintained and strengthened and the Water Act should be amended ensure that the CEWH operates as an independent statutory authority with sufficient budget appropriations.

There are additional opportunities for the Act to better meet its objects through investigations by Basin States into storage and delivery products or services (including service level pricing) that ensure the efficient and equitable distribution and recovery of costs, whilst also ensuring that the environment and other water users have access to the most fit-for-purpose services.

Some storage or delivery products give rise to barriers to holding and using environmental water. This issue is partly a function of environmental water managers holding and delivering very large volumes of water in an operating framework of products or services designed to suit smaller volume irrigation uses. Examples include allocation timing, carryover arrangements and irrigation scheme casual use fees charged on the amount of water delivered, which pose a significant financial barrier to the delivery of large volumes of environmental water. While environmental water holders could hold delivery shares in perpetuity instead, holding shares to meet the demand pattern of environmental use (such as a very large delivery 3 years in every 10) mean the costs involved may also be uneconomic or inefficient. Having environmental water managers trade or hold options for delivery shares could address this, as could development of different service levels that enable both irrigation and environmental demands to be met efficiently. These and other opportunities exist to improve products and services for all users, and to realise win-win outcomes from trade and options arrangements. Finding a solution to these issues is necessary to avoid undue costs which might otherwise constrain the delivery of environmental water and returns on investments in buyback and infrastructure to date.

Regulatory simplification

High operational costs can impede the delivery and use of water already acquired for the environment. There are acute examples of this such as in the case of the Gunbower Forest in northern Victoria where agreement on reasonable delivery costs is required to make the delivery of large volumes of environmental water feasible, and at a smaller scale with local community groups such as the Murray Darling Wetlands Working Group whose limited resources can restrict their ability to carry out pumping and other environmental water delivery actions. Addressing these issues would lead to the immediate improvement in environmental water holders and local managers' ability to deliver water.

⁶ Recommendation 20 - House of Representatives Standing Committee on Regional Australia, 2011 - *Inquiry into the impact of the Murray-Darling Basin Plan in Regional Australia* - http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ra/murraydarling/report.htm

Basin States and the Commonwealth need to respond to instances where cost barriers are preventing environmental water delivery, such as state based fees and charges for the delivery of large volumes of environmental water, and ensuring local managers have sufficient resources to deliver water.

Other relevant matters

There is substantial scope for the Act to be improved in relation to how it addresses Indigenous people's rights regarding the access and ownership of water. The Act does not sufficiently address these issues, despite the National Water Initiative requiring all jurisdictions to adequately provide for Indigenous access to water resources⁷. The Basin Plan does provide for Indigenous consultation requirements and is a positive step toward the recognition of cultural flows, however these elements should be reflected in the legislation for them to have meaningful effect. In particular there is scope across the Act to provide for improved Indigenous engagement and consultation in decision-making, planning and management. There is also scope within the Act to ensure that Indigenous peoples have rights and access to water resources for cultural and economic purposes. The Act should be amended to reflect these rights of Indigenous communities and Traditional Owner groups within the Basin. This would also be consistent with the substantial body of work underway within the MDBA and other groups, such as the Northern Basin Aboriginal Nations and the Murray Lower Darling Rivers Indigenous Nations, in relation to the acknowledgment and provision of cultural flows for Indigenous communities.

For further information contact: ACF Healthy Ecosystems Program Manager:

⁷ NWI clauses 25 (ix) and 52-54