

## **Submission to the Senate Standing Committee on Environment, Communications and the Arts: Inquiry into Water Licences and Rights**

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### **Summary**

This submission focuses on the legal and policy issues raised in connection with, '[t]he ability of the Commonwealth, across state borders, to sustainably manage water resources in the national interest'. The submission addresses specific areas identified under the terms of reference as well as providing general comments on the Commonwealth's capacity and obligations to sustainably manage water in the national interest. This submission emphasises that the *Water Act 2007* (C'th) has guiding objectives that the Commonwealth working in conjunction with the States is to manage water in the national interest by reference to international obligations for the long term sustainable allocation and use of water; for the protection of water sensitive ecological areas, and by reference to the overarching need to give effect to and implement the principles of ecologically sustainable development.

### **Background**

The manner in which Australia manages water catchments and allocates water resources in an era of climate change is one of Australia's predominant public policy, legal and federal challenges. These challenges exist at many levels across Australia from non-point source pollution affecting the Great Barrier Reef to growing recognition of the unsustainable levels of groundwater extraction in the Great Artesian Basin. However perhaps the most entrenched difficulties relate to the management of the Murray Darling Basin [MDB].

This area of intensive settlement and longstanding water resource development has been the site for ongoing tensions since pre-Federation. Historical 'institutions' and practices for water management in the MDB have resulted in unsustainable levels and patterns of water use, including highly over-allocated water resources in most jurisdictions. As a result, natural systems are highly degraded with widespread loss

of biodiversity and the threatened collapse of ecological function; and there is intense conflict and competition between water users over scarce water resources, with highly water dependent land uses and many regional centres facing very uncertain futures. The Garnaut Review and Intergovernmental Panel on Climate Change have identified that this situation will be further accentuated under climate change scenarios of increasing and continuous water scarcity.

In recognition of the dire situation facing water resource management in the MDB, the Commonwealth has legislated in the national interest to *inter alia* under 's 3 (b) *Water Act* 2007 (C'th) 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'.

### **Water Law and Policy Reforms**

Reforms to water law and policy in Australia over the last two decades have been wide-ranging and they have effected fundamental changes in the manner in which water is allocated, managed and distributed at law. Central to these changes has been first, the separation of land and water entitlements that has facilitated an expansion of water trade within the MDB and secondly the instigation of environmental water (flows) that are given recognition within various pieces of water legislation. The National Water Initiative agreed by the Council of Australian Governments in 2004<sup>1</sup> brought policy trends in favour of water trading to the surface, drawing on a national water law reform agenda,<sup>2</sup> and national competition policies designed to address what was perceived as a looming ecological crisis in the MDB.<sup>3</sup> These changes have had major impacts upon the social, economic and cultural values associated with water in the Murray Darling Basin. The most recent raft of changes enacted under the *Water Act* 2007 (C'th) have continued the process of water policy reforms but with a particular emphasis upon long term water planning and addressing over-allocation to meet sustainable diversion limits. The MDB 'cap' on water diversions is widely acknowledged to be set at unsustainable levels – a factor exacerbated by climate change and drought.

Water planning has emerged as the central mechanism to address longstanding issues of over-allocation and the goal of achieving sustainable levels of water use in the Basin. It is vital that the Commonwealth maintain a focus on the national interest and that the allocation of individual 'entitlements' to consumptive water use (i.e. water

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<sup>1</sup> Council of Australian Governments, *Intergovernmental Agreement on a National Water Initiative* (2004) (National Water Initiative).

<sup>2</sup> See Attachment A to the Communique, Council of Australian Governments' Meeting, Hobart, 25 February 1994, available at <<http://www.coag.gov.au>>.

<sup>3</sup> Productivity Commission, *Water Resources and Waste Disposal* (1992).

rights<sup>4</sup>) and the workings of the water trade 'market' must be put into the context of overall sustainability objectives and the Commonwealth's international and national obligations. The water market (and so-called water property<sup>5</sup>) was envisaged as a mechanism to achieve overarching goals of efficiency of resource use and environmental protection and not as an end in itself. While the adoption of market mechanisms has been relatively successful in achieving some structural change, it has not successfully addressed the core sustainability problems.

In summary, the most fully implemented property rights/ cap and trade scheme in operation in Australia is the water trading scheme operating in the Murray-Darling Basin.<sup>6</sup> Water markets have been reasonably effective in allowing individuals some flexibility to meet water supply and demand problems, particularly under the extreme climate change induced scarcity of recent years, and in precipitating a shift from low value to high value water uses. Water trading has been much less successful at addressing the core problems of over-allocation of water in the MDB. This highlights that in any cap and trade system, trade in 'property rights' alone (i.e. a reallocation process through trade) cannot achieve meaningful outcomes in the face of weak and poorly implemented 'caps'. Thus so called 'property in water', by itself, cannot achieve long term sustainability for water. This seeming truism is manifest most clearly in the current widespread 'market failure' of water markets across the MDB, where the federal government has now committed billions of dollars to 'buy-back' water for environmental purposes in the face of the imminent collapse of many ecosystems. It highlights also what used to be the accepted economic position that markets do not deal well with public goods as these will be subject to market failure, non-costed externalities and information asymmetries. Water is a key public 'good'; it is vital to Australia's national interest and there are emerging 'critical human water needs' to be considered as well. Further, Indigenous peoples' participation in the water planning process is mandated under the *Water Act* but significant issues remain as the nature of that participation and whether it can achieve 'meaningful' participation for Aboriginal groups. Other cultural values and social impacts related to water also must be considered alongside more formal economic efficiency arguments in considering the allocation of water rights and licences.

It is critical therefore that the Commonwealth working in conjunction with State governments strengthen its capacity to effectively implement the Basin Plan and the 'nested' environmental watering plan and water resource plans under the *Water Act* 2007 (C'th). While state governments have developed long-standing expertise in water resource management over many years that can be effectively brought to the

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<sup>4</sup> The term water right in itself is open to various legal interpretations. The legal character of these 'rights' has not been definitively settled.

<sup>5</sup> It is not clear that water allocations will be regarded as comparable to common law property rights and thus fall under s 51 (31) of the Commonwealth Constitution regarding 'just terms' acquisitions. See

<sup>6</sup> A. Pye, 'Water Trading Along the Murray: A South Australian Perspective' (2006) 23 EPLJ 131.

table in this exercise, the central focus on addressing water over-allocation needs to be maintained.

The submission turns to address specific issues below.

**a. the issuing, and sustainability of water licences under any government draft resource plans and water resource plans;**

The submission assumes in relation to the above topic that the issue of water licences (and other forms of consumptive water use entitlement) is by state and territory governments as this is the current situation under prevailing water legislation. The Commonwealth government through the Murray Darling Basin Authority (MDBA) has responsibility for developing the Basin Plan - the key reform under the *Water Act 2007* (C'th).

The Basin Plan in accordance with guidelines developed under the National Water Initiative is to institute an environmental watering plan, a water quality and salinity management plan, develop a long term average sustainable diversion limits for water allocations from the Basin including those developed under water resource plans. Importantly, the Commonwealth water legislation gives the Commonwealth (or Commonwealth agencies as specified) responsibility for rules relating to water trade and the management of water access 'rights' to achieve environmental purposes.<sup>7</sup> Further, and most specifically related to the topic above, the *Water Act 2007* sets an obligation upon the Commonwealth (i.e. MDBA) to prepare water resource plans for areas that form part of the identified water resource plan areas under the Basin plan. Water resource plans may be accredited or adopted under the Commonwealth legislation by the relevant Commonwealth Minister where the plans meet identified criteria. Thus it appears that state government plans may be accredited/adopted under this process. All water resource plans must conform to the sustainable water diversion limit for water in that water resource plan area. There are provisions that allow for transitional water resource plans and interim water resource plans<sup>8</sup> and it is perhaps these provisions that are referred to as 'draft' plans. Some issues may arise of a technical nature as to whether all existing water planning instruments at a state level may comply with the requirements under the *Water Act*. However, it is recommended that all efforts should be made to ensure that where there is substantive compliance with Basin planning processes and the *Water Act* requirements for water resource plans then such water resource planning should take effect as accredited plans.

Currently state governments also hold the requisite powers under state water legislation to issue water licences and other water entitlements. (For example the

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<sup>7</sup> s 18H *Water Act 2007* i.e. management of water access rights to achieve objectives of the Living Murray Initiative. See also ss20-21 *Water Act 2007*.

<sup>8</sup> S 24 *Water Act 2007*.

state of Victoria issues water shares,<sup>9</sup> and associated water use licences and delivery charges for regulated rivers and 's 51 'take and use licences for unregulated rivers). State governments also undertake water resource assessments and water resource planning. The state powers to allocate water and issue water entitlements need to be consistent with the water resource plans and basin wide planning processes to ensure that there is a consistent, effective and equitable approach to addressing water over allocation across the MDB.

The submission also assumes that the specific allocations to environmental water which are held by e.g. relevant water Ministers for environmental watering purposes under the *Water Act* 1989 (Vic) are not included. The submission would note though that the separate consideration of these questions in itself militates against the holistic and integrated vision required to develop a sustainable water management process across the Basin.

The submission turns to the question of government 'draft' resource plans and water resource plans and the issuing and sustainability of water licences. First, it must be noted that the concept of a resource plan is not identified in the *Water Act*<sup>10</sup>. Perhaps what is intended is a reference to the 'Water Resource Plan Area' whereby sustainable diversion limits are set. As noted, there is a requirement that Water Resource plans are in accordance with sustainable diversion limits for a given water resource plan area. Presumably any 'draft' water resource plan area 'limit' would need to comply. However it should be noted that this matter has not been clearly determined.

The Basin plan is yet to come into effect and if current state government plans are to be treated as 'draft' plans (again not conclusively determined) then presumably they would need to comply with sustainable diversion limits. However the difficulty of determining draft 'individual' limits for a part of the Basin without an overall sustainable limit being set for the entire Basin is noted. This is a classic problem of environmental management where 'individual' limits on use need to be determined within the context of the cumulative impacts of myriad use and allocation decisions.

With respect to the position of any water 'licences' issued 'under a government draft resource plan' it would appear that a precautionary approach should be adopted by governments to ensure that these processes will be in accordance with sustainable diversion limits that will enable the accreditation or adoption of water resource plans. In the interim period until the Basin Plan comes into effect, state governments already have a range of existing water resource assessments under either 'water sharing plans' (e.g. the NSW/Qld model) or sustainable water strategies (e.g. the Victorian model). These processes ought to be aligned with the need for stronger sustainable diversion limits that will be adopted across the MDB and the processes

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<sup>9</sup> S 33 *Water Act* 1989 (Vic)

<sup>10</sup> See s 4 *Water Act* 2007

for state based water allocations need to be cognisant of the potential for the adoption of these stronger 'caps'.

On this matter the question of whether the 'issuing' of a water licence as a share of a resource to give effect to sustainable diversion limits in existence, as opposed to a defined water quantity allocation involves any diminution or acquisition of 'property' is a question that is before the High Court of Australia<sup>11</sup> and to that extent is not determined at law. Earlier decisions at lower levels of the courts have not held that such water licences do constitute a compensable acquisition.

The issue of water licences in this manner would accord with the overall objectives under the *Water Act 2007* of implementing long term sustainable water resource use and with the more precise requirements for the Basin Plan under section 20 of the *Water Act* which reflect Australasia's international legal obligations to give effect to amongst other matters, biodiversity conservation and ecological integrity. More broadly, such an approach is consistent with the objectives for instituting adaptive water management and governance which is becoming increasingly critical as climate change impacts are progressively felt within the MDB. The issuing of water resource 'shares' developed in accordance with general sustainable diversion limits is one manner in which the impacts of climate change and consequent water scarcity can be most equitably borne by all stakeholders within the MDB.<sup>12</sup> The submission does note however that under the *Water Act*, critical human needs are to be given 'priority' in the development of the basin planning process. Environmental water needs also should reflect the underlying ecological integrity that needs to be sustained, as without the maintenance of these basic ecological functions, there will be limited water for any other uses including critical human water needs.

**b. the effect of relevant agreements and Commonwealth environmental legislation on the issuing of water licences, trading rights or further extraction of water from river systems;**

The submission understands 'relevant agreements' to include both Council of Australian Government Agreements, The Murray Darling Basin Agreement which is appended to the *Water Act* in Schedule One and other less directly relevant agreements such as bilateral agreements under the *Environment Protection and Biodiversity Conservation Act* (EPBC) 1999. First, it needs to be noted that CoAG agreements, while clearly central in a co-operative federalism model as a driving force for water law and policy reform, are legally non-binding and so while politically important, cannot have legal effect on the process of issuing water licences.

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<sup>11</sup> *ICM Agriculture Pty Ltd v Commonwealth* (High Court of Australia, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, 24-27 August 2009).

<sup>12</sup> The question of the 'risk allocation' formula for responding to climate change is examined below.

Also, further definition would be useful as to what is comprised by 'trading rights'. Typically, the process of water trade or transfer whether on an intrastate or interstate basis takes place through contractual mechanisms subject to controls set by relevant water legislation and other relevant legislative provisions and common law rules. There are also governing provisions for water registers. These are no free-standing 'trading rights' per se. Currently, there are provisions under the Murray Darling Basin Agreement as to salinity measures and other requirements that must be met regarding approval of interstate water trade. The requirements provide an important mechanism to ensure that the long term goals of sustainable water use and integrated catchment management are met across the Basin. Further, while there are guiding principles under the *National Water Initiative* that promote a 'deepening of the water market' that would seek to increase the extent of water trading there is a need for much stronger evidence based assessments of exactly how further deepening of the market will advance holistic sustainability objectives.

While further efficiencies might be achieved in terms of water moving to higher value uses, the effect of water trades on the overall availability of water in catchments to support ecological functions as an in-situ conservation value needs to be considered in terms of meeting the overall objectives of the *Water Act 2007* and the purposes of the Basin Plan. Clearly, if there is a further deepening of the market (i.e. enhanced water trade out of any particular catchment) this may be in conflict with the setting of sustainable diversion limits under future water resource plans. Thus, '[w]ater markets in Australia have revealed themselves to be uneven in development and a little unpredictable in nature'.<sup>13</sup>

There is a further need to ensure that widespread speculative accumulation of water is avoided by retaining controls on the amount of water entitlements that can be held independently of land holding. Speculative water holdings also may raise water prices which could affect the capacity of the federal government to cost effectively purchase environmental water to address sustainability objectives.

Moreover, any 'deepening of the market' in terms of increased water trade must occur in the context of no further extractions of water, and indeed reduced extractions, from the MDB system if sustainable diversion limits are to be met. Indeed if the sustainable diversion limits are to achieve long term sustainability it will be imperative to ensure that water resource plans are developed consistently, reducing the serious over-allocation in many catchments.

### **Risk Allocation and Review Processes**

It is important that the framework providing for water 'rights' is responsive to changing water availability under climate change and any new information on ecological water requirements. Therefore, it is essential that there are effective opportunities for the Sustainable Diversion Limit to be reviewed in line with changing

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<sup>13</sup> Gardner, Bartlett and Gray, above n 3, 566.

scientific information and risks to the water resource as climate change impacts deepen. Further processes need to be established to deal equitably with the consequent impacts in respect of the broad provisions for the review and amendment of the Basin Plan. Review of the Basin Plan is to be undertaken every ten years.<sup>14</sup> Additional legislative direction on the focus of the review should be included in future reforms to the Water Act to give clarity and strength, especially with regard to ensuring protection of the environmental water component against changing water availability.

### **Environmental Legislation**

The major federal environmental legislation is the *Environment Protection and Biodiversity Conservation (EPBC) Act* 1999. As yet, there is no definitive legal interpretation as to how the *EPBC Act* will interact with the *Water Act* 2007. There are unresolved issues as to whether 'actions' undertaken by federal administrative agencies and Ministerial decision-making may constitute 'controlled actions' under the EPBC Act in terms of significant impact on 'Matters of National Environmental Significance' that would then require federal impact assessment and approval. However given that the *EPBC Act* and the *Water Act* have congruent objectives in terms of the attainment of ecologically sustainable development it is important that these frameworks should operate consistently. Further, it is important that the Basin planning process is cognisant of the need to align its objectives to the protection of matters of national environmental significance under the EPBC Act, such as *Ramsar* wetland sites. This would accord with the need for the *Water Act* to implement Australia's international obligations under a wide range of international conventions and bilateral treaties.

### **c. the collection, collation and analysis and dissemination of information about Australia's water resources, and the use of such information in the granting of water rights;**

The development of more extensive information on Australia's water resources in the periods of high stress on the resource will be critical to developing effective decision making in relation to water planning under the Basin Plan, the environmental

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<sup>14</sup> s 50(2) and (3) or more frequently upon the request of either the Minister or all of the Basin States (but not within first five years after takes effect or last review), if they are satisfied that the outcomes specified for the Basin Plan are not being achieved, or the objectives specified for the Basin Plan are no longer appropriate for basin water resources or for one or more water resource plan areas.

NB. given transitional provisions which significantly delay full implementation of Basin Plan, full MDB coverage with Basin Plan will only have just been achieved, and Sustainable Diversion Limit may be subject to ongoing delay in full implementation in many catchments if additional temporary diversion limits of 5 to 10 years apply (s 24)



watering plan and water resource plans. In the past, decision-making on the grant of 'water rights' typically has not been able to take into account the cumulative impacts of individual water allocations on the overall water resources for an area. This has resulted in highly unsustainable levels of consumptive water allocation. The instigation of water resource planning that can take into account the long term risks such as climate change based on best available science will be imperative as the basis for decisions about individual water rights, the effective operation of water trade and the setting of long-term sustainable diversion limits. Accordingly, appropriate levels of financial resources are needed to support the development of this information.

The legislative scheme under the *Water Act* introduces some important measures for management of environmental water at a basin scale, and for improved monitoring and information management. Setting legislative standards around roles and responsibilities for environmental water management and providing for key adaptive management functions at a Basin scale, are significant developments.

**d. the issuing of water rights by the states in light of Commonwealth purchases of water rights;**

The Commonwealth government instituted a water 'buy-back' prior to the enactment of the *Water Act 2007*. The 'buy-back' was adopted as an interim measure in light of the serious decline in the environment but then was instituted under the *Water Act 2007* as the means by which the federal government dealt with 'the market failure' of widespread ecological decline across the basin. Concerns have arisen over the efficacy of the water purchase system in terms of the purchases of 'paper' water rather than water that is freely available to meet environmental requirements together with the high cost of such purchases and their 'ad hoc' nature. This submission would have favoured the adoption of a scheme of direct water acquisitions under the *Water Act* for the instigation of an environmental water reserve operating in conjunction with the sustainable diversion limits set by the Basin wide planning process. This would have allowed for water purchases in line with a comprehensive water planning process. Nonetheless, the role of the Environmental Water Holder under the federal *Water Act* is an important one for realising long term sustainable water management under basin planning processes. There needs to be much closer integration of the process of water purchases by the Commonwealth with basin-wide planning processes, the state based water resource assessments and the eventual adoption or accreditation of water resource plans at the state level. The setting of sustainable diversion limits will operate in conjunction with this wider water planning process. Ultimately, the 'cap' that is set will influence the manner in which the States issue and regulate consumptive 'water rights' so as to achieve a coordinated and holistic management framework to address water over-allocation and to allow for environmental water to meet ecological water needs more effectively. Clearly, if state

governments were to allocate new water entitlements above any sustainable diversion limits for water resource plan areas within their jurisdictions then it would be contrary to the objectives of the federal *Water Act* in seeking to implement sustainable water management. Further, there are provisions under the *Water Act* where if a state water resource plan is not consistent with the Basin plan then the Federal Minister may adopt a plan prepared by the MDB Authority.<sup>15</sup>

When the water planning processes at a Commonwealth and state level are effectively integrated and sustainable diversion limits set, it should be possible for a more co-ordinated approach to develop for Commonwealth water purchases. Nonetheless the 'willing seller' formula under which such purchases are to be made will continue to be difficult. It highlights the limitations of a market-based mechanism in achieving long term viable and adaptive water resource management across the MDB.

#### **e. Any other related matters**

Water resource management has a long contested history across the MDB. The *Water Act* and the Basin Plan are opportunities to address long entrenched water resource problems of over allocation and environmental degradation. These measures though also need to align with the considerable 'hands on' water management experience that exists at a state level across many jurisdictions in order to develop an effective framework to, 'take into account the principles of ecologically sustainable development; and which can, 'act on the basis of the best available scientific knowledge and socio-economic analysis'. Given that the Basin Plan is to have regard to:

'(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; (ix) the State water sharing arrangements; and (x) any other arrangements between States for the sharing of water',

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<sup>15</sup> *Water Act* 2007 ss 54, 55, 63, 69.

there will need to be a strongly cooperative model developed to achieve these aims for the Basin Plan and to ensure ecologically sustainable development of water resources across the MDB.