

Submission to the National Competition Council on the implementation of water reform in Queensland

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Introduction

As an introduction, the reader is referred to the article (Attachment) by the same author:

FC Coffey, "Assessment of Water Resource Plans under the *Water Act* 2000 (Qld): With Consideration of Ecological Outcomes and Environmental Flow Objectives in the context of the Precautionary Principle and Sustainable Management (2001) 18 *Environmental and Planning Law Journal* 410.

Following this article and subsequent changes to the *Water Resource (Burnett Basin) Plan* 2000 (Qld), concern is raised that Queensland has not complied with the 1994 CoAG Strategic Framework for water reform

NCC Issue: Public consultation and education

The *Water Act* 2000 (Qld) provides for a process of public consultation on amendments (other than minor amendments) to a water resource plan²:

- s 61 " Public notice of proposal to prepare draft water use plan
- (1) The Minister must publish a notice of the Minister's intention to prepare a draft water use plan for the proposed plan area.
- (2) The notice must state the following—
- (a) the purpose for which the draft plan is to be prepared, including, for example, the risk to natural ecosystems arising from the use of water on land;
- (b) the proposed plan area;
- (c) details of how it is intended that community and technical consultation for the preparation of the proposed draft plan will take place;
- (d) that written submissions may be made by any entity about the proposed draft plan;
- (e) a day by which submissions must be made, and the person to whom, and the place where, the submissions must be made.
- (3) The day stated under subsection (2)(e) must not be earlier than 30 business days after the day the notice is published" .
- ...
- s 64 " Public notice about availability of draft water use plan
- (1) The Minister must publish a notice when the draft water use plan has been prepared.
- (2) The notice must state the following—

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² *Water Act* 2000 (Qld) as in force on assent and on 1 March 2002, s 69.

(a) where copies of the draft plan may be inspected and, on payment of a fee, purchased;

(b) that written submissions may be made by any entity about the draft plan;

(c) a day by which submissions must be made, and the person to whom, and the place where, the submissions must be made.

(3) The day stated under subsection (2)(c) must not be earlier than 30 business days after the day the notice is published" .

...

" *Subdivision 3- Amending or preparing new, water use plans*

s 68 When water use plans may be amended or replaced

- (1) The Minister may-
- (a) amend a water use plan; or
 - (b) prepare a new water use plan to replace an existing water use plan.

(2) The Minister must act under subsection (1) if the Minister is satisfied a water use plan is not addressing the risk to land and water arising from the use of water on land in the plan area.

s 69 Preparing amending or new draft water use plan

- (1) For preparing the amending plan, sections 61 to 67 apply-
- (a) as if a reference in the sections to the draft plan were a reference to the amending plan; and
 - (b) with any other necessary changes.

(2) For preparing the new draft water use plan, sections 61 to 67 also apply.

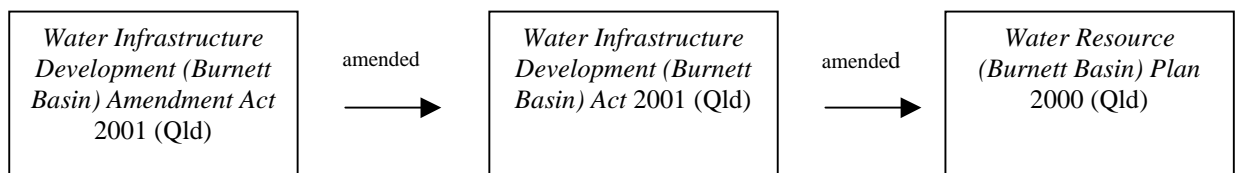
s 70 Minor amendment of water use plan

Despite section 69, the Governor in Council may approve a plan to amend a water use plan without sections 61 to 67 applying-

- (a) if the amending plan is only to correct a minor error in the water use plan, or make another change that is not a change of substance; or
- (b) if the water use plan states that an amendment of a stated type may be made to the water use plan by amendment under this subsection- to make an amendment of the stated type" .

However, the Queensland Government ignored these consultation provisions and amended the *Water Resource (Burnett Basin) Plan 2000 (Qld)* (Burnett Basin Plan) through the *Water Infrastructure Development (Burnett Basin) Amendment Act 2001 (Qld)* that amended the *Water Infrastructure Development (Burnett Basin) Act 2001 (Qld)* which in turn amended the Burnett Basin Plan, see Figure 1.

Figure 1: Process chosen by the Queensland Government to amend the *Water Resource (Burnett Basin) Plan 2000 (Qld)*.



By not following the public consultation procedures, as set out in the *Water Act 2000 (Qld)*³, public consultation on the proposed amendments to the Burnett Basin Plan was restricted.

In addition, important documents, such as report/s prepared by the Queensland Government Treasury Department on the financial viability of the proposed Burnett Dam, were withheld from the public due to provisions in the *Freedom of Information Act 1992 (Qld)*, which exempts matters that have been to Cabinet or to Executive Council.

- s 7 "Definitions
In this Act—
...
'exempt document' means a document that contains exempt matter, but to which access cannot be given under section 32".
...
s 36 " Cabinet matter
(1) Matter is exempt matter if—
(a) it has been submitted to Cabinet; or
(b) it was prepared for submission to Cabinet and is proposed, or has at any time been proposed, by a Minister to be submitted to Cabinet; or
(c) it was prepared for briefing, or the use of, a Minister or chief executive in relation to a matter—
(i) submitted to Cabinet; or
(ii) that is proposed, or has at any time been proposed, to be submitted to Cabinet by a Minister; or
(d) ..."
s 37 " Executive Council matter
(1) Matter is exempt matter if—
(a) it has been submitted to Executive Council; or
(b) it was prepared for submission to Executive Council and is proposed, or has at any time been proposed, by a Minister to be submitted to Executive Council; or
(c) it was prepared for briefing, or the use of, the Governor, a Minister or a chief executive in relation to a matter—
(i) submitted to Executive Council; or
(ii) that is proposed, or has at any time been proposed, to be submitted to Executive Council by a Minister; or ..."⁴.

As an aside, and with implications for future amendments to water resource plans, note that the *Water Act 2000 (Qld)* has the provision that Regulatory Impact Statements⁵ are not required:

- s 71 " No regulatory impact statement for water use plans
A regulatory impact statement under the *Statutory Instruments Act 1992* need not be prepared for the approval of a water use plan or a plan

³ *Water Act 2000 (Qld)* as in force on assent and on 1 March 2002, ss 68 – 69.

⁴ *Freedom of Information Act 1992 (Qld)*, as in force 8 March 2002.

⁵ *Water Act 2000 (Qld)* as in force on assent and on 1 March 2002, s 71.

amending a water use plan” .

Under Part 5 of the *Statutory Instruments Act* 1992 (Qld), all significant subordinate legislation (such as a Water Resource Plan, if it was not exempted under the *Water Act* 2000 (Qld)) requires a Regulatory Impact Statement (RIS) to be prepared. Once a RIS has been prepared the public must be notified and given 28 days to comment.

“Preparation of regulatory impact statement

s 43. If proposed subordinate legislation is likely to impose appreciable costs on the community or a part of the community, then, before the legislation is made, a regulatory impact statement must be prepared about the legislation.

Content of regulatory impact statement

s 44. A regulatory impact statement must include the following information about the proposed subordinate legislation in clear and precise language—

- (a) ...
- (b) a brief statement of the policy objectives of the proposed legislation and the reasons for them;
- (c) a brief statement of the way the policy objectives will be achieved by the proposed legislation and why this way of achieving them is reasonable and appropriate;
- (d) a brief explanation of how the proposed legislation is consistent with the policy objectives of the authorising law;
- (e) if the proposed legislation is inconsistent with the policy objectives of other legislation—
 - (i) a brief explanation of the relationship with the other legislation; and
 - (ii) a brief statement of the reasons for the inconsistency;
- (f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making subordinate legislation) and why the alternative was rejected;
- (g) a brief assessment of the benefits and costs of implementing the proposed legislation that—
 - (i) if practicable and appropriate, quantifies the benefits and costs; and
 - (ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of objectives stated under paragraph (f);
- (h) a brief assessment of the consistency of the proposed legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.

Notification and making regulatory impact statement available

- s 45. (1) Preparation of a regulatory impact statement for proposed subordinate legislation must be notified in the gazette and in a newspaper likely to be read by people particularly affected by the proposed legislation.
- (2) If the proposed subordinate legislation is likely to have a significant impact on a particular group of people, the notice must be published in a way likely to ensure members of the group understand the purpose and content of the notice.
- (3) The notice must—
- (a) ...
- (4) The notice must allow at least 28 days from publication of the notice for the making of comments”⁶.

⁶ *Statutory Instruments Act* 1992 (Qld) as in force on 2 March 2001.

The Queensland Government did not follow the public consultation procedures as set out in the *Water Act 2000* (Qld) when amending the Burnett Basin Plan. In addition, by exempting the requirement for a Regulatory Impact Statement when preparing or amending a water resource plan (subordinate legislation) in the *Water Act 2000* (Qld), and by creating ‘exempt matters’ (material that goes to Cabinet or Executive Council) in the *Freedom of Information Act 1992* (Qld), the relevant material available for public scrutiny has been reduced.

NCC Issue: Provision for the environment

Ecological outcomes

Section 4 of the *Water Infrastructure Development (Burnett Basin) Amendment Act 2001* (Qld) resulted in amendments to section 11(2) of the Burnett Basin Plan. The following lists the pre-amendment provision and the post-amendment provision:

Water Resource (Burnett Basin) Plan 2000 (Qld)

As at making

s 11(2) “Water in the Burnett River is to be managed and allocated to maintain lungfish habitat in the river particularly lungfish habitat downstream of Gayndah at AMTD 200 km”.

As at 11 January 2002

s 11(2) “Water in the Burnett River is to be managed and allocated to provide for lungfish habitat in the river particularly lungfish habitat downstream of Gayndah at AMTD 200 km.

The amended provision is weaker than the original provision. As at 11 January 2002, water only has to be managed and allocated to provide for lungfish habitat. The level of management and allocation does not have to be such that the lungfish habitat is maintained, as it was in the original plan.

Environmental flow objectives

Table 1 shows the values of the environmental flow objectives for Nodes 3, 2, and 1 for 5 key flow indicators as given in the Burnett Basin Plan before amendment and after amendment.

Note that, in particular, 3 out of the 5 key flow indicator values for the environmental flow objectives at Node 1 were amended such that the environmental flow objectives were given values further beyond the draft Burnett Basin Plan’s environmental flow limits (or limit of flow regime change, see Coffey (2001)). Thus, the Queensland Parliament has legislated for the opposite to the object of the *Water Act 2000* (Qld), namely:

s 10(1) The purpose of this chapter [chapter 2] is to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water”.

s 38(1) The Minister may prepare a water resource plan for any part of Queensland to advance the sustainable management of water”.

The amended environmental flow objectives have not, on the whole, been set to a level which is considered, at present knowledge, to be sustainable. Rather, the amended environmental flow objectives appear to have been set, especially after amendment to levels further beyond the limit of flow regime change, to values that would allow water infrastructure to be built, as proposed by the Premier of Queensland during the election campaign of 2001.

Reduced transparency with respect to the amendments of the environmental flow objectives

Section 10D of the *Water Infrastructure Development (Burnett Basin) Amendment Act 2001* (Qld) provides for the expiry of Part 3A 6 months after it commences.

It seems that Part 3A, inserted into the *Water Infrastructure Development (Burnett Basin) Act 2001* as of 2 January 2002, will be deleted after 6 months, even though the *Water Infrastructure Development (Burnett Basin) Act 2001* will not expire until 31 December 2004. It is likely that the amendments to the Burnett Basin Plan will remain in place. Thus the amendments made to the Burnett Basin Plan by the *Water Infrastructure Development (Burnett Basin) Amendment Act 2001* (Qld) will be less obvious to the public.

Conclusion

The Queensland Government did not follow the public consultation procedures as set out in the *Water Act 2000* (Qld) when amending the Burnett Basin Plan. In addition, by exempting the requirement for a Regulatory Impact Statement when preparing or amending a water resource plan (subordinate legislation) in the *Water Act 2000* (Qld), and by creating ‘exempt matters’ (material that goes to Cabinet or Executive Council) in the *Freedom of Information Act 1992* (Qld), the relevant material available for public scrutiny has been reduced.

The ecological outcome pertaining to lungfish habitat, s 11(2) of the Burnett Basin Plan, has been weakened by the amendment, as of 11 January 2002. The level of management and allocation does not have to be such that the lungfish habitat is maintained, as it was in the original plan – only provided for.

The amended environmental flow objectives have not, on the whole, been set to a level which is considered, at present knowledge, to be sustainable. Rather, the amended environmental flow objectives appear to have been set to values that would allow water infrastructure to be built.

Following the arguments detailed in Coffey (2001), and taking into account the amendments to the environmental flow objectives in the *Water Resource (Burnett Basin) Plan 2000*, provisions within the *Water Resource (Burnett Basin) Plan 2000* appear to be inconsistent with the object of the *Water Act 2000* (Qld), namely, to advance sustainable management and efficient use of water resources. Hence, concern is raised that Queensland has not complied with the 1994 CoAG Strategic Framework for water reform.

Table 1: Burnett Basin water resource plan - Burnett River catchment. Five key flow indicators (KFIs) for medium to high flows are listed with their corresponding values: at Level 1; at the environmental flow limits (EFLs) proposed by the draft Burnett Basin plan; and at Level 2. Values for the key flow indicators under existing allocations and licences (full utilisation) (Exis), the environmental flow objectives (EFO prior amendment) as prescribed in Table 6 Schedule 5 in the *Water Resource (Burnett Basin) Plan 2000* (Qld) as at making and prior to being amended for Nodes 3, 2 and 1 and environmental flow objectives (EFO after amendment) as prescribed in Table 6 Schedule 5 after amendment and as of 11 January 2002 are also listed. Values shown in bold fall beyond the environmental flow limits proposed in the draft Burnett Basin plan.

Key Flow Indicators (KFIs) (performance indicators) for medium to high flows ⁷	Natural (pre-devt) values for each KFI	Level 1 ⁸ values for each KFI.	Water resource plan's ⁹ limit of flow regime change	Draft plan's ¹⁰ EFLs. Set at 2% above Level 2 values	Level 2 values for each KFI.	Values for each key flow indicator for Nodes 3, 2 and 1 within the Burnett River Catchment under existing allocations and licences (full utilisation) and the assigned environmental flow objectives								
						Node 3			Node 2			Node 1		
						Exis	EFO prior amendment	EFO after amendment	Exis	EFO prior amendment	EFO after amendment	Exis	EFO prior amendment	EFO after amendment
APFD	0 change	1.2	Not provided	1.96	2.0	~1.2	2.0	2.0	~1.0	2.0	2.1	~1.3	2.0	2.2
Mean Annual Flow (% of natural)	0	84% of natural (ie 16% change from natural)	Not provided	81	79% of natural (ie 21% change from natural)	~ 85	81	81	~ 87	81	81	~ 83	75	72
1.5yr av RIDFV (% of natural)	0	86	Not provided	74	72	~ 75	74	71	~ 85	74	74	~ 76	69	52
5 yr av RIDFV(% of natural)	0	89	Not provided	71	69	~ 89	71	71	~ 90	71	71	~ 94	71	71
20 yr av RIDFV(% of natural)	0	91	Not provided	82	80	~ 89	82	82	~ 93	82	82	~ 97	82	82

⁷ *Water Resource (Burnett Basin) Plan 2000* (Qld) SL No 359 of 2000, s 20(b).

⁸ SO Brizga, *Burnett Basin WAMP Proposed Environmental Flow Performance Measures* (Prepared for and published by the Queensland Department of Natural Resources, 2000), p 35 & Table 6 pp 40 & 41. Two key levels of departure from natural flow regimes. Level 1: Level above which assessed sites are more likely to have no/minor impacts of water resource development on geomorphological and/or ecological conditions. Level 2: Level below which assessed sites are more likely to have major/very major impacts of water resource development on geomorphological and/or ecological conditions.

⁹ *Water Resource (Burnett Basin) Plan 2000* (Qld) SL No 359 of 2000.

¹⁰ Queensland Department of Natural Resources, *Draft Water Allocation and Management Plan (Burnett Basin) June 2000 (Draft WAMP)* (Queensland Government 2000), p 18 & Table S5.1 p 77. In the draft plan the proposed limit to flow regime change is called the 'environmental flow limit' (EFL).

- Node 3** [near Gayndah, downstream of the mid section of the Upper Burnett water project area, see Burnett Basin Plan Schedule 2 s 5]: shows that the values for the key flow indicators under existing allocations and licences (full utilisation) are within the environmental flow limits proposed in the draft Burnett Basin plan. The environmental flow objectives indicate that the Burnett Basin Plan is implicitly providing for increases in allocations of water for consumptive uses – although the process of reading the key flow indicator values for existing allocations and licences (full utilisation) from the plots in the draft plan makes it difficult to ascertain the plan’s intentions. Following amendment to the environmental flow objectives, a second key flow indicator was given a value beyond the environmental flow limits proposed in the draft plan.
- Node 2** [downstream of the lower part of the Upper Burnett water project area, see Burnett Basin Plan Schedule 2 s 5]: shows that the values for the key flow indicators under existing allocations and licences (full utilisation) are within the environmental flow limits proposed in the draft Burnett Basin plan. The environmental flow objectives indicate that the Burnett Basin Plan is implicitly providing for increases in allocations of water for consumptive uses. Following amendment to the environmental flow objectives, the key flow indicator that already had a value beyond the environmental flow limit proposed in the draft plan was given a value further beyond the environmental flow limit.
- Node 1** [mouth of the Burnett River, downstream of the Bundaberg water project area, see Burnett Basin Plan Schedule 2 s 3]: shows that the values for the key flow indicators under existing allocations and licences (full utilisation) are within the environmental flow limits proposed in the draft plan. The environmental flow objectives indicate that the Burnett Basin Plan is implicitly providing for increases in allocations of water for consumptive uses. Three of the five environmental flow objectives have values that are beyond the environmental flow limits proposed in the draft plan. The other two environmental flow objectives have values equal to the environmental flow limits. Following amendment to the environmental flow objectives, the three environmental flow objective that were already beyond the environmental flow limits proposed in the draft plan, were given values that were further beyond the environmental flow limits.