

**Submission to the
Senate Legal and Constitutional Affairs
References Committee**

Inquiry into provisions of the Water Act 2007

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Introduction

Murrumbidgee Irrigation (MI) is committed to the long-term sustainability of the Murray-Darling Basin. However, the mechanism for achieving that sustainability, the Murray-Darling Basin Plan (even in its embryonic stages) has been hopelessly compromised by bureaucratic bungling and uncertainty around the legislation that empowers its development.

Without review and amendment to provide for the optimisation of environmental, social and economic outcomes, the Act (the “Act”) will remain a contentious, ambiguous and fundamentally flawed piece of legislation.

MI welcomes the opportunity to provide a submission to this inquiry.

Executive summary

1. Murrumbidgee Irrigation supports the National Irrigators' Council and NSW Irrigators' Council in their calls for a review of the Act.
2. Murrumbidgee Irrigation believes that there is a discrepancy between the existing legislation and the intent as outlined in version 61 of the Water Bill (the final version that industry had the chance to comment on in 2007).

The Act puts international agreements (RAMSAR, etc) front and centre and seeks to optimise economic and social outcomes only after providing for these agreements and the environment.

Version 61 of the Water Bill sought to ensure that the "allocation, use and management of the Basin water resources is conducted in a sustainable and efficient way so as to optimise economic, social and environmental outcomes". This imposes a responsibility to maximise the welfare of people as well as the environment. Measures that seek to protect and restore the environment or promote the welfare of people cannot limit this objective.

We recommend that the Act be amended to reflect this intent.

3. Murrumbidgee Irrigation recommends the Senate Committee review the MDBA's legal advice, the advice provided to Minister Burke by the AGS and seek its own legal counsel on this matter to ensure that the constitutional aspects of the legislation (i.e. the external affairs powers) are clarified and that the underlying premise of the Act reflects the principles contained in the 2004 National Water Initiative.
4. Murrumbidgee Irrigation recommends the Committee considers the 2004 National Water Initiative as a benchmark for any amendments that would be required to ensure that economic, social and environmental factors are given equal consideration in the Basin Plan.
5. Murrumbidgee Irrigation recommends a specific consultation process between irrigation corporations and Government to discuss possible amendments to the Act that would reduce the administrative burden on infrastructure operators.
6. Murrumbidgee Irrigation recommends that the Committee carefully consider the submission from Professor John Briscoe from the Harvard University School of Engineering and Applied Sciences.

Our region and the role we play

The Murrumbidgee Irrigation Area (MIA)

The MIA is home to over 50,000 people with the majority of jobs tied inextricably to water supplied by Murrumbidgee Irrigation (MI) to farms and industry. The MIA is one of the most diverse and productive regions in Australia, contributing over \$3 billion annually to the Australian economy, as well as significant contributions to the national social fabric through education, the arts, entertainment, sports, and recreation.

Established in 1912 following the commissioning of Burrinjuck Dam in the Snowy Mountains, the MIA was conceived by the government of the day as a purpose-built scheme, designed to feed and provide employment opportunities for a growing nation. Although some things have changed over time including a growing awareness of and responsibility for our natural environment, the original vision for the MIA is as important today as it was 100 years ago.

Murrumbidgee Irrigation (MI)

In 1999 the MIA (and Districts) was formally separated from NSW Government ownership and MI now operates as an unlisted public company (limited by shares) owned by the irrigators we supply. MI is one of five privately owned irrigation companies in NSW.

Our core business is water management and related services. We provide irrigation water, drainage and environmental services to the MIA. The Company manages \$500 million of infrastructure assets, has an annual turnover of around \$50 million and services over \$2.5 billion in water entitlements. MI is also developing its investment base into renewable energy and carbon markets.

We have a proven track record in the water delivery and drainage business. Since taking over from the NSW Government, MI has achieved a 43 per cent real reduction in the costs associated with providing water to our customers.

The MIA covers an area of 660,000 ha of which an average of 120,000 ha is irrigated. The company employs 180 staff, with offices in the towns of Griffith and Leeton. In the provision of services we annually contribute some \$11 million to the local economy in payroll in addition to over \$5 million per annum contracted plant and labour as part of our large capital works program.

MI operates over 3,500 km of supply channels, and 2,160 km of drainage channels. The integrated supply and drainage system gives us the strategic advantage of being able to re-use a majority of water within the area. Our Integrated Horticulture Supply (IHS) program is currently refurbishing 230 km of open channels with a piped, pressurised system for improved water use efficiency. We also have responsibility for implementation of a comprehensive regional environmental management program.

Our broad concerns with the current approach to the Murray-Darling Basin planning process

The Murray-Darling Basin Authority (MDBA) has been charged, under the Act, with developing a Basin Plan for sign-off by the Australian Government. Time delays, voluminous amounts of questionable material, unbalanced recommendations, and a consultation process that provided few answers and many excuses have left Basin communities angry and frustrated with the process.

MI does not support the Guide to the Proposed Basin Plan (the “Guide”) in its current form. We believe it fails the test of good public policy and it does not meet the National Water Initiative (NWI) intergovernmental agreement standards applying to environmental, social and economic outcomes.

The response from communities and government since the release of the Guide strongly suggests there are serious deficiencies that need to be addressed. The majority of the 20,000 people across the Basin who attended the consultation sessions have expressed their support for a healthy environment but not at the expense of regional communities.

The resignation of MDBA Chairman, Mike Taylor was another telling indictment on the process so far. In his media statement, Mr Taylor made it quite clear that he believes there are still significant issues with the legal interpretation of the Act. In relation to the development of a sustainable Basin Plan he said “while the Authority has an important part to play, it is neither empowered nor equipped to undertake the entire complex task.”¹

In our view the Guide makes little or no attempt to explore the central relationship between socio-economic and environmental assets and conditions over time. Understanding this relationship and responding to the challenges it presents is critical to the development of an environmental and economically sustainable Basin Plan.

The Minister for Sustainability, Environment, Water, Population and Communities, acting on advice from the Australian Government Solicitor (AGS), has made it clear that the MDBA must take a triple-bottom-line approach in the Basin Plan. The Minister has stated that he wants the plan to deliver a healthy river system, food production and strong communities.

Notwithstanding the legal interpretation by the AGS and the commendable vision of the Minister, a number of influential commentators, including Mike Taylor, have argued that this triple-bottom-line cannot be achieved within the confines of the current Act and in that case there must be legislative changes.

¹ MDBA media release, 7 December 2010

Why we need changes to the Act

There are doubts about whether it provides for a triple-bottom-line outcome

The previous Chairman of the MDBA and the current Chief Executive made it very clear at the public meetings held across the Basin that in producing the Guide, the MDBA was delivering on its responsibilities under the Act.

The Guide itself is very clear about the process used to develop the proposals. The hierarchy of decision-making means that it is impossible to deliver a triple-bottom-line outcome because the first step is to determine how much water is needed (a range) and then determine what the impact will be within each of those scenarios.

The Guide states:

In accordance with the Water Act, the Authority has followed the process outlined below to develop the proposals in the Guide. It has:

- Established a range for the amount of water needed for the environment based on the best available science. Additional water that falls within that range will meet the environmental water requirements of the Water Act 2007 (Cwlth)*
- Considered the social and economic effects of providing additional water to the environment within that range, to meet its statutory requirement to optimise economic, social and environmental outcomes*
- Considered scenarios for establishing surface-water and groundwater long-term average sustainable diversion limits (SDLs) and how they will balance the environmental water requirements with the potential social and economic impacts*
- Presented SDL proposals for surface water and groundwater that meet these requirements*
- Examined the social and economic effects of the SDL proposals*
- In response to the social and economic assessment, developed proposals for transitional arrangements to support communities, individuals, industries and business to make the transition to the SDLs when finalised.²*

In our view this means that the consideration of social and economic impacts occurs only after the needs of the environment have been established and that this is the key flaw in the current legislation. Moreover it encourages the establishment of ‘preferred’ environmental outcomes that become subject to community debate. It is this debate that visits the very social and economic harm on affected communities that the Australian Parliament has sought to avoid.

For instance, the MDBA announced a preferred claw-back of 7,600 GL but in its view the social and economic costs of that would be too high. The figure of 7,600 GL has now become the effective target of environmental advocates and the harm on community sentiment is severe and tangible. In that light it is worth noting that a similar process has seen the ‘preferred’ environmental water claw-back increase from 500, to 750, to 1,500, to 2,200 and 4,000 GL since 2003. The MDBA – using the Act as a justification – has now lifted that figure to 7,600 GL.

We are seeking a balanced Basin Plan that optimises social, economic and environmental outcomes. This principle is consistent with the objectives of the 2004 National Water Initiative (NWI).

MI believes there is a clear discrepancy between the existing legislation and the intent as outlined in version 61 of the Water Bill (the final version that industry had the chance to comment on in 2007).

² Guide to the Proposed Basin Plan, Murray-Darling Basin Authority, 2010, p.xiii

The Act allows for interpretations that put international agreements (RAMSAR, etc) front and centre and seeks to optimise economic and social outcomes only after providing for these agreements and the environment. Our advice on the implication of these interpretations is that for the Act to be constitutional, it must give primacy to the environment.

The general basis on which the Basin Plan is to be developed is set out in section 21 of the Act. Section 21 does not mention the words “social” or “economic” until subsection (4). However, subsection (4) is *subject to* subsections (1), (2) and (3) which give primacy to environmental concerns.

Version 61 of the Water Bill sought to ensure that the “allocation, use and management of the Basin water resources is conducted in a sustainable and efficient way so as to optimise economic, social and environmental outcomes” and only then (and without limiting this objective) seeks to protect and restore the environment.

We recommend an amendment to the Act to reflect this intent. In making this point, we acknowledge that sweeping amendments are more than likely required to ensure that economic, social and environmental factors are given equal consideration in developing the Basin Plan.

It’s open to interpretation

The Act has created much division amongst a range of stakeholder groups, industry commentators and the broader community. It has also been interpreted differently by a range of groups, organisations and government agencies. These include:

1. The Australian Government Solicitor

The Act does allow the MBDA to consider the triple-bottom-line approach.

“The Water Act makes clear that in giving effect to those [international] agreements the Plan needs to optimise economic, social and environmental outcomes. Therefore, where a discretionary choice must be made between a number of options the decision-maker should, having considered the economic, social and environmental impacts choose the option which optimises these outcomes.”³ Unfortunately, it could be argued that this is what the MDBA has done in its ‘Guide’ and associated processes. But we have already seen the massive negative impacts that this approach has had on regional communities. Even at the bottom end of the proposed cuts (3000GL), the impact on purpose-built irrigation communities like the MIA will be massive and unsustainable.

2. The Murray-Darling Basin Authority

The Act is about determining the environmental water requirements (a range) first and then considering the social and economic impacts within that range.

“Mr Taylor noted that, balancing the requirements of the *Water Act 2007* against the potential social and economic impact on communities will be a significant challenge. The *Guide* was developed with full regard to the requirements of the *Water Act*, and in close consultation with the Australian Government Solicitor. However, the Authority has sought, and obtained, further confirmation that it cannot compromise the minimum level of water required to restore the system's environment on social or economic grounds.

³ The Role of Social and Economic Factors in the Basin Plan, Australian Government Solicitor, October 2010

Under the *Water Act* the further steps the Authority is able to take over the next 12 months in developing the *Proposed Basin Plan*, and the *Basin Plan* itself, will necessarily mirror and refine what has been done by the Authority to date. Nevertheless, the Authority will take into account the valuable feedback received from consultation on the *Guide*, to the extent permitted under the *Water Act*.⁴

Unfortunately, neither the MDBA nor the Minister has been prepared to provide the legal advice that Mr Taylor refers to.

3. The Productivity Commission

The Act requires the MDBA to determine environmental water needs without explicitly taking into account economic and social costs. They also recommend the Act be amended if the MDBA is unable to set sustainable diversion limits (SDLs) in a way that balances environmental, social and economic tradeoffs.

“The Commission’s interpretation of the Water Act 2007 (Cwlth) is that it requires the Murray-Darling Basin Authority to determine environmental water needs based on scientific information, but precludes consideration of economic and social costs in deciding the extent to which these needs should be met. This means that the overall proportion of water allocated to the environment is to be determined without explicitly taking into account the Australian community’s environmental preferences, the opportunity cost of foregone irrigation or the role of other inputs such as land management. There is a risk that this approach will impose unnecessarily high social and economic costs.”⁵

4. High-Level Review Panel for the Murray-Darling Basin Plan

Whilst this group’s views have not been publicly released by the MDBA, Professor John Briscoe in his submission to this inquiry states that it is the environment first and socio-economic factors second.

“Similarly, the High-Level Review Panel for the Murray Darling Basin Plan (of which I was a member) stated that *“The driving value of the Act is that a triple-bottom-line approach (environment, economic and social) is replaced by one in which environment becomes the overriding objective, with the social and economic spheres required to “do the best they can” with whatever is left once environmental needs are addressed.”*⁶

5. Professor John Williams, University of NSW

Environmental matters take precedence.

“Clearly, any suggestion that the authority need not take into account the socio-economic interests of farmers, irrigators and other locals is false. If it did so, the authority would breach its own act.

⁴ MDBA media release, 7 December 2010

⁵ Market Mechanisms for Recovering Water, Productivity Commission, March 2010, p. xlviii

⁶ Submission to the Standing Committee on Legal and Constitutional Affairs of the Senate, Professor John Briscoe, February 24, 2011

The sting for local communities lies in the fact that these interests follow after the environmental matters set out in the international conventions. Section 21 is clear in stating that these environmental considerations take precedence and that local economic and other concerns must be taken into account “subject” to them.”⁷

MI accepts that the Act is open to interpretation, however its fundamental premise is obviously in question. Crucially, the Act was cited by the MDBA as the instrument that prevented it from preparing a Basin Plan that optimises environmental, social and economic outcomes. That alone suggests that the Act is part of the problem and – in its current form – not part of the solution.

MI recommends the Senate Committee review the MDBA’s legal advice, the advice provided to Minister Burke by the AGS and seek its own legal counsel on this matter to ensure that the constitutional aspects of the legislation (i.e. the external affairs powers) are clarified and that the underlying premise of the Act reflects the principles contained in the NWI.

If the Act is open to such a broad range of interpretations then a High Court challenge over its constitutional validity seems to be a distinct possibility. This outcome may result in delays in implementation until the matter is resolved, creating ongoing social and economic uncertainty in Basin communities.

History gives us an insight into the problems

The development of the Act is important because it was played out in an election year during the worst drought since records have been kept and at a time when a strong environmental agenda was seen as critical by both major political parties.

Without the support of Victoria, the Commonwealth decided to rely on its external affairs powers to enforce its obligations under a number of international environmental treaties. These external affairs powers relied on a precedent set by the High Court in the Franklin Dam case in 1983.

MI concurs with the view that the focus on international environmental treaties comes at the expense of the economic and social interests of Murray-Darling Basin communities.

Whilst stakeholders were consulted in the development of the legislation there were fundamental changes to the Act at the eleventh hour which were not provided to stakeholders before parliamentary debate. This is important when analysing commentary that industry and both sides of politics signed off on the original legislation in 2007. Moreover, the leading parliamentarians that signed off on its enactment have since publicly stated that they had thought that they were signing off on an Act that supported a triple-bottom-line approach to the Basin Plan.

Version 61 of the Water Bill was the last seen by irrigation industry stakeholders. It sought to ensure that the “allocation, use and management of the Basin water resources is conducted in a sustainable and efficient way so as to optimise economic, social and environmental outcomes” and only then (and without limiting this objective) seeks to protect and restore the environment. This is clearly not the intent that is reflected in the current legislation.

The National Water Initiative should be the benchmark

The NWI, agreed by the Commonwealth, states and industry in 2004, was explicit in its commitment to triple-bottom-line outcomes. It remains our view that the NWI is the benchmark against which the Basin reform process must be judged.

⁷ *When water pours into legal minefields*, Sydney Morning Herald, October 26, 2010

MI agrees with the view of NSW Irrigators' Council that the NWI envisaged that trade-offs would be required in the water reform process between competing interests but that those trade-offs must optimise social, economic and environmental outcomes.

MI recommends that the Committee, in its deliberations as part of this inquiry, use the 2004 National Water Initiative as a benchmark for any amendments that would be required to ensure that economic, social and environmental factors are given equally weighted consideration in the Basin Plan.

The administrative burden on irrigation corporations is becoming excessive

During the consultative process on the Water Bill, it was acknowledged that irrigation corporations are effectively self-regulated, because their customers are also their members, and, on that basis, they should not be subject to excessive government regulation following passage of the Act.

However, despite that intention we have seen a proliferation of regulation into the operation of our business. As well as the Act (including the Basin Plan) and the Water Regulation 2008 (Cwlth), there are:

- Water Market Rules
- Water Charge (Termination Fees) Rules
- Water Charge (Planning and Management Information) Rules
- Water Charge (Infrastructure) Rules
- Water Trading Rules (still being finalised).

In addition, we have extensive reporting requirements under state water and environmental legislation and the Corporations Act 2001 (Cwlth).

MI recommends a specific consultation phase between irrigation corporations and Government to discuss possible amendments to the Act that would reduce the administrative burden on infrastructure operators without compromising the primary objectives of the regulations.

Conclusion

The proposed Basin Plan will facilitate the displacement of communities on a scale rarely experienced in Australia and result in impacts beyond the boundaries of the Basin.

The cuts proposed in the Guide are based on the premise that the environment must take priority but it gives scant regard to the impacts on people and the communities. The MDBA has identified the Act as the instrument that prevented it from preparing a Basin Plan that optimises environmental, social and economic outcomes. That alone suggests that the Act, in its current form, is part of the problem and must be addressed.

MI remains committed to working with the Australian Government and stakeholder groups to find a solution to the long-term sustainability of the Basin. It is our view that this can only be achieved with changes to the Act to allow for a triple-bottom-line approach in developing the Basin Plan