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Submission to Senate Legal and Constitutional Affairs Committee

Provisions of the Water Act 2007

110217

Submit to legcon.sen@aph.gov.au by 18 March

Andrew Gregson
Chief Executive Officer

Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators access regulated, unregulated and groundwater systems. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

This document represents the views of the members of NSWIC. However each member reserves the right to independent policy on issues that directly relate to their areas of operation, or expertise, or any other issues that they may deem relevant.

NSWIC has adopted a *Consultation Expectations* policy, a copy of which is available on our website[1] which may prove useful in designing an engagement process.

[1] http://nswic.org.au/pdf/policy_documents/090303%20-%20Consultation%20Expectations%20Policy.pdf

Background

NSWIC has long held a position that the *Water Act* 2007 (the Act) is fundamentally flawed legislation in that it does not deliver what it set out to achieve. In particular, it does not meet its own object in "optimising economic, social and environmental outcomes."[2]

To that end, we believe it a long overdue move that the Parliament, through the Committee, examine the legislation in the terms referred to it. We congratulate the Committee for taking on this task.

General Comments

NSWIC has never resisted change for the sake of resistance or the opposition to change *per se.*

In the case of the Murray-Darling Basin Plan, NSWIC has worked constructively with State and Commonwealth Governments across party lines since even before the negotiation and execution of the National Water Initiative (NWI) in 2004. It was the NWI that set out the aspirations of the Australian nation for the management of our water resources and, as such, the Committee ought consider if that document has been implemented by the *Act*. Particular reference in this respect must be given to the Act's requirement that the NWI be regarded[3]. Clearly identified in those aspirations was a triple bottom line approach, where environmental, social and economic consequences were each equally considered.

In the submission of NSWIC, since the execution of the NWI, Australia has strayed away from its agreed path. For reasons entirely political, our reform path has progressively abandoned considerations of social and economic impacts to focus solely on environmental outcomes.

It is the submission of NSWIC that the abandonment of the triple bottom line principle was predicated on the need for the Commonwealth to achieve a Constitutional head of power. We urge the Committee to consider what heads of power the Commonwealth has in respect of water resources as an initial and primary consideration. We submit that little point exists in developing regulations (the Basin Plan) pursuant to an Act which is later found to be without Constitutional capacity.

Question to be Resolved

NSWIC notes the Terms of Reference by which the Committee is bound. We believe that they are sufficient in scope to cover the issues of concern to us.

[2] *Water Act* (Cth) 2007, Section 3(c)
[3] Section 21(4)(c)(i)

Moreover, NSWIC believes that the Terms could easily be simplified to one question – does the Act achieve what it promised?

In our submission, the answer is a clear and succinct "no".

What Did the Act Promise?

To understand the Act, it is first necessary to understand its foundations.

It has long been the position of NSWIC that the NWI, as agreed by all Basin States in 2004, was and must remain the driver for national level water reform. It is the NWI that was intended by all States as the platform for reform that provided the guiding principles.

The NWI clearly laid out that a triple bottom line outcome was to be sought as part of its Objectives, *viz*;

> *... optimises social, economic and environmental outcomes...*[4]

It contemplated that this would be achieved by weighing these competing objectives equally, *viz*;

> *Decisions about water management involve balancing sets of economic, environmental and other interests.*[5]

The NWI went on to more explicitly note that balance must necessarily involve adjusting the demands of the competing interests, *viz*;

> *... settling the trade-offs between competing outcomes...*[6]

In the submission of NSWIC, the chasm of difference between the Guide to the Basin Plan, a proposed Regulation pursuant to the Act, and the intentions of the NWI are best identified by this simple requirement. The NWI envisaged a trade-off approach to balance – neither the Guide nor the Act contemplate such a possibility.

The terms "balancing" and "trade-off" as used in the NWI to indicate the development of a *subjective* list of assets. The Act, however, artificially creates an *objective* list of environmental assets, by reference to international treaties and conventions in order to give it a head of power under the Constitution, which it then necessarily determines is unassailable.

The Path to the Act

In our submission, perhaps the best evidence of the Act straying from its intended path is the seismic shift between the last version of the Bill on which it is based that

[4] National Water Initiative, paragraph 23
[5] National Water Initiative, paragraph 2.
[6] Ibid, paragraph 36.

was seen by stakeholders, version 61, and the eventual Bill (and resultant Act) presented to the Parliament.

As the NSWIC Briefing Paper on the *Act*[7] countenances, the content of the *Act* changed significantly subsequent to the withdrawal of state support for a referral of powers. The Commonwealth made a determination to seek sufficient Constitutional capacity at that time to pass and implement an *Act* that, frankly, bore little resemblance to the ideals to which it had previously strived.

"Version 61" of the draft *Water Bill* (the *Bill*) was the last into which the industry had significant input prior to the breakdown of State/Commonwealth negotiations. An electronic version of that document is available on the NSWIC website[8].

The stark distinctions between the *Bill* and the *Act* commence in Section 3 (b) with seismic differences in the Objects. The *Act* focuses solely on environmental outcomes, viz;

> *The objects of this Act are ... to give effect to relevant international agreements...*

The *Bill*, however, set out to achieve balance in the first instance, viz;

> *The objects of this Act are ... 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.*

The fundamental difference between the two is attributable to the need for the *Act* to assume Constitutional validity through reliance on the External Affairs power. NSWIC submits that such rationale is entirely inappropriate as a foundation for how Australia manages its water resources to best serve the national interest.

It is important to note that the *Bill* did specifically note in its objects that return to environmentally sustainable levels of extraction for systems that were "overallocated or overused" was fundamental, but it did so "without limiting" the fundamental of the triple bottom line approach[9]. The *Act*, on the other hand, completely reverses this approach by adding the "without limiting" criteria to "giving effect to relevant international agreements."[10]

Division 1 of Part 2 of both the *Act* and the *Bill* contemplate the "purpose of the Basin Plan". Both documents contain by way of introduction:

> *The purpose of the Basin Plan is to provide for the integrated management of the Basin water resources in a way that promotes the objects of this Act, in particular by providing for:* [11]

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[7] Appendix 2
[8] www.nswic.org.au/pdf/Water Act/Water Bill.pdf
[9] Section 3 (c) of the *Bill*
[10] Section 3 (d) of the *Act*
[11] Section 19 of the *Bill*, Section 20 of the *Act*

The *Bill* then lists the supportable concept of environmentally sustainable limits;

> *the establishment and enforcement of environmentally sustainable limits on the quantities of surface water and ground water that may be taken from the Basin water resources.*

Whilst this might not seem incongruous with the environmentally focused result of the *Act*, recall that the *Bill* did not specifically define "environmentally sustainable limits" but focused on sustainability being a triple bottom line outcome. The significance of the difference between the two documents is highlighted by the replacement that appears in the A*ct*;

> *Giving effect to relevant international agreements...*

In short, the very fundamental of the Basin Plan process had been hijacked by the necessity to find legal capacity under the *Constitution*.

Further evidence of a massive shift to environmental precedence is provided in Section 4, the definitions section. The *Act* adds definitions of several further international agreements, all of which are environmental in nature, to underscore the Constitutional capacity of the Commonwealth. These additional agreements include;

- The Bonn Convention (on the conservation of migratory species of wild animals);
- CAMBA (the agreement between Australia and China on the protection of migratory birds and their environment);
- Climate Change Convention;
- JAMBA (the agreement between Australia and Japan for the protection of migratory birds and birds in danger of extinction and their environment); and
- ROKAMBA (the agreement between Australia and Korea for the protection of migratory birds).

Additional to this is a section defining *relevant international agreement* which includes;

> *Any other international convention to which Australia is a party...*[12]

NSWIC submits that even by simple comparison of sections 3 and 4 of the *Act* as against the *Bill*, the very concept that had driven water reform at the outset has been hopelessly lost. The *Bill* aimed to achieve balance – the political necessity of the Commonwealth to proceed with the *Act* meant that such balance could not be achieved and, instead, primacy is given to environmental measures.

Moreover, the concept of "the environment" came to be defined by the Constitutional reality. "Balance" must necessarily assume that hard decisions can be made as to which environmental assets Australia wished to protect via the *Act*, as was countenanced in the term "trade offs" in the NWI[13]. The objective defining of "the

[12] Section 4 of the *Act*
[13] At paragraph 36.

environment" was not deliberate – it was a consequence of limited legal capacity. Clearly, the approach to balance must be made by recognising that "the environment" must be a subjective set in order to even contemplate "trade offs".

Referral of Powers

The operational distinction between the *Act* and the *Bill* lies in the identification of a Constitutional basis[14]. Whilst both documents contemplate a referral of powers from the States pursuant to paragraph 51(xxxvii) of the *Constitution*, it is the *Bill* that contemplates that referral as a means to draw a Basin Plan. Having achieved such referral and, indeed, cooperation from the States, the Commonwealth was clearly envisioned to have the capacity and, indeed, mandate to pursue the triple bottom line approach. The *Act*, on the other hand, relies solely on legislative powers specifically listed[15] or implied[16] via the *Constitution*.

Aside from the tenuous nature of the Constitutional validity of the powers claimed by the Commonwealth to underpin the *Act*, the effect of the change was a shift in very foundation of the water management technique contemplated by the NWI. It is the very clear submission of NSWIC that this foundation must be repaired. The method of repair is simple – the States and Commonwealth must again recommit to a triple bottom line outcome by agreeing to a Commonwealth *Water Act* in the terms set out in Version 61 of the *Bill.*

The Commonwealth *Water Act*, as it currently stands, is hopelessly weighted to one outcome. Whilst it *may* provide capacity for balance via Ministerial direction, such an outcome is but a *possibility* rather than a *requirement*. The only opportunity for the provision of balance lies in the capacity of the Minister to unilaterally make changes by direction[17]. In the submission of NSWIC, reliance on this measure to ensure an outcome agreed by all stakeholders is not only a repudiation of the entire MDBA process, but an acknowledgement that the *Act* itself is hopelessly flawed.

We acknowledge that Minister Burke received legal advice from the Australian Government Solicitor noting that social and economic considerations can be taken into account in certain circumstances. It is our submission that "certain circumstances" does not equate to equivalent treatment. Our analysis of the advice[18] concludes that the environment takes primacy.

We note that the advice received by the MDBA on this subject has not been publicly released. Aside from exacerbating the stakeholder relations problems at the Authority, the withholding of this advice has not assisted a wider understanding of the short fallings of the Act. NSWIC submits that the Committee ought not only consider that advice, but demand that it be released. Furthermore, NSWIC submits that ex-Authority Chairman Mike Taylor ought appear before this Committee to given evidence on his professional view of the Act.

[14] Section 8 of the *Bill* and Section 9 of the *Act.*
[15] Section 9(a)
[16] Section 9(b)
[17] Section 44(3)(b)(ii)
[18] Appendix One

Does the Act Allow Consideration of Social and Economic Impacts?

It is incorrect to suggest that no capacity to consider social and economic impacts exists within the framework of the Act. In fact, NSWIC specifically concedes that such capacity – for consideration – exists.

The question should not, however, be one of consideration. The NWI established the principle of equality in a triple bottom line outcome. The vestiges of it remain within the Objects of the Act[19]. Ministers on both sides of politics have promised it – and stakeholders continue to demand it.

Can equality of social and economic impacts along with economic impacts be guaranteed under the Act? NSWIC submits that the answer is an emphatic "no".

Does the Ramsar Convention Allow Consideration?

Some consideration has been given to the possibility that social and economic factors can be considered within the framework of the Ramsar Convention. This discussion stems from the "wise use" requirements pursuant to the Convention[20].

Under the original terms of the Convention, wise use was defined as;

> *the maintenance of (a site's) ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development"[21].*

This has since been modified to;

> *"The wise use of wetlands is their sustainable utilization of wetlands for the benefit of mankind in a way compatible with the maintenance of the natural properties of the ecosystem".*

Again, NSWIC is prepared to concede that consideration of social and economic impacts is contemplated through the concept of wise use. At the same time, it is clear that equality is not contemplated. Ramsar requires that a listed environmental asset be treated with primacy, but that methods of achieving that can be measured against social and economic factors. This, in our submission, is far from equality.

AGS Legal Advice

Both Minister Burke and ex-Murray-Darling Basin Authority Chairman Mike Taylor approached the Australian Government Solicitor seeking legal advice as to the status of social and economic impacts vis a viz the Basin Plan. It would appear, on

[19] Section 3(c)
[20] See NSWIC Ramsar Convention Briefing Paper for discussion – Appendix 3.
[21] Page 49 – The Ramsar Convention Manual, 4th Edition

first glance, that they received separate and incompatible answers given that the Minister publicly states that social and economic factors must be considered whereas Mr Taylor stated that they could not.

The incompatibility, NSWIC submits, comes not from *prima facie* contradictory answers, but from different questions being asked in the first instance.

We submit that it is probably that Mike Taylor asked "must social and economic factors be taken equally into account in establishing Sustainable Diversion Limited pursuant to the Act?" We submit that the answer to that likely question was "no". On the other hand, we suspect that the most likely question asked by Minister Burke was "can social and economic consequences be considered?" The answer to that apparent question appears to be yes.

NSWIC is unable to provide a definitive analysis of the above submissions as neither the MDBA nor the Minister have publicly released either the full request that they made of the AGS or the full and unedited response that they received, despite Freedom of Information requests to do so. We submit that it would be most useful to the deliberations of the Committee if these documents were available.

In October 2010, Minister Burke publicly released advice that he had received from the AGS. In our analysis of that advice[22], the outcome was obvious. It was best summarised at paragraph 23 where Mr Orr stated;

> *"Both Conventions establish a framework in which environmental objectives have primacy..."*[23]

Whilst paragraph 12 clearly notes that social and economic considerations just be taken into account when "a discretionary choice must be made between a number of options", NSWIC submits that this is clearly and obviously not equal treatment.

[22] Appendix One
[23] Legal advice, AGS, at par 23.

Terms of Reference

The provisions of the Water Act 2007 (the Act), with particular reference to the direction it provides for the development of a Basin Plan, including:

(a) *any ambiguities or constraints in the Act which would prevent a Basin Plan from being developed on an equally weighted consideration of economic, social and environmental factors;*

Pursuant to previous submissions, NSWIC believes that a final Basin Plan that equally treats social, economic and environmental factors *may* be possible within the confines of the Act, but notes that it is not a *requirement* of the Act.

In respect of the specific Term of Reference, NSWIC believes that the Authority is bound by the Act, as ex-Chairman Mike Taylor clearly believed, and hence the Plan cannot be "developed" on equal weighting. Equal weighting, pursuant to previous submissions, can only occur as a result of Ministerial direction subsequent to the development of the draft Plan.

Section 22 of the Act contains a table outlining the mandatory content of the Basin Plan. Any consideration of balance can quickly be satisfied by reference to Item 4, titled "*Management objectives and outcomes to be achieved by the Basin Plan."* The specific requirement in fulfilling that objective is;

> *The objectives and outcomes must address:*
>
> *(a) environmental outcomes; and*
> *(b) water quality and salinity; and*
> *(c) long term average sustainable diversion limits and temporary diversion limits; and*
> *(d) trading in water access rights.*

That is, the mandatory content of the Basin Plan, pursuant to the Act, is not required to balance the social and economic interests with the environmental outcomes. Nor, for that matter, is it required under this Section to detail the social and economic impacts that it will have! It must merely provide a description of the social and economic circumstances of Basin communities dependent on the Basin water resources[24].

Admittedly, Item 4 is a field in which the Minister can direct the Authority. As a word of caution, NSWIC notes legal consideration of whether the capacity of the Minister to unilaterally direct content of the Basin Plan is such that his or her directions can be in contravention of the balance of the Act[25]. In particular, NSWIC notes the opinion of Professor George Williams that;

[24] Section 22 (1) Item 1.
[25] http://www.smh.com.au/opinion/politics/when-water-pours-into-legal-minefields-20101025-170uf.html viewed 1 March 2011.

> *In passing the Water Act, the Commonwealth identified a number of international conventions upon which to base its management of the Murray-Darling basin. However, in doing so, the conventions must be implemented faithfully.*[26]

If the Minister cannot contravene the Act or must "implement faithfully" the full provisions of international treaties and conventions, then a balanced outcome, in the submission of NSWIC is, in fact, simply not realisable. NSWIC submits that consideration of this matter by – or at the direction of – the Committee would be extremely useful.

Further, NSWIC notes that the Basin Plan is a Regulation of the Commonwealth Parliament pursuant to the Act. It both can and must be reviewed on a regular basis[27]. To rely on Ministerial discretion, even if it is possible, to provide a balanced outcome is clearly only a short term solution to the significant problems that would clearly present from a bad Basin Plan.

(b) the differences in legal interpretations of the Act;

NSWIC is aware of apparently differing advice. We have not been privy to the full advice provided by the Australian Government Solicitor to either the MDBA or the Minister for Water. We lodged an application for the former under Freedom of Information provisions, which was rejected on the basis of legal professional privilege.

We submit that an open, accountable, honest and transparent process is the only way in which to successfully strike a balanced Basin Plan. To that end, we submit it is vital that the full and complete advice be publicly released.

We note the body of published legal opinion[28], including our own analysis (attached), is of the opinion that environmental considerations receive primacy. Professor Williams, the Anthony Mason Professor of Law at UNSW, summarised the position succinctly;

> *"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."*[29]

(b) the constitutional power of the Commonwealth to legislate in the area of water;

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[26] Ibid
[27] Section 19(5)
[28] Josephine Kelly, Barrister, reported in AFR 24 January and 8 February 2011, Professor George Williams, Anthony Mason Professor of Law, UNSW, reported SMH 36 October 2010.
[29] http://www.smh.com.au/opinion/politics/when-water-pours-into-legal-minefields-20101025-170uf.html viewed 1 March 2011.

The Constitution makes it clear that water is a power reserved unto the States at Federation. The Commonwealth initially contemplated a referral of powers from the States to give capacity to the Act, but eventually relied on a collection of what might best be described as miscellaneous powers in order to justify the Act. The primary head of power is, of course, the External Affairs power.

NSWIC does not make any submissions in respect of the legality of this measure, but does submit it is vital for the Committee to consider whether the Act is compliant with the Constitution. We are particularly concerned that a Basin Plan process that is enormously destabilising to regional communities may eventually be struck out in the High Court on the simple basis of lack of Commonwealth capacity.

(d) *the role of relevant international agreements and the effect of those on the parts of the Act which direct the Basin Plan to give effect to those agreements and their effect on the Act more generally;*

Pursuant to earlier submission, NSWIC is of the opinion that the Act is entirely reliant on international agreements in respect of the Basin Plan, that said agreements are entirely environmental in nature and, as a result, the Basin Plan cannot be developed in a balanced manner and may not be able to be implemented in a balanced manner under Ministerial direction in any event.

The role of international agreements is particularly clear when the version of the Bill prior to the withdrawal of the States is considered *vis a viz* the Act, as contemplated earlier in this document.

(e) *any amendments that would be required to ensure that economic, social and environmental factors are given equally weighted consideration in developing the Basin Plan; and*

The crux of the Basin Plan is the term *long-term average sustainable diversion limit*. NSWIC submits that it is to this definition that the Committee might usefully turn attention.

Whilst listed in the defined terms of the Act, the entry merely refers to provisions elsewhere;

> *"...has the meaning given by item 6 of the table in subsection 22(1)."* [30]

Subsection 22(1) is the table providing an outline of the mandatory content of the Basin Plan. Item 6 provides a relatively vague description of maximum long-term annual average quantities of water that can be taken, on a sustainable basis, from the Basin or parts thereof. It then determines that this description is the long-term average sustainable diversion limit, but notes as a specific requirement that it must comply with Section 23.

[30] Section 4

Section 23 greatly modifies the other two provisions by stating that;

> *"A long-term average sustainable diversion limit ... must reflect an environmentally sustainable level of take."*[31]

Whilst *prima facie* appearing to further cement the unbalanced foundation of the Act, the convoluted definitional process may present an opportunity for a minor amendment to give effect to the triple bottom line outcome. NSWIC therefore submits an alteration to the definition of long-term average sustainable diversion limit within Section 4 to add;

> *"noting that at all times "sustainable" is to equally include environmental, social and economic aspect such that tradeoffs occur to balance all three."*

We have not conducted significant research nor received formal advice to enable us to submit this as the singular manner in which to achieve balance, nor have we taken advice (or provide advice) as to the Constitutionality of the Act subsequent to such a proposed amendment. We urge the Committee to investigate this submission as a possibility, in conjunction with all stakeholders who seek genuine balance.

(f) any other related matter.

Section 100 of the Constitution provides that:

> *The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.*

NSWIC has taken some advice on this Section and recognises that it is not an explicit power in and of itself but, moreover, a fetter on the trade and commerce power granted in Section 51. That is, Section 100 notes that the Commonwealth cannot use its powers of trade and commerce under Section 51 in respect of water. This is essentially recognised in the reading down provisions of the Act noting alternative heads of power in the event that anything within the Act relies falsely on Section 100.[32]

Nevertheless, NSWIC submits that Section 100 may have a material bearing on matters relevant to the Basin Plan by creating an *implied right* to water. In fettering the power of the Commonwealth, Section 100 refer to a right of both a State and its residents to "reasonable use". NSWIC is not aware of consideration by the High Court of this potential implied right and hence submits that it would be extremely useful for the Committee to consider this matter.

[31] Section 23 (1)
[32] Section 11

Appendix One

Briefing Paper

Basin Plan Legal Advice

October 2010

Andrew Gregson
Chief Executive Officer

Background

NSW Irrigators Council and a range of other groups have contended for some time that the *Water Act* requires that precedence be given to environmental outcomes at the expense of social and economic outcomes. We have noted that this is not compliant with the triple bottom line outcomes envisaged in the National Water Initiative (NWI). As a result, we have advocated amendments to the *Act* to ensure equal treatment of the three outcomes.

Further background is available in our *Water Act* Briefing Paper.

Murray-Darling Basin Authority Position

Prior to the release of the Guide to the Basin Plan, Murray-Darling Basin Authority (MDBA) Chairman Mike Taylor has been upfront in his belief that the *Act* requires primacy for environmental outcomes. He made this view known in several public fora.

During the public "consultation" sessions subsequent to release of the Guide, Mr Taylor has repeatedly pointed to the *Act* when questioned in respect of equal consideration for social and economic objectives. Authority Chief Executive Officer Rob Freeman, who has joined Mr Taylor in similar statements to consultations sessions, made his belief clear in a Senate Estimates hearing when he noted that the lower level Sustainable Diversion Limit (3,000 gigalitres) could not be lowered regardless of social and economic consequences dur to environmental priority.

NSWIC understands that the MDBA sought legal advice in respect of this matter when developing the Draft Plan (and, presumably, Guide) over the course of the past two years. We understand that the advice was received from the Australian Government Solicitor under the hand of Robert Orr QC, the Chief General Counsel. Neither the instructions to Mr Orr nor the advice received has been publicly released.

Minister Burke Position

Immediately upon his appointment as Minister, NSWIC advanced the position that the *Water Act* is an unbalanced piece of legislation that must be altered to achieve a triple bottom line outcome in accordance with the NWI.

Minister Burke has repeatedly stated that a triple bottom line outcome is what he seeks but that he is reluctant to reopen the *Act.* He has sought (and received) legal advice as to whether the Plan can or must take social and economic consequences into consideration in setting the Plan. The advice was received from the Australian Government Solicitor also under the hand of Mr Orr. It was tabled in Parliament, accompanied by a Ministerial Statement the essentially advocated that the advice allows equal consideration.

The Advice

We believe that Minister Burke may have overplayed the advice provided by Mr Orr. Whilst it certainly does address how and when issues of social and economic impacts can be taken into account in establishing the Basin Plan, it is not, in our opinion, explicit in requiring *equal* consideration pursuant to the NWI.

Moreover, Minister Burke's position that the advice confirms that social and economic aspects *can* be given equal consideration is not, in our opinion, fully reflected in the advice. In our opinion, the advice notes that *where a choice exists* in fulfilling an environmental requirement, consideration of social and economic matters can be undertaken in making that choice. This is a significant variance from equal weighting to achieve a true triple bottom line outcome.

The advice notes "an overarching objective of the Act and the Plan is to give effect to relevant international agreements."[33] The international agreements, as NSWIC has long noted, are environmentally focused. To that extent, it is logical to assume that the "overarching objective" of the *Act* is also environmentally focused. More specifically, social and economic objectives are only considered "in giving effect to those agreements."[34] That is, they are secondary to the agreement which is primarily environmental.

The crux of the matter is contained within paragraph 12 of the advice which states, *inter alia*;

> *"...where in applying the particular provisions of the Act that give effect to the agreements a discretionary choice must be made between a number of options the decision-maker must, having considered the economic, social and environmental impacts, choose the option which optimises the economic, social and environmental outcomes."*

That is, where a choice exists then social and economic factors can be taken into account. Where not choice exists, social and economic considerations continue to be ignored. The primary conventions upon which the *Act* is based effectively rule out that choice being made upfront, *viz*;

> *"Both Conventions establish a framework in which environmental objectives have primacy..."*[35]

At situation where choice cannot be made does not and cannot approach a true triple bottom line outcome.

Position of NSWIC

NSWIC appreciates that Minister Burke sought legal advice on this matter, but has reached a very different conclusion to him. We believe that the legal advice confirms that the *Water Act* places primacy on environmental outcomes above all else in clear contravention of the

[33] Legal advice, AGS, at par 9.
[34] Act s 3(c) as noted in advice par 10.
[35] Legal advice, AGS, at par 23.

NWI. The advice shows that social and economic considerations do not have equivalent standing.

We note that Professor George Williams of the University of New South Wales has also concluded that the *Act* and the advice require environmental needs to be given primacy.[36]

We do acknowledge that the advice allows social and economic factors to be taken into account where choice exists and we expect that the MDBA will take this into account in its current work.

Our position, however, essentially remains unchanged. The *Water Act* does not deliver the equal weighting of social, environmental and economic factors that was agreed to by NSW, other States and the Commonwealth in the National Water Initiative. The *Act* is fundamentally unbalanced and must be altered to provide the outcome that this State signed up to.

ENDS

[36] www.abc.net.au/rural/news/content/201010/s3049282 viewed 27 October 2010.

Briefing Note

The *Water Act*

"How did we end up with this?"

9 November 2010

Andrew Gregson
Chief Executive Officer

Introduction

The *Water Act* (Cth) 2007 ("the Act") is an Act of the Commonwealth Parliament. It deals with a range of issues relevant to the use and management of water across the Murray-Darling Basin (MDB). These matters include;

- The MDB Agreement (or interstate water sharing agreement), which is an Inter-Governmental Agreement (IGA) between the Commonwealth and relevant States;
- The management of Basin water resources (including the Basin Plan);
- State water resource plans;
- Risk allocation in the event of a reduction water availability;
- Critical human water needs;
- Rules for management of the water market and the regulation of operators who deliver water;
- Water information;
- Commonwealth environmental water management; and
- The establishment and operation of the MDB Authority.

From the perspective of NSWIC Members and levy payers, the Basin Plan is the critical component of the Act.

Background

The Act has been before the Commonwealth Parliament twice – once under a Coalition Government and once under a Labor Government. It initially came before the Parliament under Minister Turnbull in 2007 and then had a series of amendments (primarily additions – matters other than the Basin Plan) made to it in late 2008 under Minister Wong.

To adequately understand how the Act became what it is – an environment focused process with social and economic considerations an afterthought – it is necessary to understand the political scenario at the time it was being developed.

Then Prime Minister Howard needed an environmental issue. For a variety of reasons, he chose water and focused on the MDB. The "blueprint" for that reform was the National Water Initiative (NWI) – still called the "blueprint" by Minister Wong and still overseen by the National Water Commission (NWC). The NWI, itself an IGA, set out the triple bottom line approach to resource management (social, economic, environmental). There was a clear goal in the NWI for the Commonwealth to legislate to enforce its provisions. Note that both Mike Taylor (Chairman, MDBA) and Ken Matthews (Chairman and CEO, NWC) publicly state that the Basin Plan is unlikely to be NWI compliant as the triple bottom line is abandoned.

In order to get that legislation right, the Commonwealth needed the cooperation of the States (either simultaneous legislation or, preferably, a referral of powers). Of course, the period during which this was occurring was becoming increasingly

unstable for political reasons. Eventually, the relationship between Canberra (Coalition) and the States (all Labor) broke down to the extent that one State, Victoria, essentially withdrew completely.

By this stage, the Act was at version 63 or thereabouts. That is, it had undergone significant consultation and change in the drafting process. Without the political will of the States, however, the Act's very Constitutional validity was in question. Did the Commonwealth have the power to "go it alone"?

It appears that the Coalition Government instructed Parliamentary Counsel to find sufficient Commonwealth power to implement the Act.

Constitutional Capacity

The Australian Federation is constructed such that all power is reserved to that States except that which they specifically provided to the Commonwealth at Federation. The powers which were granted to the Commonwealth are contained within the Constitution.

To properly implement the NWI, an additional referral of powers from the States would have been necessary. As it was not to be provided at the time of its first passage under Minister Turnbull and the Coalition, a consideration of what capacity the Commonwealth had was necessary.

Evidence of that consideration can be found in Section 9 of the Act which references Section 51 of the Constitution wherein the legislative powers of the Commonwealth Parliament can be found. Section 9 identifies each power that the Commonwealth believes it has in order to implement the Act:

(i)	Trade and commerce;
(v)	Postal, telegraphic, telephonic and like services;
(viii)	Astronomical and meteorological observations;
(xi)	Census and statistics;
(xv)	Weights and measures;
(xx)	Foreign corporations;
(xxix)	External affairs; and
(xxxix)	Matters incidental.

This is, in essence, a "grab bag" of every possible head of power that the Commonwealth might bring to bear.

The key provision is the External Affairs power. The clearest example of the use of this power by the Commonwealth is in respect of the Tasmanian Dams case in 1983, where the power was considered (in the Commonwealth's favour) by the High Court. The Tasmanian Government was preparing to build a dam in a wilderness area. The Commonwealth had executed certain international conventions to protect certain wilderness areas. By virtue of the External Affairs power, the Commonwealth were able to stop the construction of the dam to ensure that Australia complied with its external agreements.

External Affairs and the Water Act

With the External Affairs power in mind, the Commonwealth turned to international agreements that Australia had executed in order to affect this head of power. The primary agreement identified was the Ramsar Convention, although the Act does reference 8 specific *relevant international agreements* in Section 4 together with "any other international convention".

A full Briefing Note on the Ramsar convention (its full title is the Conventional on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971) is available on the NSWIC website. For the purposes of this document, all that is necessary is to recognise that Ramsar (and the other agreements) all focus solely on environmental outcomes.

The Water Act as it Now Appears

The Objects of the Act are essentially all that remains of the intent of the NWI to adopt a triple bottom line approach. The balance of the Act – for the simple reason of legislative capacity – focuses wholly and solely on environmental considerations. Social and economic considerations are descriptive only. That is, the economic and social damage that the Basin Plan will bring about must be *described*, but are not taken into account as environmental implications are in setting Sustainable Diversion Limits (SDLs).

So what of the amendments during the second passage of the Act? Did they not contain a referral of powers?

Yes – to an extent and only on certain matters. There was a limited referral (varies across States) to achieve a number of matters (primarily related to water markets), but none of the amendments was (substantively) in respect of the Basin Plan.

Implementation Compounds the Problem

Once struck as a legislative instrument by the Commonwealth, the Act contemplates implementation by the States through compliant water resource plans. This is scheduled to occur in 2014 in NSW and not before 2019 in Victoria. Notwithstanding the election timetables of those two states (post Basin Plan Guide release), the States are currently not expressing significant determination to implement the Plan. Speculation that Victoria will refer the matter back to the Commonwealth for implementation, likely triggering a High Court challenge to the validity of the Act, is rife.

NSWIC does not wish to see this matter resolved in this fashion.

How Does This Get Fixed?

The Basin Plan to be delivered by the MDBA will bring about social and economic implications that are clearly untenable as the triple bottom line approach was abandoned for political expediency. To that end, the Basin Plan needs to change – considerably.

There are three ways in which change might be occasioned;

1. *Change the Act (Parliamentary Process)*

   The simplest logical solution is to change the Act. Whilst it has been twice passed by the Parliament, considerable new knowledge now suggests that change is warranted;

   1. The ramifications of the Act are now far better understood – and are likely far worse than contemplated; and

   2. The window for "good policy" has reopened. The NWI can only be met by a sensible and practical referral of powers. A negotiated outcome is the only way for Governments (State and Federal) to avoid social and economic Armageddon under the Plan.

   NSWIC believes that this course of action is preferable as it is the only method by which to bring about long term, supportable and implementable change.

2. *Change the Legislative Instrument (Ministerial Discretion)*

   Section 44 of the Act describes the process by which the Minister must operate once the full legislative instrument is delivered by the MDBA. Section 44(3)(b)(ii) gives the Minister the capacity to *direct* the Authority to change the Basin Plan in all material respects. The Authority must comply with that direction.

   That is, the Minister has *absolute discretion* as to the content of the Plan.

   Any changes directed by the Minister must be accompanied by a statement of reasons to be laid before the Parliament with the Plan (44(7)(b)).

   NSWIC does not believe that this course is preferable as it brings about only temporary change to the initial version of the Basin Plan, leaving in place the structural and foundational problems of the *Water Act*. In short, it is a temporary fix to a long term problem.

3. *Disallowance Motion (Parliamentary Process)*

The Basin Plan must be laid before a House of Parliament pursuant to the Legislative Instruments Act (2003). In the current Parliament, it is probable that a disallowance motion pursuant to Section 42 of that Act would be moved.

NSWIC does not wish to see the matter resolved in this manner given the uncertainty that it would create.

Appendix 3

Briefing Note

The Ramsar Convention

02 July 2010

Mark Moore
Policy Analyst

Introduction

The Ramsar Convention on Wetlands is an intergovernmental treaty providing the framework for national action and international cooperation in the conservation and

wise use of wetlands and their resources. This convention was originally intended to protect waterbird habitats but has now expanded in scope to include all wetland biodiversity.

The Convention's member countries cover all geographic regions of the planet.

Australia agreed to the Convention in 1974 by being the first State to deposit an instrument of accession. Australia now has the third highest number and eighth highest area of Ramsar sites of the 160 members.

What is the Ramsar Convention?

The Ramsar Convention was first signed by representatives from 18 nations in Ramsar, Iran in 1971. It did not come into force until December 1975 when the seventh instrument of accession was received.

Eligible countries acceding to the Convention forward their instrument (an act by which a State signifies its agreement to be legally bound by the terms of a particular treaty), signed by the head of state or government or the foreign office, to the Director General of UNESCO[37]. They then must designate their first Wetland of International Importance with suitable information including a map identifying its boundaries.

Article 9.2 of the Convention on Wetlands states *"Any member of the United Nations or of one of the Specialized Agencies or of the International Atomic Energy Agency or Party to the Statute of the International Court of Justice may become a Party to this Convention"*[38].

By joining the Convention, countries signal a commitment to work actively to support the "three pillars" of the Convention. These three pillars are:

1) ensuring the conservation and wise use of wetlands it has designated as Wetlands of International Importance;

2) the further identification, designation and management of sites for the List of International Importance, contributing to a global ecological network; and

3) consulting with other Parties about implementation of the Convention, especially in regard to transboundary wetlands, shared water systems, and shared species.

There are presently 160 Contracting Parties, listing 1,890 Wetlands of International Importance covering an area of 185,450,731 hectares. Every three years a Conference of the Contracting Parties meets to adopt resolutions and make

[37] UNESCO serves as the depositary for the Ramsar Convention but has no other institutional role in the Convention's governance or legal affiliations.

[38] Page 15 of Ramsar Convention Manual, 4th Edition

recommendations for administering the work of the Convention. The last meeting was held in Changwon, Republic of Korea in November 2008.

Ramsar Mission

The Convention's mission is *"the conservation and wise-use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world"*[39].

The definition of what constitutes a wetland in the Conventions mission is quite broad and includes:

- lakes
- rivers
- wet grasslands
- peatlands
- swamps
- marshes
- estuaries
- deltas
- coral reefs
- mangroves
- tidal flats
- man-made sites (fish ponds, rice paddies, reservoirs, and salt pans)

Defining Wise-Use

Within the Ramsar philosophy is the "wise use" concept;

> *"Wise use of wetlands is the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development"*[40].

A new concept has replaced the original;

> *"The wise use of wetlands is their sustainable utilization of wetlands for the benefit of mankind in a way compatible with the maintenance of the natural properties of the ecosystem".*

The main focus remains on the environment, but now the purpose for their existence is not for the benefit of mankind, rather existing within sustainable development.

[39] The Ramsar Convention Manual, 4th Edition
[40] Page 49 – The Ramsar Convention Manual, 4th Edition

Australia's Involvement

Apart from being the first State to sign up to the Convention in 1974, Australia now has the third highest number of and eighth highest area of Ramsar sights of the 160 member countries.

By Number of Sites			
Member	Since	Sites	Area
United Kingdom	05.05.76	168	1,274,323
Mexico	04.11.86	114	8,190,991
Australia	**21.12.75**	**65**	**7,510,177**
Spain	04.09.82	63	281,768
Sweden	21.12.75	51	514,675

By Area of listed Sites			
Member	Since	Sites	Area
Canada	15.05.81	37	13,066,675
Chad	13.10.90	6	12,405,068
Russian Federation	11.02.77	35	10,323,767
Congo	18.10.98	7	8,454,259
Mexico	04.11.86	114	8,190,991
Sudan	07.05.05	4	8,189,600
Bolivia	27.10.90	8	7,894,472
Australia	**21.12.75**	**65**	**7,510,177**
Democratic Republic of Congo	18.05.96	3	7,435,624
Kazakhstan	02.05.07	7	6,626,768

Ramsar Sites in NSW

In NSW, there are 12 Ramsar sites, with the latest one (Paroo River Wetlands) being added in 2007.

Ramsar site in NSW	Date Listed	Location
Blue Lake	1996	Kosciuszko National Park, Snowy Mountains
Fivebough and Tuckerbil wetlands	2002	Crown lands near Leeton
Gwydir wetlands	1999	Four private properties near Moree
Hunter Estuary wetlands	1984	Kooragang Nature Reserve and Shortland Wetlands (The Wetlands Centre, private land), near Newcastle
Lake Pinaroo	1996	Sturt National Park near Tibooburra
Little Llangothlin Lagoon	1996	Little Llangothlin Nature Reserve near Glen Innes
Macquarie Marshes	1986	Macquarie Marshes Nature Reserve and Wilgara Wetlands (private land) near Quambone
Myall Lakes	1999	Myall Lakes National Park near Forster
Narran Lake	1999	Narran Lake Nature Reserve near Narrabri
NSW Central Murray state forests	2003	State forests near Deniliquin
Paroo River Wetlands	2007	Nocoleche Nature Reserve and Paroo Darling National Park
Towra Point	1984	Towra Point Nature Reserve near Botany Bay

* Information from NSW Environment, Climate Change & Water website

Ramsar Sites in Other States

There are a total of 65 Ramsar sites in Australia, distributed as follows:

ACT – 1
Victoria – 11
Western Australia – 12
South Australia – 5

Queensland – 5
Tasmania – 10
Northern Territory – 3
External – 6

Comparison of Performance with other Contracting Parties

At present there is no "comparison" of one Contracting Party's sites, or performance against protecting those sites, with what other Contracting Parties are undertaking. Comparisons, if undertaken, are usually associated with comparing policies and processes used by other countries to implement the Convention in the context of their respective domestic circumstances.

Reviewing notes from the last meeting of Ramsar, there are some items which give evidence to a difference in the level of work between done by various Contracting Parties.

As part of joining Ramsar, Contracting Parties commit themselves to provide an updated Ramsar Information Sheet for all their sites at least every six years or when there has been a significant change to a sites ecological character.

Notes from Ramsar[41]
*"CONCERNED that for **1,057 Ramsar sites (58% of all Ramsar sites) in 123 countries** (see Annex 1 to this Resolution), Ramsar Information Sheets (RISs) or adequate maps have not been provided or updated RISs and maps have not been supplied to the Secretariat for more than six years, so that information on the current status of these sites is not available"*

Australia appears on this list however there is no specific explanation as to why or what is missing.

"CONGRATULATES[42] *Contracting Parties for their reports and their statements made to the Secretariat or at this meeting concerning site-specific ecological character and boundary issues, notably"*

a) *the government of Australia for information concerning measures to recover and deliver increased environmental flows to six Ramsar sites along the River Murray to meet the environmental objectives for these six sites: Riverland, New South Wales Central Murray State Forests, Barmah Forest, Gunbower Forest, Hattah-Kulkyne Lakes, and The Coorong & Lakes Alexandrina and Albert;*

There were only eight "Congratulates" notes listed, of which Australia was one.

The Montreux Record[43]

[41] Information from 10th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands – Resolution X.13.
[42] Page 5 of the Ramsar COP10 Resolution X.13

The Montreux Record, first formulated in Montreux, Switzerland in July 1990, is a record of Ramsar sites where "if the ecological character of any wetland in (their) territory and included in the List has changed, is changing, or is likely to change as the result of technological developments, pollution or other human interference".

There are presently 51 sites listed on the Montreux Record from 29 Contracting Parties. Many of these have been on this list since the record was created (1990) or were added in the early 90's.

Since inception, a total of 32 sites have been removed from the list, with only one being re-added to it. At no time has Australia been on this list.

Australia does appear on the "List of Ramsar sites in which human-induced negative changes have occurred, are occurring, or are likely to occur (Article 3.2), as indicated in COP10 National Reports."

Australia lists the Coorong and Lakes Alexandria and Albert as well as the Gwydir Wetlands under this list.

"RECOGNIZING[44] the submission of Article 3.2 reports by the governments of 18 Contracting Parties concerning 22 Ramsar sites:"

- *Australia for its October 2008 updated notification concerning the status of the Coorong and Lakes Alexandrina and Albert Ramsar site and the measures and studies being implemented to address the effects of severe water shortage in that site"*

"RECOMMENDS[45], pursuant to Articles 6.2 (d) and 8.2 (e), the following with respect to alterations to the List or changes in the ecological character of specific Ramsar sites and other wetlands listed in the Report of the Secretary General to this Conference:

xiv) that the government of Australia continue to provide the Secretary General with updates on actions underway to manage the effects of severe water shortages in the Coorong and Lakes Alexandrina and Albert Ramsar site and consider the appropriateness of proposing this site for inclusion on the Montreux Record"

What is Australia doing now?

Discussion with an Ian Krebs, Assistant Director, Wetlands Section DEWHA gave some insight into what Australia is presently doing.

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43 **http://www.ramsar.org/cda/en/ramsar-documents-montreux-montreux-record/main/ramsar/1-31-118%5E20972_4000_0__#remove**

44 Page 3 of the Ramsar COP10 Resolution X.13
45 Page 8 of the Ramsar COP10 Resolution X.13

Australia has undertaken to implement a Rolling Review on the status of Australia's Ramsar sites. This will be done to provide targeted information, based on Ecological Character Descriptions, assessing threats to the ecological character of Australia's Ramsar sites.

- Allow investments to be targeted to imminent threats;
- Provide benchmark and ongoing data to support monitoring and evaluation;
- Help fulfil Australia's Ramsar obligations;
- Support effective implementation of *EPBC Act*.

Ian advised the first stage of implementing the Rolling Review has commenced with the commissioning by the Australian Government of consultants to develop site specific status forms for the 65 Ramsar sites and to pilot the Rolling Review at 20 of these sites across Australia. The 20 were not identified.

Listing of new sites

The Australian Government largely relies on State and Territory governments to suggest new nominations to the Ramsar List as the States and Territories are the responsible land managers.

Under the Natural Resource Management Ministerial Council (NRMMC) there are a number of actions are currently being looked at which will guide future development of the Australian approach to new nominations. One such action is the development of a framework to identify High Conservation Aquatic Ecosystems.

There is guidance provided by the Ramsar Convention on this issue (Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance of the Convention on Wetlands (Ramsar, Iran, 1971).
Available for viewing here: http://www.ramsar.org/cda/en/ramsar-documents-guidelines-strategic-framework-and/main/ramsar/1-31-105%5E20823_4000_0__

Questions

Did Australia, when acceding to this Treaty, recognise the full implications that it would have?

Does the new concept – particularly "benefit of mankind" – provide an obligation to protect social and economic benefits at least to the same level as environmental interest?

Are we doing more than other similarly sized countries? Should we?

Is Australia being too ambitious with so many small sites spread over such a vast dry continent?

Australia is the largest of the top 10 countries with the most Wetland sites.

Can we afford to balance all of these in the context of “sustainable development”?

Under the Conventions definition, some members of NSWIC operate wetlands. Rice paddies and reservoirs, should they be protected and guaranteed water?