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The Senate References Committee on Legal and Constitutional Affairs

Inquiry into provisions of the *Water Act 2007*

Submission by the National Irrigators' Council

March 2011

Introduction

The National Irrigators' Council (NIC) is the peak body representing irrigators in Australia. The NIC's objective is to develop projects and policies to ensure the efficiency, viability and sustainability of Australian irrigated agriculture and the security and reliability of water entitlements. NIC currently has 31 member organisations covering all MDB states, regions and commodities. Our members represent water entitlements of more than 6 million megalitres.

While this document has been prepared by the NIC, 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.

NIC requests the opportunity to address the committee to expand on our submission.

Terms of reference

(1) 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;*
- *(b) the differences in legal interpretations of the Act;*
- *(c) the constitutional power of the Commonwealth to legislate in the area of water;*
- *(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;*
- *(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*
- *(f) any other related matter.*

(2) That in conducting its inquiry, the committee should consult those with particular legal expertise in the area of water.

Overview

> *"The way in which the Act is framed leads to this sort of result, which is 'we have to do this for the environment and you're gunna have to suck it up and live with it'. Now this cannot be a viable point, you have to find a reasonable balance between this."*[1]
>
> - Professor John Briscoe, Harvard University, World Bank Senior Water Adviser, International Adviser to the MDBA

The National Irrigators' Council welcomes the opportunity for a full and frank review of the *Water Act 2007* and congratulates the committee for taking on this inquiry.

NIC has long made known its concerns about the Act – that is, that it fails to provide for the equal consideration of economic, social and environmental outcomes when water planning decisions are made. It is now clear from the "Guide to the proposed Basin Plan" that our fears were well founded.

In our submission it is the Constitutional basis of the Act that has caused a significant problem.

In our view, the Act is biased to the needs of the environment given its reliance on the external affairs powers to achieve a head of power under the Constitution. The external affairs powers focus wholly on delivering the needs of the environment in order to meet our international treaty obligations (Ramsar etc.). We do not claim that there is no consideration of social and economic impacts, but under the Act they are only considered "subject to" the delivery of the environment's needs.[2]

Our position has been publicly supported by a number of legal minds, international experts and was clearly shared by the former Chair of the Murray Darling Basin Authority, Mike Taylor.

We acknowledge and welcome assurances from the Government, Water Minister Tony Burke and new MDBA Chair Craig Knowles that they can deliver a Basin Plan that "optimises the economic, social and environmental outcomes" within the confines of the Act.

We hope they can deliver because the worst outcome for all of us with an interest in the Basin's future would be the delivery of a balanced Basin Plan that is ultimately torpedoed in the courts because it is inconsistent with the Act as it currently stands.

[1] Excerpt from interview, ABC Radio National Breakfast, 4 November 2010
[2] Water Act 2007, s21 (4)

Starting point – The National Water Initiative

The National Water Initiative, agreed by the Commonwealth, all states and industry in 2004, and the foundation of ongoing water reform, committed this nation to a triple bottom line outcome from water management – one that "optimises economic, social and environmental outcomes"[3].

The COAG Water Reforms of 1994 also began with recognition that a "package of measures is required to address the economic, environmental and social implications of future water reform".[4]

This triple bottom line approach is replicated in the objects of the *Water Act 2007*. However it is subordinate to the need to "giving effect to relevant international agreements".[5]

The NWI went further to say there was a continuing imperative to:

> "increase the productivity and efficiency of Australia's water use, the need to service rural and urban communities, and to ensure the health of river and groundwater systems..."[6]

and that

> "...settling the trade-offs between competing outcomes for water systems will involve judgements informed by best available science, socio-economic analysis and community input..."[7].

It was these principles of balance, trade-offs and equal consideration of environmental, social and economic considerations that irrigators welcomed and was the reason they supported, and continue to support, the NWI as the basis for water reform. Unfortunately, the Act fails to maintain that holistic approach and as the foundation for the Basin Plan, it is not surprising that we now have a proposal that does not deliver balance.

NIC believes that in order to deliver on the triple-bottom-line promise of COAG and the NWI and deliver a balanced Basin Plan, the Act must be amended. We believe it is incumbent on this committee to make strong recommendations to the Parliament to have it amended to reinstate the triple-bottom-line promise of the NWI. While the Government has made clear its intention to deliver a triple-bottom-line outcome, we remain concerned that any resulting Plan could then be subject to legal challenge on the basis that it is not consistent with the Act as it currently stands.

[3] Intergovernmental Agreement on a National Water Initiative, para 23
[4] COAG Communique, 25 February 1994, Attachment A, Water Resource Policy, Clause 1
[5] *Water Act 2007,* section 3 (b) and (c)
[6] Intergovernmental Agreement on a National Water Initiative, para 5
[7] Ibid, para 36

Background - the politics of 2007

The intervention of the Commonwealth in managing the water resources of the Murray Darling Basin in 2007 was played out in a political context that has ultimately led to the problems we now see with the Act.

The Howard Government announced its National Plan for Water Security on January 25, 2007 which included a $10 billion funding commitment to invest in irrigation infrastructure and address "over-allocation", among other things. It also proposed a referral of powers by the States to the Commonwealth to overcome the Constitutional constraints to further Commonwealth control of water policy.

Ultimately Victoria was the only state that refused to refer its powers and this created a Constitutional problem for the Commonwealth. Earlier drafts of a "comprehensive Water Bill" that were circulated among the states and stakeholder groups were drafted on the assumption of a full referral of powers.

When Victoria refused the referral, the Commonwealth was obliged to look elsewhere for a head of power to implement its Basin reforms.

In the end it wrote legislation that relied heavily of the external affairs powers. Under this head of power, the Commonwealth could use its obligations under international treaties (most notably the Ramsar convention on wetlands, the Biodiversity Convention and various bilateral migratory bird treaties) to deliver the Basin Plan. This relied on a precedent set by the High Court in the Franklin Dam case in the early 1980s.

In our view, this is where the legislative process went wrong. The focus on international environmental treaties, as the Act is drafted, comes at the expense of the interests of food and fibre production and rural communities.

In our view, the Constitutional construct of the Act means it is difficult for the MDBA to deliver an outcome that treats environmental, social and economic concerns equally and that contemplates to necessary trade-offs to "optimise" all three.

Specific clauses of concern

NIC does not disagree that social and economic impacts of the Basin Plan can be considered pursuant to the Act. However our concern is that consideration of social and economic impacts occurs only subsequent to the setting of the needs of the environment.

There are number of specific areas of concern.

As mentioned earlier, the **Objects** of the Act outline the intention to:

promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes[8]*;*

In itself this clause is positive however it is qualified by the prefix *"in giving effect to those (international) agreements".* That is, the international agreements must be considered first. While this may be open to interpretation, clearly the intention is to deliver on the international agreements, and therefore the needs of the environment, up front. Optimising social and economic considerations becomes a secondary concern.

If hierarchy in the Act is considered to be important (and judging by the MDBA's interpretation in the Guide, it is), **section 20 (*Purpose of the Basin Plan*)** continues to place the emphasis on the environment.

Clauses A, B and C all focus on international agreements and environmental objectives before clause D refers to the optimisation of economic, social and environmental outcomes.

This is far more explicit in **section 21 (*General basis on which Basin Plan is to be developed*)** which goes to the heart of our concerns about lack of balance.

Sections 21 (1), (2) and (3) all direct that the Basin Plan must be prepared to give effect to relevant international agreements and that it must:

- have regard to "the conservation and sustainable use of biodiversity"
- "Require...special measures to manage their use to conserve biodiversity"
- "promote sustainable use to...protect and restore the ecosystems..."

Even subsection 21 (3) which says the Basin Plan must "promote the wise use" of Basin water resources, is prefixed by "Without limiting subsection (1)".

It is not until subsection 4 (c) that references to the National Water Initiative and consumptive and other economic uses of water are referred to, but only "subject to" the preceding subsections.

That is, the environment has primacy, other factors are only considered subject to its needs.

Finally, section 23 makes it clear that Sustainable Diversion Limits (SDLs) must be set to "reflect an environmentally sustainable level of take". It does not suggest any consideration need be given to what might be sustainable for communities, particularly irrigation-dependent communities.

In all, these sections of the Act highlight to us that the water needs of the environment must be set first, and only then can social and economic impacts be taken into account. This is not equal treatment and it certainly does not "optimise the economic, social and environmental outcomes".

[8] Water Act 2007, s3 (c)

Perhaps this is no better confirmed than the MDBA's attempts to define "optimisation" as:

> *"...seeking to maximise the benefit to the environment, while minimising the economic and social impacts".*[9] *(our emphasis added)*

On any interpretation, that is not equal treatment.

It's not just us saying it

NIC's views on the Act are not held in isolation. It is clear that a number of other experts in the legal and water fields share our concerns.

Most notable of course is the former Chair of the MDBA, Mike Taylor, who in resigning from the position last year said:

> *"... 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. 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."*

Mr Taylor's full statement is appended to this submission as Attachment 1.

Mr Taylor's views were reinforced by an international panel appointed to review the overall approach of the MDBA in developing the Basin Plan. In its report to the MDBA, the panel commented:

> *The driving value of the Water Act is that a triple-bottom-line approach (environment, economic, 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.*
>
> *Interpreted literally, the Water Act implies an outcome which is broadly recognised as one that is unlikely to be socially or economically and therefore politically viable.*[10]

Bizarrely, the MDBA is yet to name these international experts, but we are aware from his own submission to this inquiry that one of them was Professor John Briscoe, an expert in environmental engineering at Harvard University and a former World Bank Senior Water Adviser.

As an aside, we strongly urge all members of the committee to read Professor Briscoe's submission. It is a concise explanation of the problems besetting the reform process and comes from the clear perspective of an independent, informed observer of the process.

[9] Guide to the proposed Basin Plan, Vol 1, pg 107

[10] Developing the *Guide to the Proposed Basin Plan*: Peer Review Reports, MDBA, 2010, pg 33

Our position has also been publicly supported by a number of legal minds, including Constitutional law expert Professor George Williams of the University of NSW[11] and Sydney Barrister Josephine Kelly[12].

The Productivity Commission has also noted the problem:

> *The Commission's interpretation of the Water Act 2007 (Cwlth) is that it requires the Murray-Darling Basin Authority to determine environmental watering 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.*[13]

It goes on further to make a recommendation that the Committee should be cognisant of:

> *Recommendation 6.1*
> *The Murray-Darling Basin Authority should set sustainable diversion limits (SDLs) in a way that balances environmental, social and economic tradeoffs. This approach would appear to be consistent with the objects of the Water Act 2007 (Cwlth), but may not be consistent with the specific provisions defining how SDLs are to be set. If it is inconsistent, the Water Act should be amended.*

Finally, as the former MDBA chair has advised, the MDBA itself has received legal advice that supports our view. Unfortunately the MDBA refuses to release that advice, including under Freedom of Information laws (yes we have tried).

We acknowledge the release of legal advice by Minister Burke on October 25, 2010, that he suggested allowed the consideration of social and economic factors. We note that the advice does not suggest the MDBA must give equal weighting to social and economic factors and that the advice confirms our view in relation to the international treaties – that they give primacy to the environment[14].

We believe if the Committee is to successfully address its terms of reference then it should demand to see the MDBA's latest legal advice, seek counsel from legal experts and form its own recommendations to Parliament in relation to the Act.

[11] "When water pours into legal minefields", Sydney Morning Herald, October 26, 2010 – Attachment 2
[12] "The river's needs are the only consideration", Australian Financial Review, November 16, 2010 – Attachment 3
[13] Productivity Commission 2010, Market Mechanisms for Recovering Water in the Murray-Darling Basin
[14] The Role of Social and Economic Factors in the Basin Plan – Australian Government Solicitor, October 2010, para 23

Amendments

NIC does not have the resources to provide legal advice on the legislative amendments that would be necessary to address the issues we raise here. In any event, this is the domain of parliamentary draftsmen and not something we can be expected to provide expertise on.

However following the examples given above, it would appear that some reasonably simple amendments are required to ensure that the economic, social and environmental outcomes are given equal treatment and that words such as "subject to" as referred to above are removed.

Other problems with the Act

A second concern of the Act, and indeed the entire Basin reform process, is not directly related to consideration of social and economic outcomes but relates to the focus on water and flow alone as a solution to the environmental problems of the river system. Indeed, the Act specifically precludes the Basin Plan from dealing with "land use or planning, management of natural resources other than water and control of pollution"[15].

This is a repudiation of some 30 years of integrated catchment management in this country that has acknowledged that management must extend to matters such as land use, riparian vegetation, noxious weeds, invasive species and foreign fish species such as European carp.

It is simply not possible to address all the environmental problems of the Basin by using flow as the only remedy. "Just add water" is not a solution to a complex problem. For an example of how this problem has manifested itself in policy, it is instructive to look at how the Sustainable Rivers Audit has been used by the MDBA to set its environmental watering targets.

The SRA considered three distinct measures of river health of which hydrology (water flow) was only one.

The overall results of the SRA indicate that only three of the 23 river valleys in the MDB were assessed as being in "good" or "moderate" ecosystem health and the remaining 20 were rated "poor" or "very poor". However on the hydrology measure, the result is almost exactly reversed: only five valleys were in the "poor to moderate category", while the remaining 18 are rated "moderate to good".

As the Guide points out: "More than two-thirds of sites were rated as being in moderate to good condition in terms of long-term hydrologic regimes"[16].

So the SRA indicates that the problem is not just lack of water, but the only solution the MDBA is offering, as directed by the Act, is more water.

[15] *Water Act 2007*, Section 22 (10)
[16] Volume 2, part 1, p. 31

Given the Guide is all about returning flows to the rivers, we fail to see how it will address the non-flow measures of fish and macroinvertebrate condition given that neither of these are entirely reliant on flow for their health and are of course influenced by other factors such as introduced species, land use, cold water pollution and migration paths.

We submit that an amendment is needed to the Act to address this shortcoming to require the MDBA to consider non-water related solutions to problems.

END OF SUBMISSION

Plan for the Murray-Darling Basin – Role of Authority Chair

7 December

The Chair of the Murray-Darling Basin Authority, Michael Taylor AO, reported today that he had written to the Minister for Sustainability, Environment, Water, Population and Communities, The Hon Tony Burke MP regarding the plan for the Murray-Darling Basin, and the role of Authority Chair.

The Chair has advised the Minister that: "Since completing the *Guide to the Proposed Basin Plan* I have had the opportunity to engage extensively with a broad range of rural stakeholders and community groups throughout the Basin and I have listened to a wide range of advice".

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.

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*.

The Chair, Michael Taylor, stated that a sustainable plan for the Basin would require far more than a decision by the Authority on how much water should be transferred from human uses to the environment.

Mr Taylor said that a successful plan would require both Commonwealth and States to work together on a comprehensive range of policy, planning and implementation issues in consultation with relevant community, industry and environmental groups. While the Authority has an important part to play, it is neither empowered nor equipped to undertake the entire complex task.

According to Mr Taylor: "Discussions, planning and addressing the full gamut of environmental, economic and social issues should commence immediately. This process should not be delayed by the Authority's report on the sustainable diversion limits on water for human uses required by the final *Basin Plan*, due at the end of 2011".

Mr Taylor said that delay would give rise to increasing community concerns and investment uncertainty in rural and regional areas of the Basin. Moreover, it may ultimately jeopardise the successful implementation of an initiative which is vital to the long term sustainability of both the river system and the communities who contribute to the health of our nation as a whole.

It is clear that the work required over the next 12 months is extensive, and crucial to the adoption and implementation of a credible *Basin Plan*, capable of full implementation. While I strongly support that outcome, I believe it is time for the Government to reconsider the next phase.

In light of this overall assessment and related governance issues, Mr Taylor has advised Minister Burke that he has determined it appropriate that he leave the role of Chair of the Murray-Darling Basin Authority at the end of January, 2011.

The Chair, Michael Taylor said it had been a privilege to serve in this important role and to work with the Board members and staff of the Authority, the Basin Community Committee and Basin communities to develop and deliver the *Guide to the Proposed Basin Plan*.

Mr Taylor wished Minister Burke and those working on the subsequent development of the plan for the Murray-Darling Basin, and especially rural and regional communities, every success.

Michael J Taylor AO

Chair

When water pours into legal minefields

October 26, 2010

Water and Australian law do not mix. Managing our scarce resources seems, inevitably, to lead to legal dispute. The latest battle has erupted over whether the law allows local interests to be taken into account in preparing the Murray-Darling Basin Plan. Once again, this exposes problems with how the legal system deals with the management of our rivers.

The Murray-Darling Basin Authority's guide to its plan has provoked considerable community anger. The authority is free from the partisan and state-specific interests that have bedevilled good governance in this area.

However, it has been said that there is no point in having an independent body if it is forced to overlook the interests of local water users and their communities.

The authority is created by the federal **Water Act 2007**. The key to its power lies in section 21, a complex and hard-to-follow provision that produces more confusion than clarity.

The wording of section 21 may be convoluted, but its legal effect is clear. The basin plan must be prepared so as to give effect to a number of international environmental agreements, such as the **1971 Ramsar Convention** on the conservation and use of wetlands and the **1992 Convention on Biological Diversity**. Lest there be any doubt about the ecological imperative imposed on the authority, the section further states that the plan ''must promote sustainable use of the basin water resources to protect and restore the ecosystems, natural habitats and species''.

If this was all section 21 said, it would vindicate those who argue that the authority can ignore local communities in preparing the Plan. However, the section also states that the authority ''must act on the basis of the best available scientific knowledge and socio-economic analysis''. It must also have regard to ''the consumptive and other economic uses of the basin water resources'' and ''social, cultural, indigenous and other public benefit issues''.

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.

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.

The Commonwealth's decision to give the highest priority to certain environmental concerns is driven by the constitution, rather than government policy. It is a result of the federal Parliament legislating in an area over which it has never been granted clear authority. Power over water and rivers was left to the states at Federation in 1901, and the Commonwealth has not since been granted a clear constitutional mandate.

The federal Parliament passed the Water Act to impose the national interest on the management of the Murray-Darling system. To do so, parliament had to rely upon a hodgepodge of federal power over things such as interstate trade and commerce, astronomical and meteorological observations, census and statistics, weights and measures, corporations and external affairs.

The most important power is that over external affairs, to which the High Court has given a wide interpretation since the 1983 dispute over the damming of the Franklin River in Tasmania. So long as the right international convention can be found, this power provides a wide basis for legislating in what had been areas of state control.

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.

Any basin plan must be consistent with the international agreements or face being struck down by the High Court. The result is a Water Act that says that the authority must ensure as a first priority that the Basin Plan gives effect to the international conventions.

Attempts at better management of the Murray-Darling basin continue to unfold against a complex set of legal obligations and century-old constitutional provisions. Unfortunately, this is driving outcomes in a way that reduces the chances of a fair accommodation of both environmental and local concerns.

There is room for debate about the relative importance of each. However, the answer should not be preordained by our legal system. Once again, how we manage our scarce water resources is being held hostage by our 1901 constitution.

George Williams is the Anthony Mason Professor of law at the University of NSW.

The river's needs are the only consideration
Australian Financial Review
November 16, 2010

No political party or Independent member in the Federal parliament is being honest with the people of the Murray-Darling Basin and the Australian public. The Water Act puts the environment first when allocating water in the Murray-Darling Basin. Social and economic considerations are not relevant to deciding how much water the environment needs. Water available for human use is what is left.

That is why the reductions in allocations for human use published by the Murray-Darling Basin Authority (the MDBA) in its Guide, were so large, and will be in the final Plan, unless the Act is amended. But Federal politicians, Government, Opposition, and Independents, are going along with Minister Tony Burke's "triple bottom line", that environmental, economic and social considerations are central to the legislation.

Minister Burke has implicitly acknowledged that social and economic considerations are not relevant when determining the water allocation for the environment. When he tabled legal advice in the House of Representatives on 25 October 2010, he said that the Act provides for the establishment of environmentally sustainable limits on the quantities of water that may be taken from the basin water resources, and subject to those limits, the Act maximises the net economic returns to the Australian community.

The legal advice he tabled also indirectly acknowledged that reality. That advice, entitled "The Role of Social and Economic Factors in the Basin Plan", begins: "This paper examines the ways in which the Murray Darling Basin Authority and the Minister are required to take into account social and economic factors in developing and making the Basin Plan, and the relationship between social-economic factors and the implementation of international environmental agreements.

Critically, the Minister's legal advice did not consider when social and economic factors are not to be taken into account. Section 23 says that long-term average sustainable diversion limits (water for human use) "must reflect an environmentally sustainable level of take". The advice says that s 23 requires the MDBA and the Minister to determine the "key environmental assets" that have to be sustained. It then gives an example of how the object of optimising economic, social and environmental outcomes could be relevant to deciding what are key environmental assets: "The MDBA and the Minister could not identify an environmental asset as key if this was not necessary to achieve the specific requirements of the Act and would have significant negative social and economic effects."

In other words, if an environmental asset is necessary to achieve the Act's specific requirements, all of which relate to the natural environment, it will be a key asset, and social and economic considerations are not relevant.

The advice does not consider the next step required by section 23, the determination of the water allocation necessary to ensure those assets are not compromised. That is consistent with its limited scope of only considering when social and economic considerations are to be taken into account. They are not to be taken into account when deciding the water allocation for the environment. The advice summary says: "… 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 those outcomes." Section 23 is not discretionary. There are no options when determining the water the environment needs. The environment is the only consideration.

It would be irresponsible for the MDBA to proceed, and for Tony Burke and the Government to allow it to proceed with the preparation of the Plan, taking into account social and economic

considerations when deciding the water allocation for the environment. The validity of a Plan prepared on that basis would be open to legal challenge – successfully in my view.
Tony Abbott's Opposition apparently cannot admit that legislation enacted by the Howard Government gave priority to water for the environment.

Josephine Kelly is a Sydney barrister.