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Submission to the Senate Environment, Communications and the Arts Legislation Committee

Water (Crisis Powers and Floodwater Diversion) Bill 2010

June 2010

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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 24 member organisations covering all Murray-Darling Basin states, regions and commodities.

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.

Summary

The National Irrigators' Council would like to place on record from the outset that we oppose this Bill as we believe it is not in the best interests of the Basin environment, communities, water users or indeed the national interest.

Fundamentally the Bill attempts to prescribe how best to share a (sometimes) limited resource, but we are not convinced that the measures proposed by the Bill would ensure any more equitable sharing arrangements would be established. We have long argued that transferring control of water from one group of politicians and bureaucrats to another group of politicians and bureaucrats (or in this case a single, unelected bureaucrat) does not create any more water, nor does it guarantee more equitable sharing arrangements.

While we would question the Constitutional validity of the Bill (and we are certain this would be immediately tested in the High Court should the Bill become law), our more fundamental objection relates to the apparent arbitrary scrapping of decades of agreements between various parties, accepted water sharing arrangements and well-known and understood institutional arrangements.

Of most concern though is the very subversion of one of the tenets of our democratic tradition – that key decisions should ultimately be the responsibility of an elected person. Transferring such key decisions as are proposed in the Bill out of the hands of elected state or federal governments and into the hands of an unelected bureaucrat (or Authority) cannot be tolerated. Our supposition is that this is a deliberate act by the authors designed to “take the politics out of water”. But at the end of the day a Minister must be accountable for decisions such as this and we believe the Bill would in effect create an all-powerful water bureaucrat with little accountability to the people.

We are also concerned at the apparent political nature of the Bill revealed by one of its key technical failings - the title and explanatory memorandum refer to “Floodwater Diversions” yet the Bill itself makes no reference whatsoever to powers over floodwaters – except in periods of “extreme crisis” – which would appear to be counter-intuitive.

We understand that the sponsors of the Bill represent a state at the bottom end of the Murray Darling system and that they are often frustrated by what they see occur upstream. We recognise that frustration and it is shared by many of our members, particularly in South Australia. But this Bill does not provide a workable solution – indeed, in our submission, it would exacerbate existing tensions and lead to even further conflict.

In summary, we submit that the only recommendation the Committee can make to the Senate is that this Bill be rejected outright.

Specific comments

Objects

The Objects of the Act are stated as control of the Basin by the Murray Darling Basin Authority. In our submission, this is a function, not an objective. Control by a single authority does not define an outcome, let alone a positive one.

Were there a clearer objective outlined in this section – for example, more equitable sharing arrangements in times of crisis - it may be easier to understand the intent of the Bill. As it stands, the Bill lacks any clear intent.

Further, Object 3 (b) refers to broader powers over the management of floodwaters, but there is only a vague reference to this in the balance of the bill and only in the context of “extreme crisis”. Again no objective for the management of these floodwaters is provided, at least not overtly.

Constitutional Basis

NIC does not have the legal expertise or the resources to provide a full legal opinion on the constitutional validity of the Bill.

However even with our limited knowledge of these matters we believe the Bill would likely be unconstitutional. At the very least, we expect its validity would be challenged immediately in the courts should it ever become law.

Notwithstanding this view, we are concerned at some of the assumptions made as the basis for extending the Commonwealth’s powers as proposed.

Section 2 (b) argues that “the only way to secure sufficient water for use for competing environmental, conservation and irrigation purposes is to implement a single, efficient system for the management of Basin water resources during periods of extreme crisis, which equitably deals with matters of water allocation and sharing,”

The Bill provides no explanation or justification for why or how such a “single, efficient system” can secure sufficient water where existing systems cannot. Changing the management system alone cannot create more water nor ensure it is managed better. The Bill, explanatory memorandum or second reading speech provide no evidence on how a new system would be more efficient. Indeed we would argue that the MDBA, while experienced in river management, does not have the level of expertise in water planning and management as state governments.

In our submission the only way to secure sufficient water for competing purposes is for sufficient rain to fall. While we are concerned the Bill would create an all-powerful bureaucrat in Canberra, not even the Parliament can make them that powerful.

Inconsistent Commonwealth Laws

The provision of the Bill that sees it override any other Commonwealth law includes the Water Act which means the effective over-riding of the Basin Plan and any arrangements that go with it. This would see the abandonment of a considered, researched plan that has had significant community input (notwithstanding our separate and very real concerns about consultation and balance in the forthcoming Plan) in favour of arbitrary decisions by an unelected bureaucrat. This would not be tolerated by the NIC and we suggest, by the majority of Australians.

Extreme Crisis

The Bill's definition of what constitutes an extreme crisis is inconsistent, unfair and in the case of the use of floodwaters, illogical.

We note the second reading speech refers to the sometimes "selfish" interests of the states, but using the height levels of Lake Alexandrina would appear to be a similarly selfish exercise when it is but one of the basin's many environmental assets.

The intention of the Bill appears to be that if the Lakes are in extreme crisis then their needs should be met first. But if they are in crisis at any given point in time, then it is likely that the rest of the Basin (or at least large parts of it) has also been suffering a distinct lack of rainfall – such as in recent years. To demonstrate, see figure 1, which plots the height level of Lake Alexandrina against inflows to the system and clearly demonstrates that as inflows have fallen off dramatically, so has the water in the lakes. Water held upstream in storages initially kept the water level relatively stable despite low inflows, but ultimately reserves became depleted (which is why the blue line then crashed dramatically).

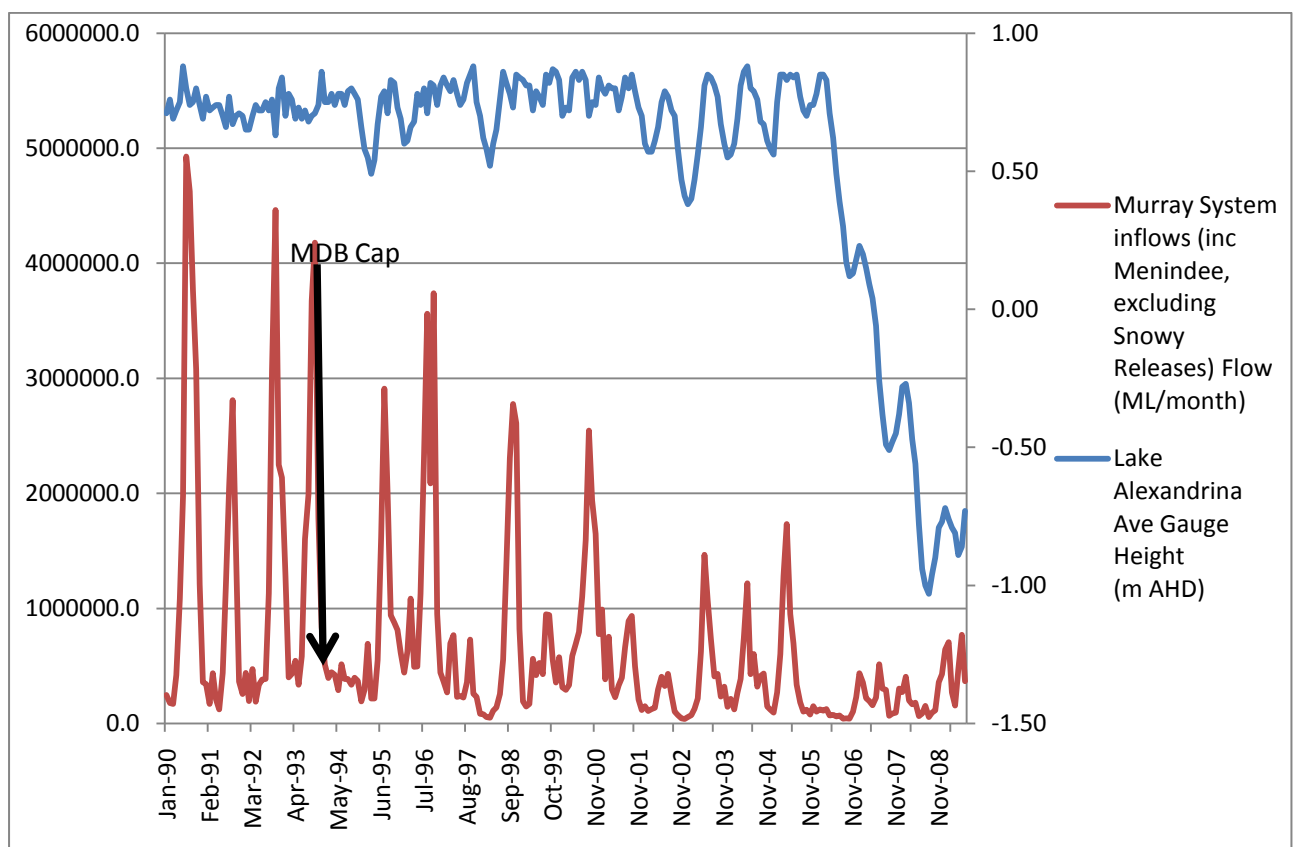


Figure 1. Data source - MDBA

The implication is that should sufficient rainfall occur in these dry areas upstream, they should not benefit at all and any flows should be diverted downstream to the Lakes. This would hardly be fair either for the environment in those areas, or for the communities reliant on water in those areas.

The trigger level for high security entitlements is equally preposterous, particularly given the unconnected nature of much of the system. Under the proposed trigger in the Bill, a groundwater user in Parilla, South Australia, could potentially have all rules relating to his water use scrapped or suspended because of a dry period affecting high security entitlement holders in the Gwydir system

more than 1300km away. Note that the Gwydir River ends in terminal wetlands and does not connect to the rest of the system except in extreme flood events. Clearly this would be absurd.

Crisis powers

Our most strenuous objection is the powers which the Bill would give to an un-elected bureaucrat. While it would be an elected politician (the Minister) who would declare, on advice, when a period of extreme crisis has been reached or finished, the decisions on management of the water in the meantime would be solely the domain of the CEO of (presumably) the Murray Darling Basin Authority.

The power of the CEO to arbitrarily suspend any “water plan, arrangement or agreement” flies in the face of our democratic tradition and the ability of the public to have input into key decisions that affect them.

For example, water sharing plans at state level take years to prepare. This involves significant scientific and economic research, modelling, planning and extensive community consultation, including with water users, environmentalists and the wider community. These plans have been agreed to by governments – indeed ALL Australian governments have decided through the COAG process and the National Water Initiative that we need to have this type of planning regime, and as part of that regime, a secure property right that will allow irrigators to invest with confidence.

Under the Bill, these processes and agreements will be scrapped in favour of decisions by a single person, with no public recourse at the ballot box and potentially with no public input at all.

It is akin to a declaration of martial law. Indeed it is not stretching things too far to say it has the hallmarks of many dictators throughout history who have suspended democratic institutions in times of “crisis” for their own nefarious purposes. We are not suggesting that is the intent of the Bill, but the effect is similar.

The implications of such powers seem not to have been thought through by the authors of the Bill. Suspension of rules, plans and agreements relating to water has impacts far beyond that of environmental and flow management.

The past few years have demonstrated that the market has worked, even in times of crisis. Governments have been able to enter the market to secure water for critical human needs and for the environment. This Bill would result in significant interference with established market mechanisms.

Tearing up water sharing rules and agreements has impacts on irrigators, their banks and other creditors, irrigation communities, businesses in regional areas, Catchment Management Authorities, government departments and many others.

To suggest, as the Bill does, that a single unelected bureaucrat should have power to make these decisions is absurd.

If for no other reason, then the Committee must reject the Bill on these grounds alone.

Other comments

The Explanatory Memorandum of the Bill includes statements about floods in the north of the Basin in January and March 2010 and that how much of that water will be allowed to flow down the system is “undetermined”. It erroneously concludes: “Rather, it is left for states to negotiate

between themselves”. In fact, the bulk of the floodwaters (that which has not already been taken up by the environment or set aside for the Lower Lakes by agreement) is flowing into the Menindee Lakes storage, and is now under the control of the MDBA. It will be shared three ways between NSW, Victoria and South Australia.

The second reading speech of the Bill demonstrates its political nature— it is clearly all about appealing to voters’ in the author’s home state. The National Irrigators’ Council agrees that South Australia has suffered significantly through the recent drought – our South Australian members know only too well how difficult things have been. They also share the frustrations that come from being at the bottom end of the system.

But they also understand they have not been alone in these difficulties.

Senator Xenophon’s statement that “South Australia has paid the heaviest price” is wrong and seeks to perpetuate the myth that those in upstream states have been living the high life while South Australia suffers. Everyone has paid a heavy price. The last four years’ season-ending irrigation allocations have been dreadful for South Australian irrigators – but the following table demonstrates the level of difficulty elsewhere.

End-of-season irrigation allocations (% of entitlement)

Water Product	06/07	07/08	08/09	09/10
South Australia	60	32	18	62
Lachlan High Security (NSW)	80	30	30	10
Lachlan General Security	0	0	0	0
Vic Goulburn High Reliability	29	57	33	71
Vic Murray High Reliability	95	43	35	100
NSW Murray High Security*	50	25	95	97
NSW Murray General security	0	0	9	27

Source – MDBA, Goulburn Murray Water (Goulburn only), Lachlan Valley Water

**NSW Murray High Security comprises only 15 per cent of the NSW Murray Valley resource*

Similarly, upstream environmental assets have also suffered – witness for example dry beds in Lake Boga, Lake Cargelligo and the Menindee Lakes (until recently), and the disconnection of the Wakool River system and its attendant ecological and social impacts. No change in management arrangements would have changed the situation for these assets or irrigation districts in the face of the worst drought in 100 years.

Finally, we note with concern that the list of groups suggested for “possible submissions or evidence” did not include a single farming or industry voice. That is a significant defect and we urge the authors of the Bill and the Committee to consider all stakeholders’ views.

NIC would be pleased to further expand on our submission to the Committee in person.

END OF SUBMISSION