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## **Briefing Note**

### **The *Water Act***

***“How did we end up with this?”***

**9 November 2010**

## 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.