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# **Submission to the Senate Standing Committee on Rural Affairs and Transport**

## ***The Management of the Murray-Darling Basin***

**101213**

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Chief Executive Officer

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Member Organisations: Bega Cheese Limited, Border Rivers Food & Fibre, Coleambally Irrigation Co-Op Ltd, Cotton Australia, Gwydir Valley Irrigators' Association Inc., High Security Irrigators Inc, Hunter Valley Water Users' Association, Lachlan Valley Water, Macquarie River Food & Fibre, Mid Coast Dairy Advancement Group, Mungindi-Menindee Advisory Council, Murray Irrigation Limited, Murray Valley Water Diverters' Association, Murrumbidgee Groundwater Inc., Murrumbidgee Irrigation Ltd, Murrumbidgee Private Irrigators' Inc., Murrumbidgee Valley Food and Fibre Association, Namoi Water, NSW Farmers' Dairy Committee, NSW Farmers' Association, Ricegrowers' Association of Australia, Richmond Wilson Combined Water Users Association, Riverina Citrus, Southern Riverina Irrigators, South Western Water Users', West Corrgan Private Irrigation District, Wine Grapes Marketing Board.

## **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.

## **Request to Address the Committee**

NSWIC requests the opportunity to address the Committee to support the evidence provided in this Submission.

## **Request for Committee to Hold Regional Hearings**

NSWIC has been a vocal critic of much of the operation of the Murray-Darling Basin Authority. At the same time, we believe that the considerable effort to which the Authority has gone to hold regional meetings is the key to their understanding of the depth of feeling across the Basin, their appreciation of the shortcomings of the work that they have completed to date and the level of involvement across the community for greater than simply productive water users.

NSWIC believes that it is vital for the Committee to gain a thorough, first hand understanding of the communities to be directly affected by the Basin Plan. We believe that this is only possible through visiting those communities and engaging directly with them. To that extent, we submit that it is vital for the Committee to schedule and attend regional hearings across all States that contain the Murray-Darling Basin.

## **General Comments**

New South Wales Irrigators Council (NSWIC) has never resisted change for the mere sake of resistance.

In the case of the Murray-Darling Basin Plan, NSWIC has worked constructively with State and Commonwealth Governments across party lines since the negotiation and execution of the National Water Initiative in 2004. It was the National Water Initiative that set out the aspirations of the Australian nation for the management of our water resources. Clearly identified in those aspirations was a triple bottom line approach, where environmental, social and economic consequences were each equally considered.

Since the execution of that document, 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.

Rallying against a singularly focused outcome is not anti-environmental – far from it. Demanding that an agreement be met, demanding that balance be achieved and demanding a triple bottom line approach is far from unreasonable. This is exactly what tens of thousands of people have come out of their homes, closed their businesses and attended public meetings have set out to achieve. It is because of their efforts that this Parliamentary Standing Committee is considering the matter. Those people deserve to be listened to.

More importantly, those people deserve to be heard.

Like them, NSWIC is not resistant to change. We embrace change when it is balanced, reasonable, rational and beneficial to all aspects of a triple bottom line outcome.

## What's Wrong With the Guide?

NSWIC sees three main failings with the Guide to the Draft Plan promulgated by the MDBA.

### 1. The List of "Assets"

The *Water Act* has resulted in a list of non-river assets that are to be significantly altered by the application of water. Pursuant to the National Water Initiative, that list was to be developed as a "trade off" arrangement. For political reasons, the trade off did not occur. This submission considers this matter in depth further on.

### 2. The Methodology for Ecosystem Function

Aside from the protection of identified assets, the Basin Plan is to protect ecosystem function. Whilst NSWIC concurs that such an aim is worth and ought be pursued, we are extremely disappointed at the crass methodology adopted by the Authority.

The Guide indicates that "end of system flow" is, in essence, the methodology used to determine volumes required for transfer from productive to environmental use. Whilst recognising the importance of nutrient and salt export from river systems to ensure health, NSWIC submits that this methodology is unsophisticated at best as an analysis tool for river system quality. We submit that a more rigorous analysis that considers the capacity of the system to sustain animal and plant life together with a range of other natural functions must be expected by Australia.

This unsophisticated approach to developing the Basin Plan in Guide form is compounded by the fact that the proposal is built on the Sustainable Rivers Audit which used exactly the same methodology to classify the health, or otherwise, of river systems. That Audit classified streams as healthy, moderate or poor based solely on end of system flows.

NSWIC submits that this analysis tool is weak, at best. For one report to rely on another whilst using entirely the same classification system is poor methodology suitable only for programs where consequences of inaccuracy are small. NSWIC submits that the massive potential impacts of the Basin Plan are such that sophistication and rigour in methodology must be demanded by all.

### 3. The Accuracy of the "Science"

NSWIC is rightly concerned at the accuracy of the "science" that is used to underpin the recommendations contained within the Guide. In particular, we note that in certain instances admissions are made by the Authority that scientific evidence is either thin or missing altogether. In these instances, the Guide relies on modelling to make predictions – an inaccurate and dangerous technique at the best of times.

As an example, NSWIC points to the proposal in the Guide that would see several groundwater aquifers across NSW face further cuts in order to achieve “sustainability”. Over the course of the last five years, NSW has seen massive cuts in groundwater across the State through the Achieving Sustainable Groundwater Entitlements (ASGE) program. Some of these same aquifers now face further cuts through the Basin Plan.

NSWIC questioned how this could be the case, posing an assumption that the definition of “sustainable” must be the root cause. Authority CEO Rob Freeman advised that this was the case<sup>1</sup>. Groundwater staff at the MDBA had initially also adopted this position<sup>2</sup>, but later revised that position advising that the differential was caused by the use of models<sup>3</sup>. Those staff advised that it was, in fact, exactly the same model used by NSW Government in the ASGE program that the MDBA used in the Basin Plan Guide program, but that considerably different results were reached with “different treatment” of the model.

The situation, then, is that groundwater irrigators in this instance face significant cutbacks that will have massive implications for their businesses, their employees and the communities that they support merely because a model is manipulated differently.

In the submission of NSWIC, this Committee must understand that vague nature of the “science” proposed to be used to devastate rural and regional NSW. It verges on anathema to science itself.

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<sup>1</sup> MDBA CEO Rob Freeman, Address to Institute of Engineers, Sydney November 2010

<sup>2</sup> MDBA Technical Workshop, Day 1, Canberra, November 2010

<sup>3</sup> Op cit, Day 2

## Background

It has long been the position of NSWIC that the National Water Initiative (NWI), as agreed by all Basin States in 2004, 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...<sup>4</sup>*

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.<sup>5</sup>*

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...<sup>6</sup>*

In the submission of NSWIC, the chasm of difference between the Guide to the Basin Plan 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 Commonwealth *Water 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 *Water 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 social and economic considerations able to be undertaken by the MDBA have been the subject of what appears to be conflicting legal analysis, although provided on both occasions by the Australian Government Solicitor (AGS). NSWIC understands that the MDBA sought advice in the first instance upon which they acted to provide a Guide which focuses solely on environmental outcomes, with social and economic consequences limited in role to description only. We have been extremely critical of the outcomes of that descriptive work in any event and continue to advocate as such in this document.

Subsequent to the release of the Guide and the public statements by MDBA Chairman Mike Taylor and Chief Executive Rob Freeman<sup>7</sup> that the *Act* required environmental precedence, Commonwealth Minister for Water Tony Burke obtained (and released)

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<sup>4</sup> Ibid, paragraph 23

<sup>5</sup> National Water Initiative, paragraph 2.

<sup>6</sup> Ibid, paragraph 36.

<sup>7</sup> Comments at Senate Estimates (19 October at page 15) and Consultation sessions both before and after Estimates

further legal advice from the AGS in respect of the consideration of social and economic matters. Whilst Minister Burke interpreted that advice such that the Authority *is* able to take social and economic matters into consideration in setting Sustainable Diversion Limits (SDLs), NSWIC has publicly questioned that interpretation of the advice<sup>8</sup>. In our submission, the advice says that social and economic consequences can be taken into account where decisions are available in servicing an environmental asset.

NSWIC submits that this process most certainly does not provide balance as it clearly does not treat environmental, social and economic outcomes as equivalents. It clearly treats the latter two as secondary considerations which can be taken into account only after the environmental outcome is given primacy.

Moreover, this approach does not even consider the NWI concept of “trade-offs”, demonstrably undermining the approach agreed between all States and the Commonwealth.

NSWIC has publicly questioned both MDBA Chairman Mike Taylor and National Water Commission (NWC) Chairman and CEO Ken Matthews as to the compliance of the Basin Plan with the triple bottom line outcome advocated by the NWI. Both responded that a Basin Plan focused on only one outcome was not compliant<sup>9</sup>.

In October of 2010 at Senate Estimates Hearings, Authority Chief Executive Officer Rob Freeman was asked the following question by Senator Birmingham:

*“...if the new research you have done on social and economic impacts comes back and says, ‘3,000 is too great a social and economic impact’ where does that leave the authority in that situation?”<sup>10</sup>*

Mr Freeman neatly summed up the lack of balance in his answer:

*“That would ultimately drive the authority to have to choose 3,000, I believe.”<sup>11</sup>*

That is, when social and economic consequences are stacked against environmental consequences, environmental considerations will not be considered equally but will be given primacy.

In the submission of NSWIC, the Guide to the Basin Plan is not compliant with the National Water Initiative. The now-departed Chief Executive Officer of the National Water Commission, the body established as the custodian of the NWI, stated that a Plan that does not deliver a triple bottom line approach will not be compliant. The Commission has been curiously silent since the release of the Guide. In the submission of NSWIC, a request for an opinion from that body by this Committee would be extremely valuable.

It is our submission that the *Act*, for reasons of political expediency, has abandoned the principle of balance in order to achieve Constitutional relevance<sup>12</sup>.

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<sup>8</sup> First Appendix to this Submission.

<sup>9</sup> Ken Matthews at NSWIC meeting in Sydney, July 2010, Mike Taylor at Australian Cotton Conference, Gold Coast, August 2010.

<sup>10</sup> Senate Estimates 19 October, Hansard, page EC17

<sup>11</sup> Op cit.

<sup>12</sup> See following section of this paper.

***The capacity to “consider” social and economic impacts is insufficient to approach the balance that the NWI demanded.***

It is therefore the submission of NSWIC that the Committee must advise the Government that, in fulfilling its obligations pursuant to the *Act*, the Murray-Darling Basin Authority, the Minister, the Parliament and the Australian Government will be in breach of the NWI.

The only way to deliver on the commitments of the Commonwealth to the States of the NWI is to change the Commonwealth *Water Act*.



## **The History and Resultant Problems of the *Water Act***

NSWIC firmly believes that the problems attributed to the Guide to the Basin Plan are, in fact, primarily caused by a fundamentally flawed *Water Act*. A full analysis of the *Act*, together with its background, is annexed to this Submission<sup>13</sup>.

We submit that the Basin Plan is built upon the foundations of the *Act*. The Authority is operating under the directions of and subject to the strictures of the *Act*. During the course of many public “consultation” sessions, senior officers of the Murray-Darling Basin Authority have referred to the requirements that the *Act* places upon them, including environmental precedence.

We submit that it is incumbent on the Committee to fully consider the *Act*, how the *Act* came to be what it was and to consider if the *Act* delivers on the reform pathway set out by the NWI. We submit that in order to give full consideration to the Terms of Reference and, moreover, to the issues at hand, the Committee must advise the Parliament if a triple bottom line approach is mandated by the *Act* or if the *Act* ought be altered to deliver that outcome.

### **Seismic Change from *Bill* to *Act***

As the NSWIC Briefing Paper on the *Act*<sup>14</sup> 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<sup>15</sup>.

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.

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<sup>13</sup> Second Appendix to this Submission.

<sup>14</sup> Ibid.

<sup>15</sup> [www.nswic.org.au/pdf/Water Act/Water Bill.pdf](http://www.nswic.org.au/pdf/Water%20Act/Water%20Bill.pdf)

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<sup>16</sup>. The *Act*, on the other hand, completely reverses this approach by adding the “without limiting” criteria to “giving effect to relevant international agreements.”<sup>17</sup>

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:*<sup>18</sup>

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 *Act*,

*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...*<sup>19</sup>

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<sup>16</sup> Section 3 (c) of the *Bill*

<sup>17</sup> Section 3 (d) of the *Act*

<sup>18</sup> Section 19 of the *Bill*, Section 20 of the *Act*

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<sup>20</sup>. The objective defining of “the 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<sup>21</sup>. 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<sup>22</sup> or implied<sup>23</sup> 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. It does not, cannot and will not provide balance.

The only opportunity for the provision of balance lies in the capacity of the Minister to unilaterally make changes by direction<sup>24</sup>. 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

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<sup>19</sup> Section 4 of the *Act*

<sup>20</sup> At paragraph 36.

<sup>21</sup> Section 8 of the *Bill* and Section 9 of the *Act*.

<sup>22</sup> Section 9(a)

<sup>23</sup> Section 9(b)

<sup>24</sup> Section 44(3)(b)(ii)

account in certain circumstances. It is our submission that “certain circumstances” does not equate to equivalent treatment. Our analysis of the advice<sup>25</sup> concludes that the environment takes primacy, a conclusion backed by a Professor of Constitutional Law.

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<sup>25</sup> Appendix One

## **Aspects of the Triple Bottom Line**

NSWIC notes that the Committee has been asked by the Senate to consider “the social and economic impacts of changes proposed in the Basin”<sup>26</sup> NSWIC submits that focusing only on the social and economic consequences is again inconsistent with a true triple bottom line approach as envisaged by the NWI. In our submission, it is incumbent on the Committee to gain an understanding of what a triple bottom line outcome would be, how it might be achieved and what the obstacles are to achieving it.

Focusing merely on what the social and economic impacts are will not solve the problem; considering the “trade off, as envisaged by the NWI, is clearly the only approach that will.

To that end, submissions below highlight the deficiencies of the Guide, as published, in dealing with each aspect of the triple bottom line.

## **Environmental Considerations**

### *Environmental Watering Plan*

NSWIC submits that the lack of an environmental watering plan is a key weakness of the Guide. The fact that the Commonwealth has become the single largest owner of water in the Murray-Darling Basin without any published plan on how, when or where to use that water is anathema to sensible, practical and rational management of the resource.

A key component of the Basin Plan is the environmental watering plan. The fact that the Guide did not provide – nor even mention – the watering plan has contributed to a dramatic slump in already wavering stakeholder confidence. They ask a simple question – how can you know how much you need in the absence of any plan to apply it?

NSWIC submits that an environmental watering plan with clearly defined objectives and methodology must be an integral part of whatever the Authority publish next, be that an amendment to the Guide or a full Draft Plan.

### *Identification of Assets*

The term “key environmental assets” is not defined in the NWI.

In the *Act*, the term is defined by reference to international treaty and convention obligations together with “ecosystem function”. Whilst the later correctly relates to river systems themselves, the former relates primarily to a series of off-river assets.

The Guide does not provide a list of the “key environmental assets”, but provides instead a series of “indicators assets” which, according to the MDBA, will ensure the health of the full list of assets through their own health. Whilst NSWIC does not dispute (nor necessarily endorse) this methodology, we submit that it is entirely inappropriate to identify a volume of water required for a list of assets without providing that full list of assets.

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<sup>26</sup> Terms of Reference, [www.aph.gov.au/house/committee/ra/murraydarling/tor.htm](http://www.aph.gov.au/house/committee/ra/murraydarling/tor.htm) viewed 15 November 2010.

Moreover, NSWIC fundamentally disagrees with the manner in which that full list was identified. The NWI clearly envisaged a “trade-off” process which has demonstrably not occurred. We further note that the NWI did not note the Ramsar convention (nor any other convention or treaty relied upon by the *Act*) in order to determine a list of assets.

It is the submission of NSWIC that the *Act* has been written such that the Guide identifies environmental assets as an *objective* process whereas the NWI clearly suggested that it was to be a *subjective* process.

NSWIC submits that the MDBA must identify the full list of assets, identify how that list was derived and clearly state their belief as to whether that list can be changed by reference to social and economic impact studies. In the event that the Authority determines that the list cannot be changed, they must indicate why they believe as such and provide reference to both the *Act* and the NWI in making that decision.

#### *End of System Flow as Indicator*

In respect of ecosystem function, NSWIC understands that end of system flow has been calibrated as the determinant of health. The Guide provides no justification for use of this indicator, nor any peer review thereof. We are concerned, particularly in respect of the lower Lakes, that end of system flow when used in conjunction with an assets list may result in double counting of requirements.

We submit that justification of the end of system flow regime for determining environmental health must be provided.

#### *Capacity to Account for Environmental Water*

Significant confusion has emerged since the release of the Guide as to which environmental acquisitions already undertaken are to be used as offsets and which are not. This appears to particularly be the case with State-held environmental watering entitlements.

NSWIC submits that a simple table of all identifiable environmental holdings – State, Commonwealth or Private – as part of the Guide together with an understanding of whether they are accounted for as offsets or not must be provided.

#### *Alternative Approaches*

NSWIC continues to be critical of the “just add water” approach to environmental asset management. Whilst Government has made much of “works and measures” as offsets against Sustainable Diversion Limits, the MDBA have been content to advise that this is the position of Government and is outside their capacity.

NSWIC submits that the role of the MDBA must be significantly beyond the mere letter of the *Act*. During the course of two years of deliberations, the MDBA must surely be aware of instances where “works and measures” could be applied to minimise the volumes of

water required to deliver environmental outcomes. NSWIC submits that it is incumbent on the MDBA to provide a comprehensive report to Government on this matter.

Further, NSWIC submits that a full suite of environmental management alternatives both can and must be presented by the MDBA. In particular, complementary land management alternatives must be explored along with the possibility of purchasing environmental assets where they are privately owned.

NSWIC submits that a failure to examine alternatives to the simple provision of vast quantities of water clearly fails the objects of the *Act*, and the professed policy of Government, to limit the social and economic consequences of the removal of productive water whilst maximising environmental circumstances.

### *Averaging Period*

NSWIC is dismayed that no averaging period for Sustainable Diversion Limits has been professed in the Guide. This indicator is vital to develop an understanding of impacts on environmental, social and economic assets. The absence of this vital information is a sad indictment on the value of the Guide subsequent to two years work.

### **Economic Considerations**

The economic impact data provided in the Guide to the Basin Plan is, in the submission of NSWIC, an indictment on the capacity of the MDBA to deliver a meaningful, practical and implementable Basin Plan. The callous and, frankly, negligent manipulation and presentation of the data calls into question the very independence of the MDBA.

NSWIC submits that the economic data and its analysis to date must be immediately withdrawn and substituted with sensible, unbiased and practical data. Waiting for further reports and analysis will not satisfy stakeholders. A simple and immediate acknowledgement from the MDBA that the data as presented is grossly misleading is necessary together with a withdrawal of the analysis in the current Guide must occur.

The issues of lost employment and productivity were first raised at the lock up prior to the public release of the Guide, where stakeholders and the media had been separated. In the submission of NSWIC, it was that separation – a blatant attempt to media manage the reporting of the Guide – that led to the reporting of figures that are entirely misleading. The Guide to the Basin Plan clearly states that lost employment from the reductions proposed will be limited to 800 jobs and productivity to \$800m. This information was presented to media in the absence of stakeholders. The information was then used to create copy. By the time stakeholders were able to interact with the media, the figure had essentially become fact by virtue of the passage of time.

Since publishing the figures, MDBA Chairman Mike Taylor and CEO Rob Freeman have repeatedly distanced themselves from them. In the submission of NSWIC, this is well beyond inappropriate. If the Authority is not prepared to stand behind figures and testify to their veracity, accuracy and accountability, then they should not propagate those figures. In short, if you don't believe it – then don't say it!

NSWIC has examined the data upon which the 800 job loss/\$800m productivity loss extrapolations were based and notes the following;

- The results are based on a 20 year simulation;
- The 20 year simulation provides analysis of end point impact, which clearly shows that the MDBA *did not* take into account short or medium term impacts or the proposals contained within the guide;
- The simulation assumes full employment economy wide across the full two decades of the data analysis, a situation which has *never occurred* across any economy in recorded history;
- The simulation assumes a frictionless scenario for labour or, in simple terms, assumes that individuals cast into unemployment in the Basin are prepared to immediately move elsewhere despite having significant equity (their house) in the Basin;
- The use of Gross Value of Irrigated Agricultural Production (GVIAP), an experimental dataset, is used to suggest bottom line impacts. This is an entirely misleading and inaccurate use of the dataset, as it *does not calculate profitability*. Further analysis on this point is provided below;
- The year-on-year analysis of GVIAP against water allocations, aside from the incorrect interpretation of GVIAP as a measure of profitability or economic sustainability, is statistically invalid. Both GVIAP and profitability are driven by a wide range of variables, of which water availability is but one. The economic analysis in the Guide fails to consider other inputs (fertiliser, labour, cost of capital and so on) and other market factors (exchange rates, commodity prices and so on); and
- The Guide suggests that irrigated agriculture adjusts due to water shortages such that productivity decline is small. Those very same figures fail to take into account the basic economic certainty of inflation, rendering them utterly useless.

GVIAP is based on taxation receipts. It provides a figure that is simply output multiplied by output price. It does not in any way address bottom line performance and as a result is not a measure of profitability. To suggest otherwise – either directly or via extrapolation of allocation across multiple years – is either deliberate misuse of the data or gross negligence in economic analysis.

By way of example, GVIAP for 2006/07 would suggest a stellar performance. The reality was far different. Those irrigation entities that continued to produce did so in the face of massive input costs. They proceeded thus in order to keep permanent plantings alive, paying record prices for water as they did so. This was only achieved through the mining of capital reserves resulting in significant erosion of equity. To assume profitability on the basis of equity mining is an accounting error of enormous proportions, and example of which was the well documented collapse of Enron. The fact that the MDBA has made such a glaring and egregious assumption must send a shiver down the spine of all Australians.



The sheer enormity of basic error in calculation of economic impacts suggest something far more sinister than incompetence. In the submission of NSWIC, the calculation and presentation of the figures was *deliberately* designed to mislead and has achieved exactly that aim. NSWIC submits that the figures must be withdrawn immediately, a public apology issued to the tens of thousands of people across the Basin who rely on irrigation for employment for economic existence and urgent work undertaken to remedy this matter.

## **Social Considerations**

The lack of analysis of social impacts within the Guide clearly shows that a triple bottom line approach has been ignored.

Moreover, social impact analysis is essentially limited to consideration of flow on effects from reduced economic activity. This analysis has again relied on an incorrectly interpreted GVIAP dataset, rendering it essentially useless even as a small part of the social impact calculation.

Communities across the depth and breadth of the Basin rely on irrigated agriculture to achieve critical mass. With the lack of that critical mass, those communities face oblivion. The fact that but three paragraphs of the Guide, at page 98, are devoted to long term social consequences is anathema to a true triple bottom line approach.

NSWIC acknowledges that the MDBA have commissioned further social and economic impact studies, but believe that such a reaction is merely admission of the fact that initial work was completely insubstantial to a level of neglect.

## **Terms of Reference**

### **The implications for agriculture and food production and the environment**

NSWIC has been particularly critical of the lack of examination of implications. What examination has been conducted has been either scant or patently incorrect.

This submission considers implications at social and economic level under the final term of reference.

In respect of environmental implication, NSWIC submits that it would be incorrect to assume that all environmental impacts associated with the Basin Plan will be positive. It is widely recognised in rural communities that farmers – including irrigators – are some of the best environmental custodians that Australia has to offer. A significant percentage of farmers invest considerable time, effort and money into environmental management not only on their own property but within their own community. Removing their capacity to operate profitably – or reducing that profitability – clearly reduces their capacity to provide environmental services.

### **The social and economic impacts of changes proposed in the Basin**

These matters were considered earlier in this submission<sup>27</sup>.

### **The impact on sustainable productivity and on the viability of the Basin**

NSWIC is particularly concerned that the economic analysis undertaken to date has been linear in nature. That is, it has not considered what is commonly referred to as “tipping points”, or calculation of minimum production levels to support processing facilities.

This matter is considered in full at page 19.

### **The opportunities for a national reconfiguration of rural and regional Australia and its agricultural resources against the background of the Basin Plan and the science of the future**

NSWIC makes no submissions against this term.

### **The extent to which options for more efficient water use can be found and the implications of more efficient water use, mining and gas extraction on the aquifer and its contribution to run off and water flow**

NSWIC submits that massive gains in water use efficiency have been realised by productive water users over time and that gains continue to be made.

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<sup>27</sup> See page 14

It is, however, simply not feasible to suggest that efficiency gains to the extent of the cuts proposed in the Basin Plan Guide can be realised. Moreover, NSWIC submits that the Committee must recognise that efficiency (or productivity) gains are necessary on an annual basis in any event merely to keep pace with inflation and to remain competitive in an international marketplace.

NSWIC has concerns in respect of the impact of mining on productive water. In particular, we harbour concerns over the use of long wall mining techniques in proximity to aquifers and over the use of chemical fracturing techniques used in the extraction of coal seam gas. We submit that anything short of absolute certainty that an aquifer will not be damaged or negatively impacted is necessary prior to approval of mining activity in proximity to it.

### **The opportunities for producing more food by using less water with smarter farming and plant technology**

NSWIC has long been a proponent of infrastructure investment – both on and off farm – as a means of acquiring environmental water. We continue to maintain that position.

### **The national implications of foreign ownership, including (i) corporate and sovereign takeover of agriculture land and water and (ii) water speculators**

NSWIC was founded on the belief that water ought be properly considered as a property right. To that extent, we believe that the remit of the Foreign Investment Review Board ought be extended in water to the same paradigm in which it considers real property transactions.

NSWIC does not advocate alienating potential holders of water entitlements without sound reason.

### **Means to achieve sustainable diversion limits in a way that recognises production efficiency**

NSWIC makes not submissions against this term.

### **Options for all water savings including use of alternative basins**

NSWIC supports the full investigation of all possibilities for the acquisition of water from alternative sources, together with increased storage capacity and opportunity within the Basin. Where sources external to the Basin are considered, we remain mindful of local impacts and the current uses of that water.

## **Any Other Related Matters**

### ***The direct and indirect impact of the Proposed Basin Plan on regional communities, including agricultural industries, local business activity and community wellbeing.***

This term essentially encompasses a large part of the work that the Authority was tasked with completing but has singularly and spectacularly failed to address.

#### *Determining impacts*

Prior to the release of the Guide, NSWIC collated, assessed and made publicly accessible a spreadsheet which interrogated existing data in the public domain to assess economic impacts in terms of both lost productivity and lost employment by valley across NSW. That spreadsheet, dubbed an “impact calculator”, is publicly available for free download from our website<sup>28</sup>.

NSWIC did not create any new data for use in our calculator. We drew upon existing data sources to calculate linear impacts. We used standard statistical multipliers to calculate flow on (broader economy) employment and productivity impacts. Our model did not make assumptions in respect of diversion of assets to alternative uses. We are completely upfront about the limitations of our modelling and have provided – in the public domain – all data, all assumptions and all calculations.

Our model shows that at the lowest levels of proposed cuts advocated by the Guide and at the bare minima across data sets, jobs losses in NSW alone would exceed 17,000 and productivity loss would approach \$2.4 billion annually.

These impacts will be felt almost immediately. Unlike drought, where the prospect of recovery is merely a matter of time, cuts to water availability for irrigated agriculture will be permanent with no prospect of recovery. There will be no drawdown of capital reserves in order to maintain operations in recovery-ready state. Employees will not be retained but will be laid off immediately. Equipment orders will not be deferred – they will be cancelled. The loss of turnover in businesses in communities will be dramatic, immediate and permanent. Communities where significant permanent purchase has already been effected – such as Moree – stand as unfortunate but ideal examples of the massive impact removal of productive water will have.

#### *MDBA data*

By contrast to the data made available by NSWIC – a three staff operation with a budget less than half a million dollars per year – the MDBA published economic impact data from which it retreated even before the “lock up” release had concluded. The taxpayer funded Authority, with hundreds of staff and tens of millions of dollars, provided a Guide containing economic impact statements which could not withstand scrutiny lasting a matter of minutes, let alone the permanent timeframe across which those impacts will be visited. The tens of thousands who attended “consultation” meetings across Australia legitimately voiced their concern at this singular disgrace.

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<sup>28</sup> <http://nswic.org.au/pdf/basinplan/Basin%20Plan%20Impact%20Calculator.xls>

As previously noted in this submission, the Authority published economic impact data that suggested a loss of 800 jobs and \$800m in productivity Basin-wide. We have previously submitted that these numbers are absurd and are based on unsustainable assumptions.

Our concern, however, is the acceptance in the public domain of data published by the Authority. Despite the protestations of Chairman Mike Taylor at the media lockup during the release of the Guide (from which stakeholders were excluded) that “the data that you just quoted is not data we’re saying is correct in any shape or form”<sup>29</sup>, the figures were widely quoted in the news media and have been used by environmental lobbyists ever since.

It is vital that Australia and Australians understand the impacts and costs of diverting water to a subjective list of environmental assets. NSWIC and those that we seek to represent do not object to sensible environmental management – but in seeking balance, we legitimately seek accurate information. The inability of the Authority to deliver that is tantamount to fraud committed on the Australian public.

### *Failure to consider non-linear impacts*

Aside from the poor data presented, the methodology in deriving that data and the unwillingness to stand behind it, NSWIC submits that the data was intrinsically flawed in its linear nature. The Authority has not considered, we submit, minimum production levels required to maintain profitability. These points have been loosely termed “tipping points”. That is, the point at which production facilities are no longer economically viable as insufficient throughput is achieved from lowered production. Once this occurs, the impact curve is no longer linear but essentially achieves infinity.

As an example, consider a cotton gin. Its optimum level of throughput is likely 100%. If production decreases such that it achieves only a 75% throughput, it is no longer operating at maximum efficiency, although it may still be operating profitably. At 50%, the profitability may be stretched. At some point along the curve, though, its profitability has collapsed entirely and it is no longer able to economically operate. At this point, the balance throughput is no longer able to be processed, essentially shutting down whatever production remains.

Without economically feasible processing facilities, impacts on industries, communities and entire economies are 100%.

This danger is real and obvious, yet absolutely no investigation has been undertaken by the Authority, the Department or any consultant. NSWIC submits that the Committee must report to the Parliament that this investigation has not been undertaken – and absolutely must be prior to any further action.

### *Challenging the “science”*

NSWIC notes that both the Authority and the Minister for Water have publicly stated that they wish to see the “science” presented in the Guide “challenged” by stakeholders. They have both noted that such challenge, if successful, can alter the outcomes proposed by

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<sup>29</sup> MDBA Chairman Mike Taylor to Guide lockup news conference. See NSWIC YouTube channel.

the Guide. Whilst acknowledging the intent of such statements, NSWIC submits that such challenge to a vast array of specialised technical detail that would necessarily consume massive resources is simply not possible for the overwhelming majority of stakeholders. In any event, the flawed “science” presented to date by the Authority has been in production for over two years. By contrast, stakeholders without resources anywhere near those of the taxpayer funded Authority have been provided a matter of weeks in which to respond.

### *Summary*

In summary for this term of reference, NSWIC submits that neither the Authority, nor the Government nor the people of Australia have any clear and firm understanding of the social and economic impacts should the Guide be implemented. We submit that it is incumbent upon the Committee, its Members and the Australian Parliament to at very least firmly understand what the impacts will be prior to even contemplating implementing a Basin Plan. To do otherwise is a clear abrogation of the responsibility that the people of Australia have bestowed upon each.

### ***Options for water-saving measures or water return on a region-by-region basis with consideration given to an analysis of actual usage versus license entitlement over the preceding fifteen years***

Considerations of how or where to “return” water are premature. Until such time as the framework for what we, as a nation, are trying to protect, what those assets best require for protection and where those assets are located, consideration – let alone entitlement acquisition – is misguided and premature.

One of the key aspects of the Basin Plan is the Environmental Watering Plan. No such Plan was provided in the Guide. To the best knowledge, information and belief of NSWIC, the acquisition program embarked upon to date by the Commonwealth has been entirely without a Plan. Then Minister for Water Senator Penny Wong noted, as did her Department, that purchasing was on a “no-regrets” basis. It is the submission of NSWIC that the point of regret is very rapidly approaching, if it has not already been breached.

When foundational questions have been successfully resolved, NSWIC will advocate that acquisition is best occasioned through investment in infrastructure (including for environmental use), best practice environmental asset management (“just add water” is far from a sensible policy approach) and on-market acquisition through minimal production-impact water products (River Reach, for example).

### ***The role of governments, the agricultural industry and the research sector in developing and delivering infrastructure and technologies aimed at supporting water efficiency within the Murray-Darling Basin***

Irrigated agriculture is – and generally has been – an early adopter of technology. The sector has been responsible for massive and sustained increases in productivity and water use efficiency. Whilst NSWIC agrees that efficiency gains are continually necessary, the level to which those gains can be made needs to be addressed. It is a simplistic solution to

assume that the levels of cuts advocated by the Authority can be achieved through productivity increases.

NSWIC submits that business in and reliant upon irrigated agriculture must ensure efficiency dividends sufficient to meet inflation occur year-on-year in any event. Any further efficiency gains to meet reduced diversion limits must come on top of that.

As a barrier to the necessity to achieve further efficiency gains, NSWIC notes that research and development funding across agriculture is based on production volumes. Government contributes on a dollar for dollar basis with industry. Should significant reduction in production result from reduction in productive water availability, the resultant drop in funds for research and development will be magnified thereby paradoxically reducing the capacity for further R and D based gains.

### ***Measures to increase water efficiency and reduce consumption and their relative cost effectiveness***

NSWIC is of the opinion that water acquisition through infrastructure will likely be more expensive than that simply purchased on market when viewed through a narrow prism of megalitre versus dollar outlaid. At the same time, NSWIC submits that a broader view of cost and benefit must be assumed, such that the contributions of continued production and flow on effects in regional areas are counted as part of the benefit.

NSWIC notes that the Productivity Commission conducted a review into matters associated with this term of reference. Copies of submissions made to that Inquiry by NSWIC are available on the Commission's website.

### ***Opportunities for economic growth and diversification within regional communities***

NSWIC recognises and applauds the quantity and value of work that has been undertaken by a number of communities across the Murray-Darling Basin to augment their economic base.

The key word, however, is "augment". Those communities across the Basin that were built on irrigation are and always will be reliant on irrigation. Any additional activity – tourism, processing, retail, services – are all ancillary to the base load economy provided by irrigation. Without water, there is no irrigation. Without irrigation, there is no base load economy. Without a base load economy, there is no regional community.

### ***Previous relevant reform and structural adjustment programs and the impact on communities and regions***

It would be a complete misnomer to suggest that reform and adjustment are new in the Murray-Darling Basin. For decades, water "reform" has been ongoing. NSWIC notes that such reform – particularly in the last twenty years – has not been in favour of productive water use but has primarily been in respect of diversion of water for environmental benefit. This is not to suggest that such benefit does not exist, but to note that the irrigation sector

has embraced such reform where it has been reasonable, rational and well implemented. NSWIC submits that of the process of the Basin Plan seen to date, none of those three can be considered achieved.

Perhaps the most pertinent of the recent relevant reforms has been the Achieving Sustainable Groundwater Entitlements (ASGE) program across NSW. This program, a joint offering of the Commonwealth and NSW Governments, was to bring about a “once and for all” solution to groundwater aquifer use in inland NSW. Many regions suffered massive cuts to groundwater availability. A compensation regime was initially completely lacking, but was eventually funded by both levels of government but at a value well below the market value of the water removed.

“Reform fatigue” is a concept more at home in the pages of a text book, but the ASGE program provides an unfortunately accurate practical example. The “once and for all” solution has not lasted half a decade before the Basin Plan is introduced suggested further savage cuts to those same aquifers that had been reduced to sustainable levels. NSWIC understands from MDBA briefings that the “necessity” for further reductions lies in the different definition of “sustainable” applied across both programs. In light of this, NSWIC submits that it is far from difficult to understand the level of reticence amongst groundwater irrigators to embrace any further “once and for all” change.

Further associated with the ASGE program was a community structural adjustment program. Perhaps the greatest challenge to continued trust by not only irrigators but the communities in which they live is the fact that money in this fund did not flow entirely to the community funds to which it was destined. In a program jointly funded by the Commonwealth and NSW, the Commonwealth diverted part of its contribution to a groundwater study. NSW did not believe that this was within the agreed terms and, as a result, simply diverted its matching contribution back to consolidated revenue.

In short, governments at all levels have essentially destroyed in previous programs the vast majority of credibility that they held. Communities are cynical about “structural adjustment”, particularly in light of further credibility damage by the MDBA.

When governments, officials or consultants are able to identify an alternate economic base for an irrigation community on which to build its future, perhaps credibility will be restored. In the meantime, “structural adjustment” will not buy the respite sought.

## **Conclusion**

The foundation of the Basin Plan is the *Water Act*. The *Water Act* is fundamentally flawed and must change. The sooner that change is affected, the sooner the concept of triple bottom line sustainability can be pursued across the Basin.

ENDS



# **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 due 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."<sup>30</sup> 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."<sup>31</sup> 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..."*<sup>32</sup>

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 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.<sup>33</sup>

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.

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<sup>30</sup> Legal advice, AGS, at par 9.

<sup>31</sup> Act s 3(c) as noted in advice par 10.

<sup>32</sup> Legal advice, AGS, at par 23.

<sup>33</sup> [www.abc.net.au/rural/news/content/201010/s3049282.htm](http://www.abc.net.au/rural/news/content/201010/s3049282.htm) viewed 27 October 2010.

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

## **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.

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