



Murray Group of Concerned Communities

Submission to the
Senate Legal and Constitutional Affairs References Committee

Inquiry into the Provisions of the Water Act 2007

The MGCC represents the Central Murray region of 31,300 people who are passionate about living and working in these regional and rural communities. The Central Murray communities have already given 17 per cent of water entitlements to the environment.

Supported by: Berrigan & District Development Association, Berrigan Shire Council, Berriquin Landholders Association, Bullatale Creek Trust, Conargo Shire Council, Deniboota Landholders Association, Deniliquin Shire Council, Deniliquin Pastoral Times, Denimein Landholders Association, Jerilderie Shire Council, Moira Private Irrigation Scheme, Murray Catchment Management Authority, Murray Irrigation Limited, Murray Shire Council, Murray Valley Community Action Group, Murray Valley Private Diverters, Murrumbidgee Private Irrigators, Peppin Planners, RAMROC, Ricegrowers' Association of Australia, Southern Riverina Irrigators, Sunrice, Wakool Action Group, Wakool Rivers Association, Wakool Landholders Association, Wakool Shire Council, West Berriquin Landholders Association, West Cororgan Private Irrigation

Introduction

The Murray Group of Concerned Communities (MGCC) encompasses the communities within the Deniliquin, Conargo, Jerilderie, Wakool, Murray and Berrigan shires, and endeavours to represent these communities represented by its 28 supporting groups.

The MGCC has read and endorses the submissions provided to the Committee from the National Irrigators Council and the NSW Irrigators Council and Murray Irrigation Limited.

Request to Address the Committee

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

Overview

The MGCC believes it is not necessary to be an expert in water policy to understand that the *Water Act 2007* (the Act) does not allow for the delivery of the triple bottom line outcomes espoused in the National Water Initiative (NWI).

There has been a significant conflict in the legal advice received by the Gillard Government and the MDBA. Minister Burke has made it clear that he believes that the advice he has received from the Australian Government Solicitor allows for the consideration of triple bottom line outcome, while the MDBA, prior to the appointment of Craig Knowles were adamant that their legal advice, from the same Australian Government Solicitor, shows environmental aspects must be given priority.

In order to fully assess the management of the Murray Darling Basin, the MGCC recommends that the Committee view the advice given to the MDBA as well as seek its own legal advice in order to make conclusive recommendations to the Parliament in relation to the parameters of the *Water Act*.

The MGCC supports amending the Act in a way that will see it brought back into line with the objectives of the NWI, formed in agreement by all Basin States in 2004. The NWI clearly laid out that a triple bottom line outcome was to be sought and achieved by the weighting of competing objectives equally:

“Decisions about water management involve balancing sets of economic, environmental and other interests.”¹

The NWI was on the way to delivering on these objectives through initiatives including the Living Murray program and the Water Sharing Plans (WSPs) and other environmental programs that saw the return of 200GL of water entitlements recovered from the Murray Irrigation area alone. Unfortunately, the extreme and prolonged drought postponed or suspended the full implementation of the WSPs which we believe, if given time, would have proven to have environmental and economic benefits into the long term.

The NWI recognises the imperative to “increase the productivity and efficiency of Australia’s water use, the need to service rural and urban communities, and to ensure the health of river and groundwater systems...”² and that “...settling the trade---offs between competing outcomes for water systems will involve judgements informed by the best available science, socio---economic analysis and community input...”³.

The essence of the NWI has not been embedded into the Act; the trade-off of competing interests outlined in the intergovernmental agreement, is not possible, or able to be contemplated, as it is presently drafted.

¹ National Water Initiative, paragraph 23

² Intergovernmental Agreement on a National Water Initiative, para 5

³ Intergovernmental Agreement on a National Water Initiative, para 36

Terms of Reference

The MGCC does not pretend to have legal expertise in the area of water policy and is therefore limited in its capacity to address the terms of reference with legal certainty; however we feel it is important to outline our understanding of the Act and its limitations as it is currently written.

1. Any ambiguities or constraints in the Act which would prevent a Basin Plan from being developed on an equally weighted consideration of economic, social and environmental factors:

In order for the Commonwealth to regulate Basin waters, the Act was drafted to enable the Government to exercise external powers particularly relating to the implementation of international agreements. While social and economic factors are incorporated in the Act, it is “subject to” giving effect to these international agreements, the content of which limit the achievement of an equal balance.

The AGS advice released by Water Minister Tony Burke in October 2010, in discussing the Convention on Biological Diversity and the Ramsar Convention states:

“Both Conventions establish a framework in which environmental objectives have primacy...”⁴

The Minister points to the objects of the Act to support his claim that there is scope to deliver a triple bottom line, however, we contend that the very object he directs us to places international agreements as the priority for the Basin Plan.

Water Act, Section 3 (c)

“in giving effect to those [international] agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental issues.” (emphasis added).

Further, the principles of ecologically sustainable development as stated in the Act, Section 4 (2) (d) say:

“the conservation of biodiversity and ecological integrity should be a fundamental consideration in decision-making.” (emphasis added).

Finally, Section 21 of the Act outlines the basis on which the Basin Plan is to be developed and it does not mention “social and economic” until subsection 4 and then it is “**subject to**” previous environmentally focussed subsections (1), (2), and (3).

2. The differences in legal interpretations of the Act:

There are many conflicting opinions about the ability of the Act to achieve a triple bottom line Basin Plan. Water Minister, Tony Burke, supported by MDBA Chair Craig Knowles believe it can be done, while former Chair of the MDBA, Mike Taylor and several prominent law experts, including Professor George Williams of the University of New South Wales are firm in their views that the environment must come first under the Act. The MGCC is of the belief that the different opinions, even where interpreting legal advice is from the same institution – the Australian Government Solicitor (AGS) - is proof enough that the Act needs to be changed in order to clarify its intent.

3. The constitutional power of the Commonwealth to legislate in the area of water:

It is the understanding of the MGCC that for the Commonwealth to assume responsibility for the management of Murray Darling Basin Waters, the State's would have to refer those powers to the Commonwealth in accordance with section 51 (xxxvii) of the Constitution and/or through State Legislation. To circumvent this requirement the Commonwealth looked for other Constitutional heads of power it could call upon to devise a Basin Plan.

⁴ *The Role of Social and Economic Factors in the Basin Plan*, AGS, 25 October 2010, para 23

According to the AGS, the provisions of the Act that relate to the Basin Plan are supported by the treaty implementation aspect of the external affairs power in the Constitution⁵ - Section 51 (xxix). In the footnotes of the AGS advice they further clarify that

“Part 2 of the Water Act which deals with most aspects of the making of the Basin Plan is not supported by the referral of powers by the Basin States and relies solely on the Commonwealth’s own constitutional powers”⁶

It is our contention that the Constitution does not grant the Commonwealth the power to legislate on water management issues, outside calling on external powers, without either a referral of power from the States or uniform State legislation.

MGCC are not experts in constitutional law and are reluctant to comment on the constitutional validity, however, we remind the Committee of Section 100 of the Australian Constitution, which – while talking about regulation of trade – reinforces the rights of the State to the reasonable use of waters:

“The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the rights of the State or of the residents therein to the reasonable use of the waters of the rivers for conservation or irrigation”

4. The role of relevant international agreements and the effect of those on the parts of the Act which direct the Basin Plan to give effect to those agreements and their effect on the Act more generally:

The Act repeatedly reaffirms the overarching objective to “give effect to relevant international agreements” in both the objects of the Act, Section 3 (b) and in the basis for the Basin Plan, Section 21 (1) and again in 21 (3) (c) (i) (Ramsar Convention) to name just a few. As these international agreements are environmentally focused, then so too must the Act be environmentally focussed.

In order to rely on external powers, the Commonwealth must implement these international agreements faithfully as expressed by Professor George Williams, constitutional law expert at the University of NSW:

“Any Basin Plan must be consistent with the international agreements or face being struck down by the High Court. The result is a Water Act that says that the authority must ensure as a first priority that the Basin Plan gives effect to the international conventions”⁷

It is the view of the MGCC that the overarching objective of the Act to give effect to the international agreements and the primacy those agreements place on the environment has a knock-on effect into the Act and the Basin Plan.

5. Any amendments that would be required to ensure that economic, social and environmental factors are given equally weighted consideration in developing the Basin Plan.

MGCC does not have the expertise or resources to be able to provide advice on the amendments that would need to be enacted to achieve a Basin Plan that delivered a triple bottom line, suffice to say they would need to be comprehensive to ensure the intent of the Act is clear.

Where ever the current Act refers to social and economic factors, they are always “subject to” previous requirements to meet international agreements or other environmental aspects. While on the surface it would appear that removing these “subject to” criteria would enable the Basin Plan to deliver the triple bottom line, without a referral of powers by the States, or uniform State legislation, such a simple amendment may not be constitutional under the external powers provisions.

⁵ *The Role of Social and Economic Factors in the Basin Plan*, AGS, 25 October 2010 para 9.

⁶ *The Role of Social and Economic Factors in the Basin Plan*, AGS, 25 October 2010, footnote 26.

⁷ *When Water Pours into Legal Minefields*, George Williams, <http://www.smh.com.au/opinion/politics/when-water-pours-into-legal-minefields-20101025-170uf.html> viewed 10 March 2011

This is an area that the Committee should review further. Examples of these clauses include, but are not limited to:

- a. Water Act 2007, Section 3(c) reads:
“In giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes.”
- b. Section 21 (4) reads:
“Subject to subsections (1), (2) and (3), the Authority and the Minister must, in exercising their powers and performing their functions under this Division:”

6. Any other related matter:

It is the view of MGCC that the Act, while written to give effect to relevant international agreements, Section 21 unnecessarily goes further where it states:

- “(3) (c) take account of the ecological character descriptions of:
- (i) All declared Ramsar wetlands within the Murray-Darling Basin; *and*
 - (ii) All other key environmental sites within the Murray-Darling Basin
(emphasis added)

In our opinion the addition of clause (ii) increases the environmental focus of the Act and has led to the identification of 2,442 “key environmental assets”, of which only 1,033 meet the criterion as being “formally recognised in, and/or is capable of supporting species listed in, relevant international agreements”⁸. The MGCC questions whether this has led to Sustainable Diversion Limits that are excessive to that which would be required only to meet the international treaty obligations.

MGCC would ask the Committee to consider this issue and look closely at the Act to ascertain if there are any other areas that increase the environmental focus of the Act.

A further concern with the Act is its restriction to dealing only with water and flow as a solution to the environmental problems of the river system.

Conclusion

The MGCC does not oppose the progression of water reform in rural and regional communities and, like many other organisations, is keen for the exploration of ideas that can benefit their communities by helping the local environment and making local farming businesses more efficient and profitable.

The MGCC supports the notion of a Basin Plan that meets the objectives of the NWI and delivers for social, economic and environmental outcomes. We believe this is ultimately achievable, but not under the Water Act 2007 that, by constitutional necessity, gives primacy to meeting international agreements that put the environment first.

We urge the Committee to recommend to the Commonwealth that they return to the table with the States and negotiate a referral of powers to the minimum extent needed to allow for a Water Act, and ultimately a Basin Plan, that delivers for people, communities and the environment.

Signed

Bruce Simpson
Chair

⁸ *Guide to the proposed Murray Darling Basin Plan*, MDBA, 2010, Vol 2, p93