



Submission to:

Senate Legal and Constitutional Affairs References Committee

Inquiry into the Provisions of the Water Act 2007

18 March 2011

Prepared by Southern Riverina Irrigators

Introduction

Southern Riverina Irrigators (SRI) is a representative body of Four Landholder Associations located within the Murray Irrigation Region of Southern NSW. The organisation's representation covers an area of 748,000 hectares and 1,600 landholdings.

Through the National Water Initiative and associated programs, such as the Living Murray and the NSW Murray Regulated Rivers Water Sharing Plan (WSP), over 200GL of water has been recovered for environmental purposes in the Murray Irrigation area in which our membership operates. SRI believes there is enough environmental water available in our valley to effectively address this region's environmental assets if current programs and WSP are fully implemented, efficiently managed and evaluated over time.

As a member of National Irrigators Council and NSW Irrigators Council, SRI gives full support to the responses submitted by each body to the Senate Legal and Constitutional Affairs References Committee. Both of these organisations have provided a more detailed in depth submission on the Inquiry into the provisions of the Water Act 2007. We also endorse the submission by Murray Irrigation Limited to this inquiry.

Request to Address the Committee

SRI requests the opportunity to address the Committee to support the evidence and opinions provided in this submission.

Overview

SRI believes the Water Act 2007 does not allow for the delivery of the triple bottom line outcomes espoused in the National Water Initiative (NWI) signed by all States in 2004. We congratulate the Committee for holding this inquiry into the provisions of the Water Act 2007 (the Act).

SRI has heard the many conflicting views about the ability of the Act to deliver a triple bottom line. It is our view that the fact that there are so many differing opinions is cause enough for the Act to be amended to ensure there can be no misinterpretation of its objectives.

The Australian Constitution does not give the Commonwealth the power to regulate waters, in order to do so the States need to refer such powers under section 51 (xxxvii) of the Constitution. The NWI was an Inter-Governmental Agreement and operated through the States implementing the required legislation to meet the commitments of the initiative.

In reacting to the record-breaking drought of the last decade, the then Coalition Government decided to address Basin water policy again, however, this time around, failure of the States and Commonwealth to negotiate a referral of powers, the Commonwealth moved to draw upon powers they do have constitutional control of, in this instance predominantly the external affairs power¹. This power enables the Commonwealth to legislate to enable the implementation of identified international agreements for example, the Convention on Biological Diversity² and the Ramsar Convention³ among others.

By drawing on external powers the Commonwealth must faithfully implement these international agreements, all of which give the environment primacy over other considerations. Therefore, to remain constitutional, the Act must also give the environment primacy.

¹ Australian Constitution, Section 51 (xxix)

² Rio de Janeiro, 5 June 1992, [1993] ATS 32.

³ Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, Iran, 2 February 1971, [1975] ATS 48.

It is our view that in order to deliver a triple bottom line as supported by the National Water Initiative, the States and Commonwealth must recommit to an Inter-Governmental Agreement or negotiate for a referral of powers to enable legislation without the need to rely on environmentally focussed international agreements.

Specific Concerns

By drawing on external powers, the Commonwealth is required to faithfully implement “relevant international agreement(s)” that include:

- The Ramsar Convention;
- The Biodiversity Convention;
- The Desertification Convention;
- The Bonn Convention;
- CAMBA (China, Australia Migratory Birds Agreement);
- JAMBA (Japan, Australia Migratory Birds Agreement);
- ROKAMBA (Republic of Korea, Australia Migratory Birds Agreement);
- The Climate Change Convention; and
- Any other international convention to which Australia is party....⁴

The common factor in all of these international agreements is the fact that they are environmental agreements and therefore place priority on environmental concerns.

While we acknowledge, as does Minister for Sustainability, Environment, Water, Population and Culture, Tony Burke, that the Act does provide opportunities for consideration of social and economic factors, we contest that this is invariably “subject to” consideration of environmental factors.

“...the act can do what it proclaims it wants to do, and that is to optimise the environmental, social and economic outcomes,” Tony Burke, ABC 4 Corners⁵

However, our interpretation of the objects of the Act (Section 3) is that they place priority on giving effect to international agreements; therefore, they place priority on the environment over other factors. Specifically:

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 outcomes.”

That is to say that economic, social and environmental outcomes can only be considered in so far as they allow for international agreements to be implemented.

In short, the primacy the relevant international agreements place on the environment has a knock-on effect into the Act and, finally, into the Basin Plan itself.

International water expert, Professor John Briscoe of Harvard University identified this issue in his submission to this inquiry when he states:

⁴ Water Act 2007, Section 4

⁵ “Backlash in the Basin”, ABC 4 Corners, aired 7 March 2011, transcript:
<http://www.abc.net.au/4corners/content/2011/s3157341.htm>

*"[the]... MDB Basin Plan process was not, in my view, an aberration which can be pinned entirely on the leadership of the MDBA Board and management, but intrinsic to the institutional power concentration that is fundamental to the Water Act 2007."*⁶

This is further evident in Section 21 of the Act which outlines the general basis on which the Basin Plan is to be developed and does not acknowledge social or economic considerations until subsection (4) which is "subject to" the more environmentally focussed subsections (1), (2) and (3). This view is supported by Constitutional law expert, Professor George Williams,

*"Section 21 is clear in stating that... environmental considerations take precedence and that local economic and other concerns must be taken into account "subject to" them."*⁷

SRI are concerned that if the Basin Plan is developed to meet social, economic and environmental outcomes without changes to the Act, the Plan will be open to legal challenge as again identified by Professor Williams:

"Any basin plan must be consistent with the international agreements or face being struck down by the High Court."

It is our belief that the failure of the Act lies with its reliance on the external affairs power. Further, any amendments to the act weakening the ability of the MDBA to put international agreements, and therefore, the environment first would be unconstitutional without a referral of powers or uniform legislation from the States.

Conclusion

It is clear that the Act, as presently drafted, does not allow for equal consideration of social, economic and environmental factors. Further, it is clear that the Constitution does not grant the Commonwealth the power to rectify this on its own.

SRI believe the best solution is for the Commonwealth to return to the negotiating table with the States to develop a new Inter-Governmental Agreement for uniform State laws or for a referral of powers to enable the development of an evenly balanced Basin Plan that addresses equally social, economic and environmental concerns.

Yours faithfully

Ted Hatty
Chairman

⁶ Submission to the Senate Legal and Constitutional Affairs References Committee, Professor John Briscoe, date 24 February 2011

⁷ Williams, "When water pours into legal minefields" 26 October 2010, <http://www.smh.com.au/opinion/politics/when-water-pours-into-legal-minefields-20101025-170uf.html> viewed, 8 March 2011.