



**Murray Irrigation Limited**

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**To:  
Legal and Constitutional Affairs References Committee**

**Submission to the Inquiry on the Provisions of the Water Act 2007**

**18 March 2011**

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## **Introduction**

Murray Irrigation Limited is an unlisted public company that provides irrigation water and associated services to almost 2,400 landholdings through around 3,000km of gravity-fed earthen supply channels over an area of 748,000ha in the NSW southern Riverina. Murray Irrigation's source of water is the regulated River Murray above Barmah Choke and the company's water supply is almost exclusively NSW Murray General Security Water.

Murray Irrigation's shareholders are farmers, with food and livestock being the focus of regional production for both domestic and international markets. With a regional population of around 33,000, irrigated agriculture is the foundation of the social and economic wellbeing of our towns and businesses. Prior to the extreme drought of 2006 and 2007, the Murray Irrigation area of operations produced 50 percent of Australia's rice crop and, in terms of State production, 20 percent of milk, 75 percent of processing tomatoes and 40 percent of potatoes.

Murray Irrigation is a member of National Irrigators' Council and New South Wales Irrigators' Council. We endorse both organisations' submissions to this inquiry.

Murray Irrigation prepared this submission in consultation with Norton Rose Australia, who provide expert legal advice to Murray Irrigation with respect to water legislation and regulation.

## **Request to Present**

Murray Irrigation welcomes the opportunity to supply the Senate Legal and Constitutional Affairs References Committee with this Submission to its Inquiry on the Provisions of the Water Act 2007 and requests the opportunity to address the Committee to support the evidence provided in this Submission.

## Executive Summary

Murray Irrigation commends the Committee for undertaking this review of the provisions of the Water Act 2007 (the Act) and welcomes the opportunity to provide this submission for consideration.

While the scope of this inquiry is to review the Act, we feel it is important to record our issues with the way this Act was drafted, with no consultation with the communities, industries or even States affected by it. As the Murray-Darling Basin Authority (MDBA) failed to consult during the preparation of the Guide to the Proposed Murray-Darling Basin Plan (the Guide), so too did the then Environment Minister, Malcolm Turnbull fail to consult adequately in the drafting of the Act.

We believe the Act was drafted in response to an extreme weather event (2006/07 recorded the lowest inflows in the Murray-Darling Basin on record) that saw NSW water sharing plans (WSPs) suspended and special water accounting provisions apply. This led some to believe the National Water Initiative (NWI) and WSPs had failed. We contend that, if allowed to be implemented and operational in 'normal' weather years, given time, the WSPs would have proven to be successful at addressing the equitable sharing of available water resources and, as a result, environmental concerns.

Further, lessons learnt from the experience of the drought led to the adoption of a new basis for planning provisions. These new provisions, combined with the WSPs and separate environmental strategies implemented to date, such as the Living Murray program or Water for Rivers, mean that we are already better equipped, from both an environmental and a water management perspective, to deal with the next drought.

Good policy is policy that has been developed in consultation. The original intent of the National Plan for Water Security announced by the Howard Government in January 2007, despite being in response to extreme drought, was for good policy through State negotiations and industry consultation. The breakdown of those negotiations and the resultant Act, relying on external powers, drafted by the Commonwealth in isolation has led to compromised policy.

The ability for the Basin States and communities to respond to the drought is recognised by leading international water expert, Professor John Briscoe of Harvard University in his submission to this Inquiry:

*"It is equally clear to me that the Institutional Response (of the Murray Darling Basin Commission, the basin states, and farmers) was extraordinarily innovative and – within the bounds set by nature – effective. Not only for the economy but, as shown by the National Water Commission, for ameliorating the environmental damage of the terrible drought."<sup>1</sup>*

As a result of the process undertaken by the Commonwealth, the Act was drafted with little regard to the impact on regional communities and regional services (health, education etc), for which the Commonwealth holds no direct responsibility. We do not believe it is in the best interests of regional communities for one Minister of the Commonwealth to have the have overriding authority over water policy implementation as per the present Act.

Murray Irrigation supports the development of a Basin Plan that provides a framework to ensure the interests of the whole Murray Darling Basin (the Basin) are at the forefront of policy; however, we believe legislative control for implementing policy and managing the waterways should remain with the States who are more accountable to their regional communities.

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<sup>1</sup> Submission to the Senate Legal and Constitutional Affairs Committee by Professor John Briscoe, Harvard University, dated 24 February 2011.

## Recommendations

**Optimal** - The Commonwealth and States negotiate a new cooperative arrangement that allows for the introduction of uniform laws in each jurisdiction enabling a triple-bottom-line Basin Plan to be developed while actual legislative control of Basin waterways is maintained by the States.

**Alternatively**, we outline below why we believe the only other options available that enable a more equitable Basin Plan are:

- The Commonwealth negotiates with the States for a referral of powers to the minimum extent necessary to enable the Act to be amended to deliver a triple-bottom-line outcome in line with the NWI.
- **Failing that**, The MDBA should apply more appropriate criteria in selecting “key environmental assets”.

## Overview

Murray Irrigation has fundamental issues with how the Act came about but recognise that this inquiry has been set up to look at the provisions in the Act as it stands.

Murray Irrigation believes the Act must be thoroughly investigated and amended to ensure that it is clear in its intent to deliver a Basin Plan that meets social, economic and environmental objectives.

*“The 2007 Water Act was flawed,”* Member for New England, Tony Windsor MP<sup>2</sup>

We appreciate that the Minister for Sustainability, Environment, Water, Population and Communities, The Hon. Tony Burke MP (Minister), has publicly stated that his interpretation of the Act allows equal balance of the three considerations, an opinion echoed by MDBA Chair Craig Knowles; however, they appear to have a different interpretation to the former Chair of the MDBA, Mike Taylor. We assert that this in itself is a problem. Where the intent of the Act is open to interpretation, it is open to legal challenge.

*“... 3,000 to 4,000 gigalitres of additional water is absolutely the bare minimum which is required to return our rivers to health .... If we try to go below that level, it won't restore our rivers, it won't comply with the Act....”* (emphasis added), Dr Arlene Harris-Buchan, Australian Conservation Foundation.<sup>3</sup>

We fear that the assessment of Mike Taylor is correct that, under the Act, the MDBA “cannot compromise the minimum level of water required to restore the system's environment on social or economic grounds.”<sup>4</sup>

The Commonwealth has no enumerated constitutional power over the control and management of inland waterways; therefore, to gain control of Basin waters, the Commonwealth needs either a referral of powers from the States or to draw upon other powers under the Constitution.

Hence, the Act relies predominantly on the external affairs power<sup>5</sup> to implement international agreements under the Constitution. In all of the international agreements relied on for the purposes of the Act, environmental objectives are given primacy over economic and social considerations. Therefore, to remain constitutional, the Act must also give the environment primacy.

<sup>2</sup> Interview with Andrew Bolt and Steve Price, 15 October 2010, MTR Radio 1377, [http://www.mtr1377.com.au/index2.php?option=com\\_newsmanager&task=view&id=6957](http://www.mtr1377.com.au/index2.php?option=com_newsmanager&task=view&id=6957) accessed 7 March 2011

<sup>3</sup> ABC 4 Corners, aired Monday, 7 March 2011 : <http://www.abc.net.au/4corners/content/2011/s3153385.htm>

<sup>4</sup> *Plan for the Murray Darling Basin – Role of the Authority Chair*, Statement by MDBA Chair Mike Taylor announcing his resignation, released 7 December 2010

<sup>5</sup> Section 51 (xxix) of the Constitution

Therefore, the Commonwealth cannot implement a triple-bottom-line approach unless:

1. the Constitution is amended to give the Commonwealth the requisite head of power;
2. the Commonwealth enters into an international agreement which calls for equal consideration of economic, environmental and social interests and implements that agreement through the Act; or
3. the States refer the minimum requisite powers to the Commonwealth.

Without one of the above, any amendment to the Act that does allow for equally weighted consideration of economic, social and environmental interests would not be in line with the international agreements upon which the Commonwealth's use of its external affairs power relies, and so would be unconstitutional.

In saying that, Murray Irrigation believes the Act does not conform to the intent of the NWI and therefore needs to change, via some lawful mechanism. Section 21 of the Act, which sets out the basis of the Basin Plan, strays from the original intent of the NWI, and section 22 increases the bias towards the environment by requiring the Basin Plan to set sustainable diversion limits by reference to undefined key environmental assets.<sup>6</sup>

Taking this as a starting point, the MDBA has produced a list of 2,442 'key' environmental assets using five criteria<sup>7</sup> which they devised, at least one of which appears to be an excessively broad catch-all (that being criterion 4, which results in a large proportion of environmental assets being selected as 'key', although they would not meet any other criterion).

The CSIRO has commented that the list appears to be "*an almost complete inventory of watercourses and lakes (including reservoirs) in each region*".<sup>8</sup> More appropriate criteria would identify only those environmental assets that really are "key". This would fall short of achieving a triple-bottom-line approach, but should result in a more practical and accountable Basin Plan which requires less drastic cuts to water for consumptive use.

The NWI, agreed to by all States, called for a triple-bottom-line approach to managing the Murray-Darling Basin to increase the efficiency of Australia's water use and address environmental concerns:

*"The Parties agree to implement this National Water Initiative (NWI) in recognition of the continuing national 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 by establishing clear pathways to return all systems to environmentally sustainable levels of extraction."*<sup>9</sup>

In the absence of cooperative agreement as outlined in our recommendations above, the alternative would be for the States to refer powers to the Commonwealth, negating the need to rely on international agreements to implement the Basin Plan and allowing a return to the intentions of the NWI.

It is clear that the Act, as presently drafted, does not allow for equal consideration of social, economic and environmental factors. Furthermore, it is clear that the Constitution does not grant the Commonwealth the power to rectify this drafting of the Act on its own. Therefore, the optimal solution would be uniform State legislation as stated above or, failing that, a referral of power by the States to the Commonwealth.

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<sup>6</sup> Sections 4 and 23 of the Act, as well as Item 6 of the list in section 22 of the Act.

<sup>7</sup> Guide to the Proposed Murray Darling Basin Plan, Vol 2, Part 1, MDBA, October 2010, p93

<sup>8</sup> Paragraph 3.1.2 of the CSIRO's *CSIRO Technical Comments on the Guide to the Proposed Basin Plan*.

<sup>9</sup> Paragraph 5 of the Intergovernmental Agreement on the National Water Initiative signed June 2004.

## Terms of Reference

### 1. 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

*"The Act mentions the environment 258 times, sustainability 60 times, irrigated agriculture three and agriculture once," Mike Taylor, former Chair, MDBA<sup>10</sup>.*

The general basis on which the Basin Plan is to be developed is set out in section 21 of the Act, which does not mention the words "social" or "economic" or any variants of them until subsection (4). Subsection (4) is "[s]ubject to subsections (1), (2) and (3)", all three of which give effect to implementing international agreements. Paragraph (3) (c) goes so far as to require that the Basin Plan take account of, not only all declared Ramsar wetlands, but all other (undefined) key environmental sites.

As the international agreements give primacy to the environment, the whole basis on which the Basin Plan is to be developed gives primacy to the environment, and only as secondary issues can economic and social considerations be taken into account.

Therein lies the decisive constraint in the Act. Professor George Williams, a preeminent authority on Constitutional law, has explained what this means in terms of preparation of the Basin Plan:

*"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."<sup>11</sup>*

and

*"First, the Plan must be prepared to implement the relevant international conventions. Secondly, in doing this, some social and economic factors can be taken into account in the meeting of the core environmental objectives. Thirdly, once the threshold of compliance with the international conventions has been met, social and economic factors may generally be taken into account to the maximum remaining extent possible."<sup>12</sup>*

### 2. Differences in legal interpretations of the Act

Of all the possible legal interpretations of the Act, the fundamental difference between them is whether, when the MDBA is developing the Basin Plan, the triple-bottom-line is open or environmental objectives must take primacy.

Former MDBA Chair Mike Taylor was consistent in his message at public consultation meetings following release of the Guide, that the MDBA's hands were tied by the Act, a point he emphasised in his notice of resignation in December 2010:

*"The Guide was developed with full regard to the requirements of the Water Act, and in close consultation with the Australian Government Solicitor. However, the Authority has sought, and obtained, further confirmation that it cannot compromise the minimum level of water required to restore the system's environment on social or economic grounds."<sup>13</sup>*

<sup>10</sup> MD Chiefs Reject Calls to Resign, October 2010, ABC Rural: <http://www.abc.net.au/rural/news/content/201010/s3037568.htm> viewed 8 March 2011

<sup>11</sup> George Williams, "When water pours into legal minefields", *smh.com.au* viewed at <<http://www.smh.com.au/opinion/politics/when-water-pours-into-legal-minefields-20101025-170uf.html>> on 2 March 2011.

<sup>12</sup> Paul Kildea and George Williams, "The Water Act and the Murray-Darling Basin Plan" (2011) 22 *Public Law Review* 3, 13.

<sup>13</sup> Plan for the Murray-Darling Basin – Role of Authority Chair, Press Release, Mike Taylor, 7 December 2010

By contrast, the Minister has made statements to the effect that the triple-bottom-line is open.

*"If [the MDBA] wanted to, they could do completely equal weighting of environment, economy, social impacts".<sup>14</sup>*

The Minister is supported in his view by the incumbent Chair of the MDBA, Craig Knowles:

*"[I want to] make it clear from day one that there is more than enough room in the Act to focus on a balance between social, economic and environmental outcomes".<sup>15</sup>*

The Minister released legal advice from the Australian Government Solicitor entitled *The Role of Social and Economic Factors in the Basin Plan* which he claimed supported his views; however, the Minister has misinterpreted this advice, which clearly states:

*"The overarching objective of the Act and the Plan is to give effect to relevant international agreements"<sup>16</sup>, and that the key agreements "establish a framework in which environmental objectives have primacy".<sup>17</sup>*

Based on the current Act, the triple-bottom-line approach is not open and environmental objectives must take primacy, as outlined by 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."<sup>18</sup>*

Further, we are concerned that any Basin Plan that strives to achieve a triple-bottom-line under the current Act will be challenged in the courts causing unnecessary delay and uncertainty for regional Australia, as the following quotation intimates:

*"If we don't achieve that minimal amount of environmental water to repair and restore the basin, then our environment will continue to decline. .... It's no good for anyone in the basin if we don't get this right, and it won't comply with the Water Act either."<sup>19</sup>* (emphasis added) Dr Arlene Harris-Buchan, Australian Conservation Foundation.

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

The Constitution sets out the heads of power of the Commonwealth. Although this issue was very lively at the Constitutional Conventions, the framers did not enshrine a power with respect to rivers or water. This power thus remains with the States.

Following the signing of the NWI in June 2004, in 2007 the then-Coalition Government announced a National Plan on Water Security in response to the extreme drought – the River Murray System recorded less inflows in the entire 2006/07 water year than during one week in September 2010.<sup>20</sup>

The Commonwealth then entered into negotiations with the States to draft a Water Bill to be presented to the Federal Parliament (the last version that was made available to industry was

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<sup>14</sup> Tony Burke, quoted in *Interview with Matt and Dave, ABC 891* (26 October 2010), available at <<http://www.environment.gov.au/minister/burke/2010/pubs/tr20101026.pdf>> viewed 4 January 2011.

<sup>15</sup> Knowles Named MDBA Chair, *Farm Weekly*, <http://stage.fw.farmonline.com.au/news/nationalrural/agribusiness-and-general/general/knowles-named-mdba-chair/2060460.aspx> viewed 14 March 2011

<sup>16</sup> *The Role of Social and Economic Factors in the Basin Plan*, AGS, 25 October 2010, Paragraphs 2 and 9.

<sup>17</sup> *The Role of Social and Economic Factors in the Basin Plan*, AGS, 25 October 2010, Paragraph 23.

<sup>18</sup> Williams, *"When water pours into legal minefields"*.

<sup>19</sup> ABC 4 Corners, aired Monday, 7 March 2011 : <http://www.abc.net.au/4corners/content/2011/s3153385.htm>

<sup>20</sup> River Murray Weekly Report, MDBA, week ending 08 September 2010

“version 61”) in conjunction with an Intergovernmental Agreement and uniform legislation for the State Parliaments. These negotiations failed and the Federal Government had to find another constitutional mechanism under which they could proceed with their reform.

*“That is why the Commonwealth has drawn on its constitutional powers to implement the fundamental aspects of the Plan through this legislation”*: Former Environment Minister, Malcolm Turnbull.<sup>21</sup>

One of the most open-ended Constitutional heads of power is the external affairs power, which has a number of aspects, including the power to implement international agreements.<sup>22</sup> However, legislation based on the external affairs power must be proportional, that is *“reasonably capable of being considered appropriate and adapted to implementing the [agreement]*.”<sup>23</sup>

The key agreements underlying the Act *“establish a framework in which environmental objectives have primacy”*.<sup>24</sup> To implement these proportionally, then, the Act must also give primacy to environmental objectives. The external affairs power does not extend any further than the international agreements to be implemented. In the absence of international agreements which call for equal consideration of economic, environmental and social interests, the Commonwealth does not have sufficient power to achieve a triple-bottom-line when legislating in the area of water.

In order to do so, the States could refer power to the Commonwealth to the minimum extent necessary for the Commonwealth to achieve a triple-bottom-line approach; however, the lack of consultation from the MDBA in developing the Guide may have strengthened the States’ reluctance to refer powers to the Commonwealth.

#### **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.**

We believe that our point as it applies to this term of reference has been made very clearly in the foregoing section, so, in the interests of brevity, we sum it up thus: the primacy the relevant international agreements place on the environment has a knock-on effect into the Act and, finally, into the Basin Plan.

The need for the Government to rely on the external affairs power to implement the Act has seen the focus shift from meeting the triple-bottom-line to meeting international, environmental, obligations. Evidence of this can be found by comparing version 61 of the Draft Water Bill (Draft 61), written during negotiations with the States when a referral of powers was still an option, to today’s Act:

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<sup>21</sup> Government Delivers Historic Water Plan, Environment Minister, Malcolm Turnbull, 8 August 2007

<sup>22</sup> See *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1.

<sup>23</sup> *Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416 at 486.

<sup>24</sup> Paragraph 23 of the AGS Advice.



Provision	Summary of provision in the Act	Comment on corresponding provisions in Draft 61
3(c)	The objects of the Act include promoting the use and management of the Basin water resources in a way that optimises <b>economic, social</b> and environmental outcomes in giving effect to relevant international agreements.	Paragraph 3(b) was a much more strongly-worded provision. It provided that the objects of the legislation included <b>ensuring</b> that the <b>allocation</b> , use and management of Basin water resources was conducted so as to optimise economic, social and environmental outcomes. That is, it enshrined achievement of the triple bottom line as an object of the legislation.
3(d)(iii)	The objects of the Act include maximising the net <b>economic</b> returns to the Australian community from the use and management of the Basin water resources. However, this is subject to ensuring the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused and protecting, restoring and providing for the ecological values and ecosystem services of the Murray-Darling Basin (including biodiversity).	<p>The forerunner to this provision was paragraph 3(c)(iii) of Draft 61. That paragraph referred to maximising economic returns from the <b>allocation</b>, use and management of the Basin water resources. This was also subject to two subsections. However, instead of ensuring the return to environmentally sustainable levels of extraction for water resources, which has a broad definition in the Act including a watercourse without water in it, it did so for surface water and groundwater systems only. There was no specific mention of biodiversity in this version.</p> <p>The effect of this paragraph would have been to enshrine as an object of the legislation the maximisation of economic returns from the <b>allocation</b> of Basin water resources. However, the word "<i>allocation</i>" has now been deleted.</p>

\*Comparison of the objectives of the Water Act to the objectives of version 61 of the Draft Water Bill 2007

**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.**

As a preliminary point, it must be highlighted that unless the States refer powers to the minimum extent necessary to achieve a triple-bottom-line approach, Commonwealth legislation that does allow for equally weighted consideration of economic, social and environmental interests would not be in line with the international agreements relied upon, and so would be unconstitutional.

If an agreement were reached with the States, sweeping amendments would be needed to ensure that economic, social and environmental factors were given equal consideration in developing the Basin Plan. A starting point could be to refer to how the Draft Water Bill version 61 dealt with the interrelationship between these factors.

Murray Irrigation would propose the following could be undertaken to address the current imbalance of the Basin Plan:

**Preferred Solution:** Return to a collaborative Basin Agreement that, through the passing of uniform laws across the relevant jurisdictions, allows the development of a Basin Plan to provide a balanced framework for meeting economic, social and environmental objectives throughout the Basin, while the legislative power to manage water remains with the States.

**Alternate Solution 1:** With appropriate referrals of power from the States, the necessary amendments would be to remove subsections (1), (2) and (3) from section 21 of the Act. This section has been described as the “key” to the power of the MDBA under the Act,<sup>25</sup> and this amendment would unshackle that power from international agreements and the primacy of environmental objectives. This type of amendment would need to flow throughout the Act to amend any other drafting that makes the triple-bottom-line approach subject to the implementation of international agreements or environmental objectives.

**Alternate Solution 2:** An alternative approach, which could be implemented by the Commonwealth without a referral of power, would be to have the MDBA apply more appropriate criteria when determining sustainable diversion limits (SDLs).

SDLs must be determined with reference to an “*environmentally sustainable level of take*”,<sup>26</sup> which is defined as the level at which water can be taken from a water resource without compromising, among others, “*key environmental assets*”. At present, the MDBA has devised five criteria for selecting key environmental assets, of which only one must be satisfied before an environmental asset (which includes water-dependent ecosystems, ecosystem services and sites with ecological significance)<sup>27</sup> will be deemed a ‘key’ environmental asset.

The result is that there are 2,442 named ‘key’ environmental assets contained in the Guide.<sup>28</sup> However, the CSIRO has commented that the list appears to be “*an almost complete inventory of watercourses and lakes (including reservoirs) in each region*” and for many of the smaller watercourses “*it is hard to imagine how these are ecosystem assets and how reducing water use in the basin will improve their ecological situation*”.<sup>29</sup> That is, the list goes too far.

Of the five criteria devised by the MDBA to identify ‘key’ environmental assets from environmental assets, criterion 1 identifies all Ramsar sites within the MDB and any wetland that supports birds listed in any of the international migratory bird agreements supporting the Act. The other four criteria are all designed to give effect to the Convention on Biological Diversity. Given there is only one criterion to implement the Ramsar Convention and other international agreements, there seems to be an excess of criteria to implement the Convention on Biological Diversity.

Moreover, some of the criteria designed to give effect to the Convention on Biological Diversity are excessively broad catch-alls. For example, on the basis of criterion 4 alone, 475 of the 477 key environmental sites in the Murray region would have been selected.

It is our submission that criterion 1, implementing the Ramsar Convention, and one other focussed criterion designed to give effect to the Convention on Biological Diversity, are the only criteria needed for selection of key environmental assets and would still meet the requirements under the named international obligations.

This would fall short of achieving a triple-bottom-line approach, but it should result in a Basin Plan that addresses more measurable environmental targets by redirecting water to environmental assets that really are “key” and which requires less drastic cuts to water for consumptive use.

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<sup>25</sup> George Williams, “*When water pours into legal minefields*”.

<sup>26</sup> Section 23 of the Act.

<sup>27</sup> Section 4 of the Act.

<sup>28</sup> Guide to the Proposed Murray Darling Basin Plan, Vol 2, Appendix A, p 455-486

<sup>29</sup> Paragraph 3.1.2 of the CSIRO’s *CSIRO Technical Comments on the Guide to the Proposed Basin Plan*

## **6. Other related matters**

The last opportunity stakeholders had to comment on this area of Government policy (as distinct from MDBA policy) was version 61 of the Draft Water Bill. As mentioned above, the Act that was finally passed by Parliament and the ensuing amendments in 2008 have seen a marked divergence in the objectives of the Act. Murray Irrigation would like to express concern with the development of this Act once the Commonwealth decided to call on the external affairs power to draft it.

In the past the Commonwealth Government has used Inter-Governmental Agreements to force changes to State policy, that may not be in the State's interest, by withholding funding –such as competition policy. It is our concern that the Commonwealth may again force the Basin Plan through such tactics if the State's withdraw from the current agreement.

There are several other related matters that Murray Irrigation would like to raise in connection with this inquiry:

## **7. Staggered implementation of the Basin Plan will lead to inequitable outcomes.**

The Basin Plan will not come into force uniformly across the Basin States, with the legislation providing for staggered implementation as transitional and interim water resource plans expire. One example of where this could lead to inequitable outcomes is with respect to the Water Trading Rules (WTR), of which the Australian Competition and Consumer Commission (ACCC) said in their final advice:

*"While any new WRPs [water resource plans] must be consistent with the relevant Basin Plan to be accredited, the Act provides for the continued application of transitional and interim WRPs following the commencement of the Basin Plan. The implications of this are that initially even the Basin Plan water trading rules will not apply uniformly throughout the MDB because the Act will allow interim and transitional WRPs to operate until their prescribed expiry date (as late as 2017)".<sup>30</sup>*

By 2014, the majority of existing water sharing plans in New South Wales will have expired. However, it is intended that Victoria's water resource plans will expire in 2019. To have some water resource plan areas operating under the WTR and not others, will create a significant distortion in the market for a lengthy period of time. This may have unintended or perverse consequences.

We submit that the Committee consider this issue, and whether it may be advisable to have all aspects of the Basin Plan come into force at the same time across the MDB.

## **8. The Act as currently drafted places an excessive administrative burden on irrigation corporations.**

When the consultative process prior to the passing of the Act was underway, it was acknowledged that irrigation corporations are effectively self-regulated, because their customers are also their shareholders and, on that basis, they should not be subject to excessive government regulation following passage of the Act.

Since then, there has been a proliferation of government regulation which intrudes into many areas of the businesses of irrigation corporations. Beyond the Act, *Water Regulation 2008* (Cth) and soon to be implemented Basin Plan, including any Water Quality and Salinity Management Plan, there are now Water Market Rules, Water Charge (Termination Fees) Rules, the Water Charge (Planning and Management Information) Rules and the Water Charge (Infrastructure) Rules, with at least the Water Trading Rules still to come.

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<sup>30</sup> ACCC, *Water trading rules: Final advice*, released March 2010, page 15.

These have created obligations to, for example, process transactions in prescribed ways, within prescribed time limits and publish sets of rules; produce consultation papers, five-year network service plans, information statements, and schedules of charges; consider advice from an ACCC engaged engineer; only levy fees and charges in certain circumstances; and, for those irrigators that issue a distribution to all their related customers (Part 7 operators), have those fees and charges determined by the ACCC.

If the ACCC's *Water trading rules: Final Advice* is reflected in the WTR, then irrigation infrastructure operators will additionally, for example, have to comply with a set of prescriptive new rules about internal trades of water delivery rights. Furthermore, directors of irrigation corporations (many of whom are irrigators) may not be able to trade their water rights when in possession of price-sensitive information about allocation announcements or policy changes lest they contravene a new prohibition.

Reporting requirements are also becoming excessive. Irrigation corporations were already required to produce quarterly water accounting reports against their State licences; an annual environmental compliance report against their State licences; and financial reports and directors' reports under the *Corporations Act 2001* (Cth). Now, under the Act, irrigation corporations also are required to provide reams of data to the Bureau of Meteorology.

To the extent that any benefits at all may be said to have flowed from this regulation, it is not clear that they exceed the very significant costs involved, all of which, in New South Wales, are ultimately borne by irrigators.

The heavy hand of government has gone too far and it is simply not necessary to regulate irrigation corporations with the intent of rectifying any perceived power imbalance between irrigation corporations and their customers: their customers own them.

It is our submission that the Committee should consider whether the administrative burden imposed by the Act could be scaled back.

#### **9. Accountability of the Environmental Watering Plan (EWP) and the Commonwealth Environmental Water Holder (CEWH):**

It is of great concern to Murray Irrigation that, while legislated as mandatory content for the Basin Plan under section 22 of the Act, neither the EWP, nor the Water Quality and Salinity Management Plan were given adequate treatment in the Guide.

The EWP is to lay the foundations for use of environmental water by the CEWH including environmental objectives and targets to measure progress towards achieving those objectives. It is vital that this plan be released as soon as practicable, and a comprehensive consultation ensue.

Further, the CEWH is now a significant holder of water and its actions are strongly felt in the water market. We contend that the CEWH does not face the same administrative accountability as irrigation corporations. Murray Irrigation requests that the CEWH to be subject to the same level of regulation, even if differentiated, as irrigation corporations.

## Conclusion

Murray Irrigation supports the development of a Basin Plan that identifies environmental objectives as equal with economic and social objectives. However, we do not support allowing the ultimate decision-making power to rest with one (Commonwealth) Minister. It is our view that only a consensus arrangement ensures that the needs of regional communities are adequately considered in the decision-making process.

We believe the Act as it stands encroaches on each relevant States' constitutional right to manage its waters by giving the Commonwealth Minister the authority to accredit each State's Water Resource Plans, without having obtained a mandate from the States.

The Act does not deliver a triple-bottom-line outcome as promised by the NWI and agreed between the States. Section 21 of the Act, which sets out the basis of the Basin Plan, strays from the original intent of the NWI's prescription to have management of surface and groundwater resources that "*optimises economic, social and environmental outcomes*".<sup>31</sup>

There are differing opinions as to what extent the Basin Plan can deliver a triple-bottom-line outcome. However, it is very clear that, under the current Act, the triple-bottom-line approach is not open and without an appropriate referral of powers from the States, any amendment to the Act that does allow for equally weighted consideration of economic, social and environmental interests would not be in line with the international agreements upon which the Commonwealth's use of its external affairs power relies, and so would be unconstitutional.

Amending the Act, without proper constitutional support, could result in legal challenges against any final Basin Plan which would create further delays and uncertainty for regional communities.

The relevant legal arrangements must be thoroughly investigated and revised to ensure that they deliver, in a constitutional manner (either by way of cooperation between the States or referrals of power to the Commonwealth), a Basin Plan that balances equally social, economic and environmental objectives, and we commend the Committee for undertaking this review.

Signed

Anthony Couroupis  
General Manager

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<sup>31</sup> Paragraph 23 of the National Water Initiative.