



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ENVIRONMENT, COMMUNICATIONS AND THE ARTS
LEGISLATION COMMITTEE

Reference: Water (Crisis Powers and Floodwater Diversion) Bill 2010

WEDNESDAY, 30 JUNE 2010

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SENATE ENVIRONMENT, COMMUNICATIONS AND THE ARTS

LEGISLATION COMMITTEE

Wednesday, 30 June 2010

Members: Senator McEwen (*Chair*), Senator Fisher (*Deputy Chair*) and Senators Ludlam, Lundy, Troeth and Wortley

Substitute members: Senator Hanson-Young to replace Senator Ludlam for the committee's inquiry into the Water (Crisis Powers and Floodwater Diversion) Bill 2010

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Mark Bishop, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Lundy, Ian Macdonald, McGauran, McLucas, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Trood, Williams and Xenophon

Senators in attendance: Senators Birmingham, Fisher, Hanson-Young, McEwen, Moore, Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

The ability of the Commonwealth, across state borders, to sustainably manage water resources in the national interest, with particular reference to:

- a. the issuing, and sustainability of water licences under any government draft resource plans and water resource plans;
- b. the effect of relevant agreements and Commonwealth environmental legislation on the issuing of water licences, trading rights or further extraction of water from river systems;
- c. the collection, collation and analysis and dissemination of information about Australia's water resources, and the use of such information in the granting of water rights;
- d. the issuing of water rights by the states in light of Commonwealth purchases of water rights; and
- e. any other related matters.

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Committee met at 9.14 am**GREGSON, Mr Andrew, Chief Executive Officer, New South Wales Irrigators Council****THOMSON, Mr Colin, Chairman, New South Wales Irrigators Council**

CHAIR (Senator McEwen)—I declare open this public hearing of the Senate Standing Committee on Environment, Communications and the Arts in relation to its inquiry into the provisions of the Water (Crisis Powers and Floodwater Diversion) Bill 2010. The committee's proceedings today will follow the program as circulated. These are public proceedings. The committee may also agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is to be taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer given in camera. Such a request may of course also be made at any other time.

I would like to begin by welcoming representatives of the New South Wales Irrigators Council. Thank you very much, Mr Thomson and Mr Gregson, for coming along to talk to us today. The committee has received your submission as submission No. 3. Do you wish to make any amendments or alterations to it?

Mr Gregson—No, thank you.

CHAIR—Would you like to make an opening statement before we go to questions?

Mr Gregson—Briefly, if we may. Thank you to the committee for the opportunity to provide evidence this morning in support of our submission. With me is Mr Colin Thomson, who is our chairman. He is an irrigator from Wentworth on the New South Wales' side of the Murray River. He may also be able to assist the committee, particularly with issues of a practical nature from an on-farm perspective.

The motivation behind this bill should not be discounted. From our reading of it, the motivation behind this bill is to better manage the water resources across four states and one territory in the Murray-Darling Basin. I think it would be fair to say that all stakeholders in the debate around water agree that any moves towards better management of those water resources for a triple bottom-line approach are an excellent motivation and indeed should be supported. In fact, the objects of the Water Act state that water management from a Commonwealth perspective is all about maximising the social, economic and environmental benefits of the water that is available across the Murray-Darling Basin, and that obviously is an approach that we support. Whilst we do not question the motivation of the bill, we do have some serious concerns about the direction that the bill proposes in Australia's water management and also about the construction of the bill and how it intends to pursue that pathway.

The committee would be well aware of the National Water Initiative and of the COAG agreement in 1996 prior to that, which set out the fundamental basis for the way that water would be managed in Australia—that is, by means of a private ownership market to enable trade and management of that process by both state and federal governments. Any market operates in an area where variables are critical to its success. There are already significant variables in the water market in terms of both natural rainfall and the agricultural use of that water. We would encourage this committee to recognise that adding further government or regulatory variables will only serve to undermine that market and undermine the foundation of the way Australia has chosen to manage its water resources. We would encourage you to recommend to the parliament that this bill not be continued in its passage.

Senator XENOPHON—Thank you, Mr Gregson, for your submission. I have a preliminary issue in terms of process. You said in your general comments:

NSWIC notes the motion to refer this matter to the Committee identified evidence to be considered from environmental lobby groups and activists only. It did not note any agricultural stakeholder or representative group. In the submission of NSWIC, this does little to enhance the credibility of the Inquiry.

Could we just get on the record that you acknowledge that the committee, in inviting submissions, invited you? I have the list of organisations invited. Most of them are irrigator groups and farmers federations—the Lower Balonne Floodplain Association, the Australian Floodplain Association, the South Australian Farmers Federation, Australian Dairy Farmers, the Australian Dried Fruits Association. It would seem that a casual

observer may consider that somehow this committee has tried to exclude getting information from all stakeholders, particularly irrigators, up and down the basin.

Mr Gregson—I am not sure what the question is.

Senator XENOPHON—You say that it ‘does little to enhance the credibility of the inquiry’, on the basis that—it seems you are implying—this committee has only sought information from environmental groups and environmental activists, when in fact the invitation for submissions indicated that most groups would be irrigator groups and farmer groups. Do you at least concede that?

Mr Gregson—We will concede that those groups have been invited to provide evidence to the inquiry, yes. The committee itself has obviously taken steps to ensure that that occurs. In considering the *Hansard* of the motion in the Senate to refer this bill to a committee, we will stand by the comments that we provided in our submission, because the *Hansard* reflects that only a handful of environmental groups were noted in the motion that came from the Senate.

Senator XENOPHON—But you concede that the committee has gone out of its way to invite a broad church of groups, including particularly irrigator groups and those involved on the land in terms of various farmers associations?

Mr Gregson—The committee has; the motion in the Senate did not.

Senator XENOPHON—But, in terms of the process, are you satisfied that the committee has been fair in inviting a whole range of groups, particularly irrigator groups throughout the basin?

Mr Gregson—Yes, we are satisfied with the proceedings of the committee; we were not satisfied with the motion.

Senator XENOPHON—Yes. But you did not mention that in your submission.

Mr Gregson—I am not sure that that is a question either.

Senator XENOPHON—It is a question. You did not mention it in your submission. That is a no. You were quite selective in what you put in your submission.

Mr Gregson—With respect, our submission says, ‘NSWIC notes the motion to refer this matter to the committee,’ so we are not reflecting on the process of the committee; we are reflecting on the motion that was put to and passed by the Senate.

Senator XENOPHON—All right. I think we have both made our points and you acknowledge that it is quite broad. The committee, I think, has been very fair in the process. I thank you for your very comprehensive submission. The intent of this bill is to say, in cases of extreme crisis and where there are floodwaters in the system, that emergency powers be invoked to better manage the system. The irrigators that I speak to in the Riverland understand acutely, as I think the irrigators that you represent do, the necessity of having a healthy river system so that we can have healthy agricultural production in the basin. What do you say is a better way to manage floodwaters when we have those periods when we have increased water flows through flood? Isn't it reasonable to ensure that we lay the foundations for the river to be healthier, rather than diverting that water immediately—in other words that there needs to be a balance between the two?

Mr Gregson—Yes, of course there needs to be a balance. There needs to be a balance, as the Water Act suggested in its objects, between social, economic and environmental use of water. I think the question is how that balance is best achieved. This bill, in our opinion, suggests that a series of trigger mechanisms to switch water control and management between the Commonwealth and the states is a means to achieve that. We fundamentally disagree with that, for a number of reasons—and those reasons are advanced in our submission—but primarily because we do not believe, at a practical level, that the Commonwealth has the capacity to manage a broad and complex system of rivers.

Senator XENOPHON—So you are saying it is best managed at an individual state level, or the status quo?

Mr Gregson—No. What I said was we do not believe the Commonwealth at present has the capacity to manage a broad and complex river system. We do not believe that developing that capacity would be an efficient use of resources, particularly in light of a shortage of water professionals on a global scale, not just in Australia. We believe that to do so would result in a significant inefficiency of having management structures at both a state and federal level, as the bill contemplates switching of who would be in charge, based on a series of trigger mechanisms. We also believe, at a more fundamental level, that that sort of move to add another significant variable to certainty of a water licence—and those water licences obviously are used for a

range of reasons, not only economic but also environmental—would do nothing to advance the cause of sensible, practical and sustainable water management in Australia.

Senator XENOPHON—Can we just unpick that. I know that the New South Wales Irrigators Council has put a lot of thought into its submission and I do appreciate that. If you say the Commonwealth does not have the expertise, I presume you are referring to the Murray-Darling Basin Authority, because that is one of the key bodies involved. Where is the lack of expertise? There are a number of bodies—there is the National Water Commission and the Murray-Darling Basin Authority. Do you consider that they are not equipped to deal with these water policy issues and the implementation of the whole issue of water management?

Mr Gregson—With respect, this is not a water policy issue; this is management of rivers and streams. That is a very different set of skills—

Senator XENOPHON—But you need to have policy and then implementation.

Mr Gregson—Absolutely. We would be one of the first to say that significant policy capacity exists not only within the MDBA and the National Water Commission but also within the Commonwealth department of water. But policy capacity does not provide day-to-day management expertise in what is fundamentally a very difficult system of operations. Whilst at the moment Murray River operations exist within the Murray-Darling Basin Authority, this bill contemplates operations of everything from the Warrego and the Paroo right through the Murray-Darling Basin. Each of those river systems operates in a very different way to the way the Murray does. This would require the acquisition of significant levels of staff and expertise by the authority, as the bill suggests, in order to have the capacity to enable this to happen if the triggers were pulled. We simply do not believe at a practical level that is either efficient or possible.

Senator XENOPHON—So you do not think that the Murray-Darling Basin Authority for instance would have the expertise to be able to get the requisite advice? You just do not think they are up to it?

Mr Gregson—This is not just advice; this is river operations.

Senator XENOPHON—Sure, but you do not think they are up to it. Is that it in a nutshell?

Mr Gregson—Is it possible? It would be extremely difficult to identify the human resource capacity to do it. In the event that you could, you would be doubling up human resource capacity across Australia and we simply do not find that to be an efficient solution.

Senator XENOPHON—But you concede, don't you, that you need to look at the Murray-Darling Basin as an integrated system?

Mr Gregson—Which is exactly what the National Water Initiative presupposed was occurring and commenced with the COAG agreement in 1996. I do not believe in any way, shape or form that our submission in response to this bill suggests that we do not see an overarching policy role for the Commonwealth in management of the Murray-Darling Basin.

Senator XENOPHON—But you do not want to see an overarching policy role in terms of managing floodwaters and the river in times of crisis. Is that what you are saying?

Mr Gregson—We do not believe that this bill, in centralising power in Canberra, provides a solution at a practical management level, nor do we think it provides a better solution than the current Murray-Darling Basin Agreement. As you would know better than most, the basin has been through a decade of particularly tough years and the Murray-Darling Basin Agreement, the interstate sharing agreement and the goodwill of the states involved were able to see the country well through that in balancing the social, economic and environmental objectives as set out in the Water Act.

Senator XENOPHON—You think we are through the crisis now?

Mr Gregson—Does a crisis ever have a defined beginning and end point? You can only tell in retrospect. I can tell you, as you well know, that circumstances are certainly not as dire now as they were over the course of the last three years.

Senator XENOPHON—Is that because we had above average rains, particularly in northern parts of the basin?

Mr Gregson—For the lower end of the Murray River, absolutely. That has certainly benefited from the fact that there were significant rainfall events in the northern part of the basin catchment. It flowed down the Darling and it flowed into the Murray. That provided benefits not only for the lower reaches of the Murray but also for the Murray and Murrumbidgee systems, because the amount that was designated to flow across the

border was able to come from the Darling system rather than having to solely come from the Murray and the Murrumbidgee.

Senator XENOPHON—If we can go to the issue of the circumstances where there are floods in the northern part of the basin and you have the southern parts of the basin literally dying, in particular the Lower Lakes, what is wrong with having an equitable diversion of some of those floodwaters to ensure that you deal with that crisis? And, again, you know more about river systems than most in this country by virtue of your role. If you flood the Lower Lakes with seawater there is a real concern of salinity creeping up, let alone the impact it would have at that local level. Don't we need to give the river a decent flush and that will, in turn, help irrigators so that we have a healthy river system?

Mr Gregson—I think that the history of the last couple of years shows that there is not only the capacity but the reality within the current management arrangements to share the social, economic and environmental benefits of flood events, no matter where they occur in the system. Yes, a significant portion of flood waters that occurred in southern Queensland and northern New South Wales was diverted for economic use. At the same time, a significant portion of those floodwaters flowed down the Darling system, through Menindee, through the lower Darling and into the Murray, feeding a whole range of environmental assets, including the Lower Lakes.

Senator XENOPHON—Can we just pause there. You may wish to take this on notice. What proportion of those floodwaters went into flood plains and what proportion went into economic use, into irrigator use and into environmental use? I am very happy for this to be taken on notice; I do not want to put you on the spot.

Mr Gregson—I understand that.

Senator XENOPHON—You mentioned Menindee Lakes. That is an issue of real concern in my home state and it has been an issue of concern when I have met with the Darling River Action Group. They say they have been waiting for over a decade for successive New South Wales governments—the Carr, Iemma, Rees and now Keneally governments; I think that is all in the last 10 years—

Mr Gregson—I have not read the newspaper in full this morning.

Senator XENOPHON—That is right; we do not know if there has been a change! They are still waiting for some sensible engineering works to take place and works to secure the water supply of Broken Hill, which is essential. But it is just a big evaporation pan. Hundreds of gegalitres of water are being wasted whenever we have a flood event.

Mr Gregson—I will agree with part of your proposition. I am sure that most of those that we seek to represent in New South Wales will agree—

Senator XENOPHON—You will not lose your job agreeing with any part of my proposition, will you? There will be a black mark against you!

Mr Gregson—No. We certainly agree that there have been successive failures to act on the Menindee Lakes and their efficient management and operations. We note that at the last federal election the Labor Party promised up to \$400 million to be spent on that. We know that that has not yet been spent. We are not here to apportion blame as to whether there is a New South Wales or federal government barrier to it. All we would say is: get your heads together and get on with it. It is pretty obvious. At the same time, I am a little concerned by the prospect that it is viewed in South Australia that Menindee Lakes is merely a big evaporation pan. It is also an environmental asset in the same way the Lower Lakes are. It just happens that it is a bit further up the system and is also used as storage.

Senator XENOPHON—But there is an issue in terms of the enormous amount of evaporation in that system, isn't there?

Mr Gregson—There also is in the Lower Lakes, Senator.

Senator XENOPHON—You do not see the role of the Lower Lakes of providing opportunity to flush out the salt and other things—I would not say 'toxins'—to give the river system an opportunity to flush through to have a healthier freshwater system?

Mr Gregson—I certainly do not deny that. But, at the same time, that is no different to the Menindee system either. Salinity as an issue and toxins, as you put it, as an issue are not confined to the Lower Lakes; nor are environmental assets confined to the Lower Lakes.

Senator XENOPHON—To go back to the Menindee Lakes issue, if there were a central body that could say, ‘Let’s get on with it’ and I think you have conceded that, doesn’t that indicate that there is a need for a different approach—something similar to the approach put forward in this bill that is being introduced by me and Senator Hanson-Young?

Mr Gregson—No, we would not agree with that, because the management system around the Menindee Lakes is well defined and well understood. It is contained within the Murray-Darling Basin Agreement. The lakes have operated well in both New South Wales control and in MDBA control, as they are at the moment. It is the certainty behind that operation which underpins the entitlement system that we were talking about earlier. From our perspective, what the bill talks about is how, at a practical level, it would be managed. I do not think you can point to a failure in the management of the Menindee system. I think we can point to a failure in its efficient operation through investment and infrastructure, and I think they are different things.

Senator XENOPHON—This will be my final question, because I am concerned about time constraints. You say that this bill will ‘serve to significantly undermine the water policy process upon which Australia embarked in 1996’. That is a pretty self-evident statement. Part of that water policy process has been the agreement in 2008 and the Murray-Darling Basin Authority and the setting of sustainable diversion limits. That is part of the process as well, isn’t it? But isn’t it the case that the New South Wales Irrigators Council wants to put a pause or a moratorium on that process?

Mr Gregson—No. We are seeking a deferral of the implementation in New South Wales to ensure that it is implemented at the same time across all states.

Senator XENOPHON—Which is different from the water policy process that has been set out.

Mr Gregson—I beg your pardon?

Senator XENOPHON—Doesn’t the deferral that you are seeking in itself significantly undermine the water policy process that has already been started in this country?

Mr Gregson—Not in the least. It changes the timing of the implementation, not the process itself—

Senator XENOPHON—Timing is everything sometimes.

CHAIR—Senator Xenophon, we do need to move on.

Senator XENOPHON—Okay. I will not take it any further.

CHAIR—Mr Gregson, can you complete your answer?

Mr Gregson—I can. We reserve the right to suggest amendments to the outcomes of the process, particularly if the basin plan does not meet the objects of the Water Act. In terms of the timing of it, I think what we are seeking in terms of equity amongst the states is not unfair. Senator Xenophon, I think you will find that your own constituents in South Australia would consider differential implementation of the basin plan unfair as well, although I do not seek to speak on their behalf.

CHAIR—Before I go to other senators to ask quickly if they have got any other questions, does the New South Wales Irrigators Council have a position on the Leader of the Opposition’s proposal to hold a referendum on the complete federal takeover of the Murray-Darling Basin if the states do not agree to surrender their powers?

Mr Gregson—Yes. We have publicly stated that we oppose a referendum.

CHAIR—As there are no further questions, we thank you very much, Mr Thomson and Mr Gregson, for your submission to this inquiry and for travelling to appear before us today. We appreciate it very much.

Mr Gregson—Thank you very much for the opportunity.

Mr Thomson—Thank you very much.

[9.38 am]

KILDEA, Mr Paul, Director, Federalism Project, Gilbert and Tobin Centre of Public Law

LYNCH, Dr Andrew, Centre Director, Gilbert and Tobin Centre of Public Law

WILLIAMS, Professor George, Foundation Director, Gilbert and Tobin Centre of Public Law

Evidence was taken via teleconference—

CHAIR—Welcome. The committee has received your submission as submission No. 4. Do you wish to make any amendments or alterations to it?

Prof. Williams—No.

CHAIR—Would you like to make an opening statement before we go to questions from senators?

Prof. Williams—Yes. Paul Kildea will make an opening statement on our behalf.

Mr Kildea—We only wish to make a brief opening statement. I wish to emphasise the two main points that we made in our submission. The first is that we think there are questions as to the constitutional validity of the bill. We agree that the Commonwealth has significant legislative capacity in the area of water management, particularly with respect to its powers over corporations and interstate trade and commerce; however, we are not satisfied that the bill has been drafted to take advantage of these powers. We also note that, while the management of the Murray-Darling Basin is supported by referrals of state legislative power, the current bill does not acknowledge this.

The second point we would like to make is that the bill appears to undermine the cooperative nature of the existing regulatory framework in the area of water management. This flows from the fact that it seeks to augment the powers of the Murray-Darling Basin Authority without first obtaining the agreement of the basin states. In formal terms, this is likely a breach of the 2008 Murray-Darling Basin intergovernmental agreement, but more broadly it breaks with a long tradition of collaborative action in this area and has the potential to undermine the stability of basin management. As our submission notes, we suggest that the aims of the bill would be best pursued through the existing framework for intergovernmental management of the basin rather than outside of it.

CHAIR—Thank you very much. In your submission you note:

However, we are not satisfied that the Bill is drafted in a manner that takes advantage of such powers through establishing a clear constitutional connection to them.

... ..

In the absence of clarification of the extent of Commonwealth legislative power, the failure of the Bill to acknowledge the existing scheme's reliance on State referrals raises additional constitutional uncertainty.

With regard to that constitutional uncertainty that you claim, how would that be tested?

Prof. Williams—Ultimately, it would only be tested in the High Court. You would imagine that someone who was aggrieved by the legislation might take a challenge in the High Court if the legislation was ever invoked. Of course, that would bring into play enormous uncertainty at a time of crisis and would mean that it could be some months before you actually had a resolution of that issue.

The important point from our point of view is that the powers are actually very wide and we have attached a paper where we look at this very carefully. I think the powers are much wider than is often recognised in this area and that the Commonwealth has quite an extensive capacity to regulate. It is really, apart from anything else, a matter of approach and drafting. If you do want to rely upon those powers, you cannot draft legislation in a form similar to the underlying legislation because you have got a referral there that does not support this extra legislation. You would really need to tailor it very carefully to things like making sure that obligations are just placed upon corporations and entities engaged in interstate trade and commerce. It is the breadth of the legislation here that takes it beyond even what are quite substantial Commonwealth powers.

CHAIR—If somebody was aggrieved by the act, should it come to fruition, can an individual person or a state take a matter to the High Court?

Prof. Williams—It could be a state. What would likely happen is that the legislation would just sit on the books until it was invoked. That is because it is unclear that anyone would have standing to actually bring a challenge now. When the crisis occurs and when the legislation is invoked, someone who suffers an economic

loss due to the legislation or a state that feels as if it does not like what is occurring might take a challenge. There is a large range of people who would be able to do so once the legislation was invoked. As I have said, that would also be the most unfortunate time to do so because it would get in the way. You may have things like an injunction being invoked that would prevent the legislation actually being used for some time. Our view, as we say in our submission, is that a challenge would likely succeed on the current drafting. That, of course, would be doubly unfortunate.

CHAIR—Your view is that collaboration between the state and federal governments is the most appropriate way forward?

Dr Lynch—Our submission stresses the fact that there is a long history of that. Obviously that history has not necessarily been trouble free from time to time. As recognised in other areas in the last 10 years—namely, corporations regulation, industrial relations laws and also antiterrorism—the surest path to removing constitutional uncertainty is for a productive and collaborative relationship with the states.

Prof. Williams—As we also set out in the attached paper, the underlying problem is that we have a constitution that was not drafted to really take account of contemporary problems with water use in river systems. We have a constitution that was directed at issues such as the riverboat trade, but not to these contemporary problems.

Despite that, the Commonwealth does have extensive power. If the Commonwealth wanted to go it alone generally in this area it might consider doing so and might provoke a fight with the states and abandon the cooperative efforts. But you would not want to do that just in a one-off bill dealing with crisis management. It would be a very serious step to take that would likely end up in long-term litigation where you would find the Commonwealth has great power, but not over everything. It just does seem an unfortunate path to take, to pick a fight over one set of emergency legislation that could well undermine what is essentially a cooperative approach at the moment.

CHAIR—Thank you very much. I will now go to Senator Hanson-Young.

Senator HANSON-YOUNG—Thank you for your opening statement and the submission. One of the key things you have pressed in the submission and raised again here is the issue about the contradiction between this draft legislation and the existing Murray-Darling Basin intergovernmental agreement, and suggested that it is indeed a breach. Doesn't that just prove that the Murray-Darling Basin agreement is in no way capable of managing the river system in any time of crisis? If there is no ability to interlink the two, surely that points to the failure of the agreement to be able to manage the system when times are different.

Dr Lynch—It might point to a perception amongst some, and I know you have submissions from other bodies that may well have very clear ideas about the water management of the basin. But it certainly would support a perception that there is an inadequacy in the agreement, that this issue is not appropriately dealt with. That does not alter the fact that the agreement currently has particular terms. Our submission is obviously based purely upon the legal aspects of enacting this particular bill, and all we are saying is that the bill would not comply with the terms of the agreement that deal with expressly amending the water legislation. You might say that that indicates that the agreement itself lacks something that this bill is trying to bring to it, but our focus is really on that process. We have also said in the submission that a breach of the agreement would not necessarily invalidate the legislation, but clearly it causes particular problems given that the states' agreement has been sought in order to support those earlier referrals and that their continued support is necessary so that those referrals are not withdrawn.

Prof. Williams—Can I add that I do not think it is so much a problem with the agreement, which does have the capacity to lead to agreement about these types of matters and to lead to legislation; it is more a failing of cooperative federalism in this area, which is really at odds with dealing with what I think is clearly a national problem. When you are taking a path of cooperative federalism with the vested interests involved, you will find that agreement cannot be reached on some of the most fundamental questions because even though they are in the national interest they are not in the interests of particular states.

My view is, and has been for some time, that when you are dealing with a river system of this kind there should be clear Commonwealth control. That is not provided for in clear terms enough by the Constitution. If we were to look at dealing with these matters in a longer term way, then you would have to deal with some of these underlying structural problems which have been with us for decades. Unless they are fixed they will continue to get in the way of a range of solutions which we might agree are in the interests of the river system and the community as a whole.

Senator HANSON-YOUNG—What would be your suggestion for doing that?

Prof. Williams—I think at some point we have to come to terms with the fact that we have a broken federal system when it comes to dealing with some of the most serious contemporary problems in Australia, and water scarcity is one of those. We have a system designed in the 1890s that does not sit well with these contemporary problems. In particular, that system said that the states should have primary responsibility for dealing with these matters. That just does not fit with water scarcity in a river system that crosses a number of state boundaries.

I think unless we deal with those federal problems, absent dealing specifically just with the symptom of those problems, we are not going to fix the longer term issue. That might be at some point that we actually need to hold something like a federalism convention. There are a range of mechanisms that can be used to deal with this but, as yet, there has been none of those invoked to move beyond dealing with the crisis to actually dealing with the underlying cause—which is not just a problem of water scarcity but, as I have suggested, a broken federal system that gets in the way of properly managing that.

Senator HANSON-YOUNG—Would you argue, then, that the intergovernmental agreement, alongside the current Water Amendment Act, does not deal with those complexities of the need for some type of cooperative federalism? Are you saying that the existing Water Act and the agreement do not actually deal with the problem at hand anyway?

Prof. Williams—I see the agreement and the legislation, subject to improvements that we might make, such as emergency management and the like, as essentially doing the best you can in a broken system. They reflect the flaws I have talked about. As long as you operate in such a system you have to accept that even the best of what you can do sometimes will be inadequate to deal with long-term problems of this kind. This is the case in many areas of governance in Australia today; it is certainly not unique. But what is common to all of those is that we just accept that we work within a broken system without trying to fix the underlying structural issues. The point we make is that, at some point, you have to engage with those questions if you want to get serious about dealing with these symptoms. These are questions that extend beyond any one political cycle, and that is of course one of the reasons why no government yet has sought to address them, despite decades-long evidence about the problems.

Senator HANSON-YOUNG—So the concern you have in relation to this bill is less about the objective of the legislation and more about the fact that it is one of the fixtures to a broken system which you do not think will actually deal with the problem?

Dr Lynch—I think it is fair to say that we have no objection at all to the bill or its aims as a matter of substance. The purpose of our submission is simply to highlight that it does not exist in isolation but against the backdrop of the IGA's attempt to try to solve the challenges facing the river system through cooperative federalism. The fact that there is a level of cooperation is a positive thing. We see that in a whole heap of policy areas as a solution to the outdatedness of our Constitution, which George has described as leading to a broken system of federalism. I think the increased efforts in the last 20 years of collaborative federalism between the Commonwealth and the states have been very positive as attempted solutions to that. His view is that that will take you only so far.

There is an element of debate as to when that line is crossed, but I think we are all agreed that there is a particular mode of solution in dealing with the problems confronting the Murray-Darling Basin, which is heavily reliant on collaborative federalism. In terms of the legislation passed to date, that is reflected in the fact that state referrals underpin substantial parts dealing with the authority's powers. The problems that underlie this bill are that it does not demonstrate a sufficient acknowledgement of that, and there is also the fact that it may well need to be underpinned by further instances of state cooperation, be those legislative referrals or simply agreements under the terms of the IGA.

Senator HANSON-YOUNG—In working within a broken system, is your view that we need to be getting further state referrals in times of crisis?

Prof. Williams—Yes, that is the most likely answer. But I would say that state referrals can happen in two ways. One is that you can get their legislation changed, but the more likely is that you just take advantage of the existing referrals and get the agreement under the intergovernmental agreement. There is a path to already do this. It does require the consent of some of the states to achieve that. If that path were followed, it would provide a guarantee of constitutional validity and path that is consistent with the cooperative means. The difficulty is that some states will not always agree to these things because, even though they may be in the

national interest, they are not in the state interest. But the state agreement path is the path of how this is currently done and the most likely path of success, unless you are to tackle some of those larger issues, which just are not on the agenda at the moment.

Dr Lynch—As I understood your question, you seemed to be asking whether it was necessary to seek the cooperation of the states at the actual time of crisis. I may be wrong on that but, if that is what you were asking, that is not necessary. It would be possible to pass a bill with these particular objectives once you have gone through the processes that George was outlining of seeking the agreement of the states under the IGA. He is quite right that that would be by far the easiest approach and the most certain one in terms of results.

Senator XENOPHON—Thank you for your submission. Notwithstanding the intergovernmental agreement which was hailed at the time, back in 2008, as going a long way to solve the river problems, we have litigation between South Australia and Victoria in the High Court about the whole issue of caps. My question to you is: do you see that the Commonwealth could push the envelope in using even its treaty powers in terms of the Ramsar convention, which would affect the Coorong and Lower Lakes and other parts of the river system, in order to invoke emergency powers? Would it be fair to say that the Commonwealth has not pushed the envelope in the same way that the Hawke government did back in 1983 in relation to the Franklin River case?

Prof. Williams—Yes, I would agree with that. The paper that Paul Kildea and I have written does make that point, that the Commonwealth has far more extensive power in this area than it has yet chosen to use. Nonetheless it is not fully co-extensive with the problems that the river system is facing. There will still be some gaps. The Constitution does not give you the same breadth as it did over the Franklin River dispute. You do not have an international treaty which is as convenient to cover these matters as you may like. Nonetheless you could go substantially further and the Commonwealth could act unilaterally in these areas. The problem is that would run counter to what is essentially a cooperative approach in other legislative schemes, many of which are the most important ones in this area, and that would be a very serious decision to take. If you want to push the envelope at whatever cost, it may well be at the cost of undermining some of those other legislative attempts. Nonetheless that is a political decision and legally there is no doubt that you, as the Commonwealth, could go substantially further.

Senator XENOPHON—Professor Williams, the paper by you and Mr Kildea makes it clear what an urgent problem this is. Professor, could the Commonwealth also use the issue of tied grants? But I do not necessarily want us to get tied up in terms of what sorts of grants. Could the Commonwealth use grants to the states tied to the performance of the river system so that you can get a common outcome for the entire river system? In other words, it is a carrot-and-stick approach using its funding powers.

Prof. Williams—They are already doing that to some extent, but, yes, they could take that further. Of course the states depend very much on Commonwealth grants in a range of areas. If the Commonwealth really wanted to get nasty, it could even tie grants relating to other needed services in education, health and the like to performance in these areas. The Commonwealth has a complete discretion as to what terms and conditions it imposes on the states for the receipt of those grants. So, yes, it could go further but that would run into some serious problems in that the Commonwealth and the states have recently agreed to a new federal financial agreement, which came into force on 1 January 2009. That actually prevents the Commonwealth from setting the sorts of conditions that you would like and the Commonwealth has agreed to move back from micromanagement and conditions of this kind. If you were to unpick that, that would actually have a real cascading effect across a lot of very important areas. I recognise the grave importance of this, but it would do a lot of damage as well to other areas that have been well served by the changes to the funding relationship. The power is there but I am a bit sceptical about how far you could usefully take that. I think the paths are either to consider a unilateral legislative approach or in the longer term to recognise that there needs to be some sort of better constitutional settlement, because that is always going to be something that will get in the way of what I would see as appropriate national regulation.

Senator XENOPHON—Finally, Professor, there is a broader issue. Has there been an interpretation of section 100 in terms of the rivers?

Prof. Williams—Yes, there has now been in the case of Arnold, which was handed down recently, but it did not deal with that in any extensive way. It essentially indicated that it did not apply in that case.

Senator XENOPHON—Sorry, I meant there has not been a decision that has been definitive in terms of the extent of section 100—or has there?

Prof. Williams—No, there has not been. But, even in the absence of that, enough has been determined to indicate that it is not likely to be a major barrier, partly because it seems clear that it only applies for a particular set of laws dealing with matters of trade and commerce and it has been drafted in a pretty narrow way. Again, we look at that in the paper that we have attached. But I would not hold out much hope for that provision having much of a substantive impact.

CHAIR—As there are no further questions, we thank you very much, gentlemen, for your submission and for taking the time to talk to us today. Your evidence has been very useful to the inquiry and we appreciate it.

Prof. Williams—Thank you.

Mr Kildea—Thank you.

Dr Lynch—Thank you.

[10.01 am]

O'BRIEN, Mr Daniel David, Chief Executive Officer, National Irrigators Council

CHAIR—Welcome. The committee has received your submission as submission No. 7. Do you wish to make any amendments or alterations to it?

Mr O'Brien—No.

CHAIR—Would you like to make an opening statement before we get to questions?

Mr O'Brien—Just a brief one to encapsulate the main points of our submission. In a nutshell, we do not support this bill. There are a number of reasons for that, but I guess what it boils down to is the debate over sharing of a sometimes limited resource. I say 'sometimes'; it has certainly been a limited resource in recent years, over the last decade or so, but of course we do have periods of plenty in this country. The sharing of that resource becomes a difficult issue because of the rival needs or desires for the use of that water. Yesterday, in doing some other work, I stumbled upon the definition of 'rival'. It actually comes from the Latin word 'rivalis', which literally means 'one who shares the same brook or stream'. I thought it was rather appropriate, given the sort of issue we are talking about, in terms of rivals, that that very word comes from the sharing of water.

Senator XENOPHON—I haven't had Latin in a Senate committee for a long time—in fact never, I think!

CHAIR—You haven't been with Senator Brandis!

Mr O'Brien—That is, unfortunately, the extent of my Latin knowledge, but I thought it useful in this context. As I said, we think this is about that how best to share the asset, the water that we have in this country. There are a number of questions about the bill itself. We have some concerns about the constitutional validity, but you have just spoken to some people far better qualified to speak about that than I am.

Most fundamentally there are a couple of issues. One is that we do not have any confidence that the Commonwealth would do a better job than the states. There is no evidence to suggest that they would in this respect. We certainly have concerns about the Commonwealth's capacity to manage the systems. The counterargument would be that they can get that talent and capacity in, but it would be a significant process and it would take a significant amount of time.

Secondly, the ideas behind this bill throw out literally decades of agreements and negotiated outcomes that have occurred within states and across state boundaries. Thirdly, the important thing is that we are currently going through a reform process related to the Murray-Darling Basin Plan, which we are partaking in constructively as best we can, and we are concerned that this bill would leave that by the wayside.

Those are our concerns in a nutshell. I should add—and this is reflected in our submission—that we understand where the concerns are coming from for the authors of this bill. We have South Australian members and they are equally frustrated and concerned at what happens in the system but, as I say, this does get back to the sharing of the resource, and we are not convinced that this bill would do a better job.

CHAIR—Thanks very much. Before I go to Senator Xenophon, does the National Irrigators Council have a position on the Leader of the Opposition's proposal to hold a referendum on the complete federal takeover of the Murray-Darling Basin should the states not agree to surrender their powers?

Mr O'Brien—Yes, we do. We have a formal position that we oppose any further federal takeover of the Murray-Darling Basin. The question I would pose in response to anyone proposing a Commonwealth takeover is: what exactly do you mean by a Commonwealth takeover? To our mind, we actually have a Commonwealth takeover of the most important aspect of water management at the moment, and that is how much can be taken from the system. Ultimately, of course, it will be the states that implement that through the basin plan.

Firstly, in response to that, we want to see what people mean by a Commonwealth takeover. If it means the Commonwealth running the rivers, managing the allocations and creating water sharing plans, we certainly do not support that—for a number of reasons, not the least of which is that our members, who live in Deniliquin, Moree, Shepparton, Mildura, Renmark et cetera, are comfortable, if not always completely happy, with the decisions that are made in Sydney, Melbourne, Adelaide and Brisbane. To take that a step further away from where they are to Canberra, we think would be a backward step.

CHAIR—Just to clarify, you do have members in South Australia?

Mr O'Brien—Yes. We have members in four states—but certainly all Murray-Darling Basin states.

Senator XENOPHON—Thank you for your submission, Mr O'Brien. Have your members in South Australia given you specific views on, if not this bill, the whole issue of floodwaters in the northern parts of the basin and what is an equitable way of sharing that?

Mr O'Brien—In relation to this bill, I have had at least one conversation with one of our members in South Australia. Whilst he agreed with the tenor of our submission—it was actually him that made the point that I alluded to, that you need to understand where the frustrations are coming from and that is why I reflect that in our submission—he did not support the tenets of this bill. In relation to floodwaters, I have not had any formal feedback but I spend a bit of time in South Australia and I have to say that, to be honest, sometimes the understanding is lacking. I had questions from a number of irrigators but also from media while I was in the Riverland soon after the St George floods. The question was asked of me: given that New South Wales irrigators have now got as much water as they need—indeed, more water than they can cope with—when are we going to see some down here? I pointed out to them that there was a lot of water in the Darling at that particular time but that Murray irrigators, general security, were on 27 per cent of their allocations, Murrumbidgee was about the same, the Lachlan was zero and the Macquarie was zero. So there is a misnomer sometimes about there is suddenly all this water in the system when in fact it is only in one river.

Senator XENOPHON—That is general security and not the high security water, though, is it not?

Mr O'Brien—That is right.

Senator XENOPHON—What is Murrumbidgee high security at the moment?

Mr O'Brien—Murrumbidgee was at 97 per cent, I think, and Murray got to the 100, as did Victorian Murray at the end of the year. Victorian Goulburn—which ultimately is a similar class of water, I guess—was only about 72 per cent, from memory. I guess that is one of the things that it is misleading to compare the water allocations to. New South Wales high security water for both the Murray and the Murrumbidgee is still considerably less. I would have to check this but I think it is about 200 gegalitres less than the total entitlement in South Australia. So it is a very small share of the irrigation pool in New South Wales.

Senator XENOPHON—In terms of general principles, though, if there is a flood event in the system, I think by implication that means that there is more water than normally is or that there is a surplus. What do you say should happen to that? Should it not be shepherded through the system when there are parts of the system that are in crisis with their salinity levels, toxins and algae blooms? Don't we need that good flush to the system so that your members up and down the basin can have a healthy river system to draw on?

Mr O'Brien—I do not disagree with the principle but that assumes that floodwaters in one area will automatically go to another area. As we saw with the St George floods in March—and I saw this in evidence to the Senate estimates hearing—about 6,700 gegalitres flowed through that St George in that event. Very rough estimates from the MDBA on the amount that was harvested by private diverters was that it was about 1,500 gegalitres—so about 22 per cent of that water—and the rest, literally, funnelled out over the flood plain and filled channels and billabongs and soaked into the surface, because it was incredibly dry. It was also very slow moving—I guess because we had had that flood in the northern part of the basin in late December-early January, which had stimulated some growth.

Of course, when you have got grass and vegetation coming up it also slows the water. It allows it to sit there for longer and evaporate. Ultimately, I think we had about 1,100 gegalitres flow into Menindee Lakes. That was the natural occurrence of what happens in a flood event. It is very flat terrain. Once it gets up out of the bank, it floods out over the flood plain. It has of course given enormous environmental value to that area, but not a hell of a lot of it would have ended up down in the lower reaches.

Senator XENOPHON—You mentioned Menindee Lakes. Is it not the case that both South Australia and the Darling River Action Group have been waiting 11 years for four successive New South Wales Premiers and their governments to take some action to reduce the level of evaporation from those lakes to undertake those engineering works to secure the water supply of Broken Hill and also to ensure that so much water does not evaporate—that water that could be used to flush the system downstream?

Mr O'Brien—Yes, but there are a number of issues with Menindee. Firstly, let us not leave it aside that it is an environmental asset in itself, in that it is a natural system of lakes that would have filled and emptied naturally over a period of time. So there are environmental values there.

Senator XENOPHON—It is not entirely natural, though, is it?

Mr O'Brien—It has certainly been modified. The second question is—and I actually did have this question from one of my South Australian members: ‘With the floodwaters lakes, why are they letting it go into the lakes; why not just let it come down to us, let it flush through the system?’ As I said, about 1,100 gigalitres has gone in. Menindee was about 85 per cent full a week or so ago. It is really the only major storage on the Darling where water can be held. Potentially, we could have let it flow through the Darling and into the Lower Lakes—the whole lot. There were potential flooding issues along the way at Wentworth and the like but, more particularly, it then would have been very difficult to recapture that water and provide for South Australia’s needs in future. Had we let that go all the way to the Lower Lakes and we do not get any rain either in the Darling or the Murray systems in the next 12 months, that water is lost and—

Senator XENOPHON—You are not suggesting that Menindee Lakes are a long-term storage system, are you—because of its evaporation?

Mr O'Brien—They are. They are a long-term storage system.

Senator XENOPHON—There is massive evaporation there.

Mr O'Brien—There is a lot of evaporation. I am not denying that there is possibly a need to do some work out there. I was out there recently and talking to the people on the ground and they were—‘sceptical’ is not the word—of the opinion that the ability to make significant changes to it is not a simple process and there is the compounding factor of a number of national park and Indigenous issues there as well in terms of the works that can be done. That is the advice that I am getting from various government sources. You would need to check with them on the developing of the spending and the infrastructure there. It is not perfect but this is, as I said before, a very large, flat area, and there are not a lot of other storage options in that area.

Senator XENOPHON—I know my colleague Senator Hanson-Young, who co-sponsored this bill with me, has a number of questions. You represent, by your name, a national irrigators group—irrigators in Queensland, New South Wales, Victoria and South Australia. Any other states? Any in the ACT?

Mr O'Brien—No.

Senator XENOPHON—None in the ACT?

Mr O'Brien—Other than myself, in my backyard, I do not believe there are any irrigators in the ACT. There may be a few small ones, I think, but—

Senator XENOPHON—But basically you represent the entire basin in terms of irrigators?

Mr O'Brien—That is right.

Senator XENOPHON—Don’t we need a truly national approach? At the moment, with the current plan, the intergovernmental agreement, you can have one state stymieing another. Don’t you actually need to have an approach that says, ‘Forget about state borders; let’s look at the health and the sustainability of the river system’? This bill is trying to do that. It is trying to move towards the policy approach of, ‘Let’s have a unified approach that, if there are certain triggers as to the health of the river system, we should just act on it in the national interest.’ You hear from irrigators up and down the system. Do you think that our current governance structures and the way the states can veto or stymie things are a recipe for further problems? The intergovernmental agreement has not been a panacea for fixing up the river system in terms of governance. Where do you see this going? We have been lucky with some rains. It has given us a bit of breathing space in the southern parts of the system, but probably only for a few months. What do we do in the longer term?

Mr O'Brien—The word ‘panacea’ is an interesting one. I think our members would agree that there is no simple solution to this. This is a highly complex and difficult situation. I come back to our fundamental point: this is about the sharing of the resource. It is a question of the nature of our Federation. Should we have states? Should we have lines on maps rather than geographical or hydrological boundaries? Even if there were not states, there would still be disagreements about who gets the water, who is allowed to harvest water in a certain spot and how much water must flow through the system. That comes back to putting it in the hands of the Commonwealth and, more particularly, under this bill, in the hands of one chief executive. That does not necessarily give a better outcome. If I may be facetious for a moment, people often say we need federal control. I say to them, ‘If the minister was a man from the cotton-growing region of St George, would you still be happy about that federal control?’ They say they do not know if that is the way they want it.

Senator XENOPHON—It does not matter who the minister is if you have the policy framework right, if you have a set of rules with triggers that are fair for the entire system.

Mr O'Brien—It still comes back to equitable sharing of the resource and it is still going to need agreement among a wide range of stakeholders and people. Whether that involves states, whether it involves river valleys, communities, environmental and irrigation groups, it is still going to need a sharing arrangement. We have seen no evidence that the Commonwealth is going to be able to do that any better than the current state agreements. It has put to me that the states constantly bicker. People suggest that the deal on the waters that came from the Christmas-New Year floods that delivered 148 gigalitres to the lakes took some weeks to turn out. It was actually a good deal. It was an agreement that made common sense. It delivered water to the environment and there was little third-party impact on anyone else. I guess it is an example of people working together and coming to common-sense solutions.

Senator HANSON-YOUNG—I was just about to reference the arrangement that was struck at the beginning of the year between South Australia and New South Wales in particular. You represent irrigators across the entire basin, surely, they need a bit more security and stability than just relying on whether, in times of flood or times of drought, state premiers are going to be able to strike a deal with each other based on—and I am being facetious now—how close their state election is. That was a very big impact and had significant play into the deal that was struck in South Australia. I do not think anyone can actually deny that. The pressure was on the South Australian Premier to do something. Irrigators at one end of the system, throughout the middle and up the top need more reliability than they get with the politics of Labor states.

Mr O'Brien—Absolutely, and that is possibly the best argument against this bill. We have a system of agreements. We have the tri-state agreement between New South Wales, South Australia and Victoria. We have the 10-year water sharing plans in New South Wales and South Australia and the 15-year plans in Victoria. Those agreements tell irrigators how much they are able to take from the consumption pool and how the water is shared with the environment. This bill would in fact throw all that out in a crisis situation and completely lose all that certainty, which is one of the main reasons we are opposed to it. The agreement that was struck earlier this year was outside the terms of that particular deal but, in theory at least, it did not impact on the existing sharing arrangements. If anything, it probably impacted on my South Australian members and possibly my Victorian members as well to some degree. But generally it was a common-sense outcome in that the water that was coming down would not have been enough to fill Menindee Lakes without wasting a hell of a lot of it through evaporation. Ultimately, it was a good deal for the environment in that respect. But I just wanted to highlight the point that, at least to some degree, this bill would throw out of the window the certainty we have in the current arrangements.

Senator HANSON-YOUNG—You say that you understand the frustrations of those at the lower end of the basin. What do you think is the best way of dealing with those frustrations? If you do not accept that there needs to be some trigger by which, in a crisis situation, there is some type of national management that accepts that the river system does cross state borders and that we cannot allow state premiers to go cap in hand begging each other, what do you think is the fairest way of doing it? Put aside the regular understanding of water-sharing arrangements, because this is not talking about that. This is talking about in particular times of crisis.

Mr O'Brien—Again, it comes back to the sharing of the resource. The frustration that has built in probably the last five years has been because of the fact there has not been much of the resource, and that is not something anyone can do anything about. Until it rains significantly, we get a flush through the system and we fill the dams, there is always going to be an argument over how much water goes where. But I think it needs to be equitably shared among those who are upstream where the rain falls and those downstream where the rivers should flow. We believe that the current arrangements provide that. I am not saying they are perfect, but to throw all that out the window would—

Senator HANSON-YOUNG—Your South Australian members agree with you, do they? They think there is currently an equitable system?

Mr O'Brien—If I was to say all of my members agreed with me on any particular point I would no longer be the CEO. We have a range of views. Dare I say it, we are a broad church. There is an understanding that the system is not perfect, but I think the concern is that throwing it all out in a crisis situation is not going to fix it. Certainly my South Australian members are largely looking forward to the basin plan and hoping that that will deliver at least better water quality to them. But, again, it is about sharing. I have had conversations with irrigators who said: 'I'm a high-security irrigator in Renmark. I should get 100 per cent of my allocation before anyone else in the basin gets any.' I said to them: 'Well, I've got a few thousand people upstream I'd like you to meet. They obviously believe they have an entitlement to use some of the water that flows in their

area, and I think as a country we have to accept that that should be the case.' I just do not think there is a broad amount of support for throwing out the current system.

Senator HANSON-YOUNG—In terms of the basin plan and its implementation, is the National Irrigators Council confident that that will deliver all of the cooperation that is needed?

Mr O'Brien—The basin plan in itself, not necessarily. We have some significant concerns about the basin plan, particularly in relation to the balance between the needs of the environment and irrigators. I would not say we are confident that it will deliver cooperation because cooperation is an ethereal thing, it will come and go—people will cooperate depending on certain circumstances. But it is about sitting down and coming to an agreement and working these things through, not throwing out all the rules and all past agreements and putting it all in the hands of one person to make a decision.

Senator HANSON-YOUNG—What is your opinion on the position of the New South Wales irrigators who insist that all states need to be lined up with the same time frame, that nobody should have to go first?

Mr O'Brien—In terms of the implementation of the basin plan? We do not have a formal position. We have not discussed it at council level. But I think generally we would expect that there should be competitive neutrality, that everyone goes at the same time. Also, and I stress this is a personal view, Victorian irrigators have made decisions based on the understanding that they had at least a 15-year time frame for their arrangements. So I would strongly argue at my council that they should not be brought forward, but if there is to be competitive neutrality then everyone should be starting from a similar date.

Senator FISHER—I heard your responses to Senator Xenophon and also in part to Senator Hanson-Young. As a senator from South Australia I ask you—and I think your answers to both Senators Xenophon and Hanson-Young touched on this—how can it make sense for your members in South Australia for water to evaporate from the Menindee Lakes and the Lower Lakes instead of being used for anything? I ask that, being mindful of your response to Senator Xenophon, which was in part about the environmental benefits. How can your members, particularly your members in South Australia, think it makes sense to let that water evaporate?

Mr O'Brien—I guess it comes back to the nature of the storage. There is no alternative deep storage in that Darling system where water could be more efficiently used.

Senator FISHER—If the federal government had carried out its promise to re-engineer the infrastructure of the Menindee Lakes, would your answer be different?

Mr O'Brien—Not in a geographical sense in that the physical nature of the system does not change, but certainly we would support whatever work can be done at Menindee to reduce evaporation—and we would support that wherever—with the obvious qualification that we would need to see what is proposed and that there are no third-party impacts.

Senator FISHER—Given that that election promise has been breached and that work has not been done, I come back to: how can it make sense for your South Australian members in particular that the water in the lower reaches of the Menindee Lakes evaporates rather than being used by something or anything?

Mr O'Brien—I am not sure what the question is. It is not my position that the water should be allowed to evaporate.

Senator FISHER—Given that the re-engineering of the works has not happened, what should have happened to benefit your members in South Australia rather than letting it go into the ether?

Mr O'Brien—I think if the 1,100 gigalitres or so that went into the Menindee Lakes in the latest flood event were allowed to flow through the system—and I not know how much would have ended up at the mouth, for instance, but certainly not the whole lot—

Senator FISHER—True.

Mr O'Brien—on the way the floods would have probably caused some damage along the river and, more particularly, given that Lake Victoria was close to full at the time, there was no other storage. So if it goes into the Lower Lakes, where it will also evaporate or go out through the mouth, there was the potential if we have another dry year in either the Murray or the Darling, that water would not be lost to the environment, the consumptive pool and the users of Adelaide. So it is about capturing the water there and having it available for use down the track.

Senator FISHER—So it is your position that it might as well evaporate from the Menindee Lakes because there is no other way it can be utilised with net benefit?

Mr O'Brien—I am not sure I would put it exactly that way, but I guess it is storing water. If it were not allowed—

Senator FISHER—It is not storing water if the water does not stay in storage; if it evaporates instead.

Mr O'Brien—It does not all disappear.

Senator FISHER—About 80 per cent is likely to.

Mr O'Brien—I am not sufficiently qualified to answer the questions about the level of evaporation. We know there is plenty of evaporation there and we know there is plenty of evaporation in the Lower Lakes.

Senator FISHER—True.

Mr O'Brien—There is no question about either of those. I am not arguing that the water must be kept in Menindee Lakes; what I am saying is that was a significant amount of water coming down from the floods in March and, had it not been diverted into the Menindee Lakes, it would have been lost to all users almost immediately, including my South Australian members. As I said—and it may have been just before you came in—I think that, if anyone lost out of the earlier deal that delivered 148 gigalitres to the Lower Lakes, it was probably my South Australian irrigators—

Senator FISHER—Yes, I heard you say that.

Mr O'Brien—They saw a lot of water going past but did not get any of it.

Senator FISHER—That is exactly right.

Mr O'Brien—In the event that we get another dry year—and it is not looking particularly great at this stage—the water in the Menindee Lakes now will start an allocation for our South Australian members. The indications are that by August we will probably have at least 25 per cent allocation, which is significantly better than previous years opening allocations. If that water had been allowed to flow through the system, it would not be there and would not be available for irrigators to use. Given that it came in March, it was right at the end of the irrigation season so what might have been allowed to flow down would not have created a great deal of benefit for our members. It was far better for it to be stored where it can be used in future.

Senator FISHER—If that be the case.

Mr O'Brien—It certainly will be the case. That water will be available to be used—not the whole 1,100 gigs; I am not sure what the ultimate outcome will be. Certainly the other thing is that the fact that it came in in March and is going to be stored over winter will mean a hell of a lot less evaporation than otherwise.

Senator FISHER—It is all relative.

Mr O'Brien—I am not here to defend Menindee Lakes.

Senator FISHER—Good.

Mr O'Brien—I am just saying that it is the only available storage and had it not been diverted into the lakes we otherwise would have lost it.

CHAIR—Thanks very much, Mr O'Brien, both for your submission and for appearing before the committee today. We appreciate your assistance very much.

[10.30 am]

KERR, Ms Deborah, Manager, Natural Resource Management, National Farmers Federation

CHAIR—Welcome. Thank you very much for your submission. Your submission has been received as No. 14. Do you wish to make any amendments or alterations to your submission?

Ms Kerr—No, the submission stands.

CHAIR—Would you like to make a brief opening statement before we go to questions?

Ms Kerr—Thanks. You have our submission and I will not elaborate on that. What I will say is that the National Farmers Federation has been a longstanding advocate for water reform. We supported the National Water Initiative. We still support the National Water Initiative. We have worked cooperatively with the federal government and the previous federal government on the Water Act and reform of the basin's water management. I think it is fair to say that water is quite complex. I think everybody thinks they know everything about it but that is probably not quite correct. I think there have been a lot of misunderstandings and parochial interests which are undermining some good outcomes.

The basin plan is underway. Development is occurring. There are some limitations on that. There are some issues around lack of time for adequate, good planning. It does take time. The authority is under significant pressure to get good planning out in a short period of time. There are also some issues, as we understand, around lack of adequate data to inform their work. The Water Act is in place. One of our concerns about the structure of the Water Act as it relates to the basin plan is the provisions which should balance social, economic and environment. We need some time for the basin plan to be implemented and a chance for that to work. We have not seen what the basin plan is yet and we will not see the final result of that until 2011. I might leave it there and take questions.

CHAIR—In your submission you mention that in your view the bill before the committee refers principally to the Lower Lakes and Coorong, or is targeted at that area, and that the bill ignores other just as important assets. What do you mean? What other important assets are you referring to?

Ms Kerr—I think the Murray-Darling Basin Authority had originally identified something in the vicinity of 9,000 environmental assets across the basin. They are assets that are listed under either international agreements or national and state regulations legislation. As I understand it, that list has come back to about 3,500 assets, so, while the Coorong and Lower Lakes are very much an important Ramsar site, there are, as the authority have identified, about 3,500 other assets around the basin.

CHAIR—Does the National Farmers Federation have a position on the Leader of the Opposition's proposal to hold a referendum on the complete federal takeover of the Murray-Darling Basin if the states do not agree to surrender their powers?

Ms Kerr—The National Farmers Federation's view is that there is a water reform process underway and that water reform process ought to be allowed time to not only be developed but be implemented, and there should be time for us to monitor that reform process and see how that goes. That is some way off. We are not even started there. Even a 2013-14 federal election is going to be quite short. The basin plan's implementation at a state and a regional level will not actually be occurring at that point in time.

CHAIR—Thank you very much for that.

Senator HANSON-YOUNG—Thank you, Ms Kerr, for your submission and your opening statement. Obviously you can see what the purpose of this bill is. The fact is that there is limited capacity at the moment when there is a particular crisis, whether that is floodwaters or in a drought, for the intergovernmental agreement to really manage that system outside of the regular day-to-day water sharing arrangements. I have read through your submission and understand your criticisms of the bill. But surely there is a weakness and a flaw within the current management system that is not able to deal with those special circumstances? If you do not agree with it being managed in the way set out in the bill, how would you prefer it to be managed?

Ms Kerr—I probably would take a backwards step. What we have seen over the last 100 or so years are water wars in Australia, where people have thought of particular ways to do water management as being the preferred option. Certainly it was a concern when the Constitution was being drafted. I think that over the last decade we have been challenged by the worst drought in a century. We are at full development. We call it the first irrigation drought because it is the first time that there has been insufficient water to supply not just

downstream needs, stock needs, domestic needs and environmental needs but also irrigation. So it has been a drought that has challenged people, farm businesses and the environment as well.

Have we managed that poorly? I think that the jurisdictions have managed trying to provide, particularly in the southern basin, the small amount of water that has been available to the critical high-priority users in the system. There have been some environmental flows made available and most of the water has been allocated for stock and domestic supply, and urban water use. They have had the ability to deliver that water down the system. I think that cooperative arrangement has served us well. The question in the bill is whether it is adequate to serve us in the future. If you look back over history, the way that we have managed a lot of these sorts of arrangement has been through cooperative arrangements between jurisdictions. Certainly parochial interests can come to the fore sometimes. But I think that, generally, when they are put in a room and the jurisdictions have to make the tough decisions they have done it well. We have seen that demonstrated in recent years.

Senator HANSON-YOUNG—Can I just clarify: the South Australian Farmers Federation is not actually a member of the National Farmers Federation, is it?

Ms Kerr—The South Australian Farmers Federation is not a member of the National Farmers Federation but we have members that span South Australia, from the pastoralists of the west Darling. We also have seconded onto our water committee a South Australian irrigator to ensure that we take account of the South Australian views.

Senator HANSON-YOUNG—But most of your members would come from where?

Ms Kerr—Our members are generally the state farming organisations—with the exception of the South Australian Farmers Federation—and commodity groups. But through our restructure we are also getting through-chain members like GrainCorp, real estate agents, veterinarians and a whole range of new members.

Senator HANSON-YOUNG—If there were not some type of change through this particular piece of legislation and state premiers, in a time of flood, continued to go to each other cap in hand begging for X gicalitres to come down the system, do you really think that would give any type of fairness to people, either upstream or downstream?

Ms Kerr—I will come back to the point that I think difficult decisions are being made in a cooperative manner. The Murray-Darling Basin Agreement, which most people are probably familiar with, covers the operational management of the southern system. It also covers the financial arrangements of the MDBA or the commission prior to that. It is about the operation and the rules that codify how we operate the basin in that agreement—they are not in the basin plan or the Water Act; they are in that particular agreement. That defines how we share water and what happens in particular cases. You could look at the recent flood event that you were talking about before through from the northern basin. How that was managed is defined by the agreement.

Senator FISHER—How long is it since the South Australian Farmers Federation was a member of the NFF?

Ms Kerr—I would have to take that question on notice; it predates my employment.

Senator FISHER—Probably some years. Would it be fair to say that the NFF would be seeking to encourage them to rejoin as it would any previously affiliated organisation?

Ms Kerr—I believe that there have been high-level discussions, but I am not privy to those.

Senator FISHER—But it would not be likely, would it, that the NFF in formulating its views would leave its South Australian compatriots out in the cold?

Ms Kerr—No, it would not, and that is the reason we did specifically second a South Australian irrigator onto our water committee—to ensure that the South Australian interests were also covered in our policy framework.

Senator XENOPHON—Thank you for submission. Would you concede that, at the moment, the fact that there is litigation between South Australia and Victoria in the High Court over the intergovernmental agreement on the issue of caps means that we have a situation where the issue of water governance is dysfunctional in the sense that there does not seem to be one national authority that looks at the interests of the entire river system to deal with the crisis or the fundamental problems of the river system? What do you see as an alternative to this bill? In terms of the broad policy, do you see that if there are floods in a certain part of the system those floodwaters should be harnessed for environmental and other purposes so that you can actually

flush out the river system to ensure its environmental viability, which in turn would impact on the way it can be used by irrigators?

Ms Kerr—I will come back to my earlier comments. Firstly, the basin plan is not in place and we have not given it time to be implemented and to have all those effects. I understand there are a lot of concerns about the delays around that, but we do need to allow time for it to work and we need to see what the authority has done. That policy framework is in place and is being implemented.

The second thing that needs to occur, and I understand this is also underway, is the review of the agreement I referred to before. I think it is a requirement of the Water Act that it be reviewed after the basin plan is put into place, to ensure that the two are consistent. So we have the policy framework, firstly, while the agreement is about the operation. I assume that through those two processes some of those concerns will be taken into account.

Senator XENOPHON—Your submission states:

... this Bill as it seeks to circumvent a significant reform of water planning in the Murray-Darling Basin.

Does that imply that the NFF will go along with the process through the Murray-Darling Basin Authority such that the NFF will agree with whatever sustainable diversion limits are set by the Murray-Darling Basin Authority because it is part of the water reform process that has been instigated?

Ms Kerr—We certainly have some concerns about the structure of the basin plan in the Water Act and we have advocated that to have not just good outcomes for the environment but a minimal effect on the social and economic fabric of our communities the authority needs to consider nonflow as well as the flow options in setting the sustainable diversion limits. Whether or not we are successful in that is yet to be tested, but certainly in delivering that sort of reform framework it is not a fait accompli that we will tick off SDLs as the authority sets them. There is a process of consultation and we are involved in that consultation process.

Senator XENOPHON—To get this straight: the situation is that you see this bill as circumventing the water reform planning process in the Murray-Darling Basin?

Ms Kerr—The basin planning process, yes.

Senator XENOPHON—But the NFF does not consider itself bound by the current process in the sense that, if it is not happy with the SDLs, the sustainable diversion limits, the NFF reserves the right to criticise or to campaign against those SDLs?

Ms Kerr—I think everybody reserves that right. There is a consultation process that is required under the act. As a stakeholder, we are fully engaged in consulting with both the authority and the government on the plan and the SDLs. Until the final plan is in place, we will continue that advocacy work.

Senator XENOPHON—It is not a criticism; I am just trying to sort this out. One of the reasons you do not support this bill is that it undermines the water reform process—

Ms Kerr—That is currently underway, yes.

Senator XENOPHON—that is currently underway, but you reserve the right to criticise the water reform process when the SDLs come out?

Ms Kerr—I think they are two slightly different things. Our view is that we are part of that water reform process and we are undertaking and participating in that water reform process as appropriate and, as the bill says, through a consultation process, but what we see in this particular bill is that it is seeking to, I suppose, set aside or circumvent that process before it has actually got underway. So it is not part of the process; it is trying to undermine the process, as we see it.

Senator XENOPHON—But ultimately, on behalf of your members, you reserve the right to undermine or criticise the process down the track?

Ms Kerr—I would not say—

Senator XENOPHON—I would not say ‘undermine’; I withdraw that. You reserve the right to disagree with the process or disagree with the outcomes of the process down the track.

Ms Kerr—We reserve the right to participate in the consultation process right through until the final basin plan. We cannot influence the final basin plan and the SDL once the authority has made that final and the minister has accepted that. That is the end point for our advocacy in trying to ensure that the basin plan not only delivers a maximum outcome for the environment but minimises the effects on the social and economic fabric of our communities.

Senator XENOPHON—Thank you.

Senator FISHER—Ms Kerr, do your members have a view—speaking agriculturally, I guess—about what happens if the bottom of the system clogs up?

Ms Kerr—I suppose we do not have a formal policy view.

Senator FISHER—Let us talk about it in a practical sense. Is there much difference between the bottom of an animal clogging up and the bottom of a water system clogging up? We call the bottom in this case the mouth, but it is actually the bottom.

Ms Kerr—The water reform process, as I said earlier, is underway. There are opportunities to ensure that we deliver maximum environmental outcomes for the basin's environmental assets while minimising social and economic impacts. The concern that we have is ensuring that the authority considers all of the management options available to it, and that relates to both flow and non-flow options. From the old MDBC website, there are about six causes of environmental problems. Only one of those is flow. You need to have a look at engineering solutions. You need to have a look at all of those options around the assets from the northern basin right through to the Coorong.

Senator FISHER—If the bottom clogs up, doesn't it totally stuff the flow in the upper system, in the upper tracts?

Ms Kerr—I am no ecologist, but I would suggest that the upper reaches—

Senator FISHER—It is common sense, though, isn't it?

Ms Kerr—I think it is a bit of a misnomer to try and compare it to a digestive system, but anyway we will try. The upper reaches are in poor health in some circumstances already. The middle reaches have different health statuses, and the lower reaches have different health statuses. So, in terms of the river's environment, we need to look at all of the options that are available to us to manage their particular issues.

I think somebody mentioned blue-green algal blooms before. The worst thing you can do to a blue-green algal bloom, as far as I understand it, is to stick more water on it, because what you are doing is flushing it down the system and spreading the bloom across a larger area of river health. Simply putting more water down to fix a particular problem can actually result in perverse outcomes. We saw that in the Murray last year, I think it was, where water was put into some of the wetlands and ended up creating a black-water event. It was unintended but it occurred, and fish species died as a result of that.

Senator FISHER—Let me ask the question another way. Surely it is to the benefit of your membership overall for the mouth to be flushed all the time, noting that there are a range of different mechanisms you could use to get there and that you could argue the quid pro quos of all the mechanisms? But surely it is going to be to the net benefit of your membership for the mouth of the Murray to be flowing—that is, flushing out to sea?

Ms Kerr—It is in their interests to ensure that the river system is looked after all the way down, and I am sure that is what the authority will be ensuring happens. There is a huge focus politically, in the media and socially on the lower end of the river and making sure that it is healthy, and I am sure that the authority will ensure that that occurs. How—

Senator FISHER—Wouldn't you be saying that, come what may, the mouth must be flushed?

Ms Kerr—I have no intimate knowledge of the system over time down there, but I understand it has been closed once before, in the 1980s—correct me if I am wrong—but it is a—

Senator Birmingham interjecting—

Senator FISHER—Yes, there have been lots of times where not a lot has been happening.

Ms Kerr—Yes, and it has been closed many times since then. I also understand that it is not where it originally was a couple of centuries ago. The Murray mouth down in the Lower Lakes is a difficult system. There are estuarine issues. There are issues around the incoming tides and dumping sand, so it is a difficult system. It is an important system. It is a Ramsar site. I would think that, as I said, through the basin plan and the huge focus on that end of the river system, the authority will ensure that it is looked after.

Senator FISHER—Thanks, Ms Kerr.

CHAIR—There being no further questions for the National Farmers Federation, thank you very much for your submission and also for taking the time to appear before us today. As always, we appreciate your assistance. Thank you.

Ms Kerr—Thank you.

Proceedings suspended from 10.52 am to 11.16 am

BELL, Professor Diane, Private capacity

CALDECOTT, Mr John Earle, Foundation Chair, Environmental Standing Committee for Water, Water Action Coalition

CHAIR—Welcome. Thank you for joining us today. The committee has received your submissions as Nos 15 and 13 respectively. Do either of you wish to make any amendments or alterations to your submissions?

Prof. Bell—No.

Mr Caldecott—No.

CHAIR—Would one or both of you like to make an opening statement?

Prof. Bell—We both will. Thank you very much to the committee. It is good to see so many friends of the river here, because the river really needs and friends. So I am going to make an argument for what friends of the river might look like. I want to make a call for some conceptual clarity in the way in which we think about issues concerning the Murray-Darling Basin and I want to make a distinction between thinking about river as a water resource, as a commodity, something that gets moved around, allocated, divided up and is thought about in terms of the politics of scarcity, so we hear language like a resource, an asset, and that underlines the arguments in the recent Wentworth report about how SDLs might work in the basin plan. On the other hand I would think about the river as a living body which relies on connectivity. It is a holistic way of thinking and it would be the politics of interdependency. The trouble with this living body is that it has a very erratic pulse. I have engaged in the little bit of anthropomorphising the river—that is some Greek, I think, Nick, to add to the Latin this morning.

CHAIR—We have had a bit of anthropomorphising as well.

Prof. Bell—This friend, this anthropomorphised river, is a very wilful friend, and we have to learn to live with that erratic pulse. We know it is a land of droughts and flooding rains and that is what we need to learn to work with. In saying this I am drawing on the Ngarrindjeri conception, the traditional owners of the area, which takes in Lake Alexandrina, Lake Albert and the Coorong and the lower Murray. Their concept is where waters meet, where fresh water meets seawater meets estuarine meets lagoon, is an area of enormous creative potential. It is where life itself happens with the mixing and mingling of waters. We know this as ecologists and we also know this through the traditional stories of the Ngarrindjeri, who have been good stewards of the land for some millennia. When they talk about the land they talk about the connection between land and body as a reflexive relationship: damage one and you damage the other. And their totems, their ngaitjis, are what stand for that relationship. What they say is when ngaitjis, their totems, are sick they too are sick and the country is sick. At the moment you could point to those images of the turtles, the tube worm incrustation, to say that is evidence that the land is sick and people are sick and we have violated that relationship.

This legislation is of interest to me on a number of fronts. First of all, I think it is a conversation we need to be having. Having listened to some of the other witnesses this morning, I think what we have heard is a spelling out of some of the framework of that conversation. It is an ongoing one and I think we need thoughtful interventions like this piece of legislation to help frame that conversation. It is also of interest to me because I worked for the Australian Law Reform Commission as a consultant when Justice Kirby was the commissioner there. One of the things I learnt through that period was the way in which legislation can in fact start conversations—and at that point it was law reform as to recognition of customary law in Aboriginal communities. I also learnt that if you do not understand the history of a problem you are not going to be able to come forward with reasonable solutions. In that respect I would say we really have to understand the nature of overallocation, not just keep on privileging drought. This is an issue of mismanagement and this is a man-made problem, and we need to understand that if we are going to undo that and get ourselves to the other side. We are at code ‘catastrophic’ with our river but it can be saved. We can have water to bring new life. I have been flying recently over the river system of Cooper Creek, the Diamantina and the Warburton, following those rivers down into Lake Eyre. It was something to see that new life, to see that reconnection that the Ngarrindjeri talk about—that connection that I would argue we need in the living system—to see the trees that have not had water for 20 years starting to come into leaf and to see the breeding populations of birds in a land awash with water—and here we are down in the Lower Lakes watching every tiny little dribble that comes in.

The river is a whole system. We have the Murray-Darling Basin Authority, which holds out hope of managing it as that, but what we are finding is that sectional interests are undermining that potential. If we are going to think about the river as a commodity, then we have to have a much better way of valuing it as a

resource. What is a wetland worth? When we disconnect it we certainly know what it is worth and what is the impact on the whole system. As for the questions that Senator Mary Jo Fisher was bringing forward about what happens when you block up the mouth, rivers die from the bottom up. If we do not have that holistic understanding we are really in trouble.

Can we manage the Murray-Darling Basin? If we do manage it, in whose interests and according to what principles and conceptual framework do we manage it? Does this legislation help? I have spelt out my questions on the first page in terms of the big picture—I will not go through them as I am sure all of you can read them—and then I turn to the specifics of the legislation, which have to do with things like what happens when power is concentrated in the hands of a few, what kinds of checks and balances are there on that, the role of ADJR in terms of being able to review decisions and what is the definition of a crisis and whether we need to have one or we need to have a shifting definition. And I think the issue of critical human needs is one we need to be revisiting in terms of what it means, not generally in terms of the Water Act but also in terms of what it means for how the Lower Lakes population is treated as to allocations.

In conclusion, we need a freshwater solution. The water is there. Do we have the will to do it? I think this legislation is a step in the right direction.

CHAIR—Thanks, Professor Bell. We will go to Mr Caldecott.

Mr Caldecott—Thank you for the opportunity to present our submission to the Senate inquiry that is reviewing the draft Water (Crisis Powers and Floodwater Diversion) Bill 2010. The position of the Water Action Coalition of South Australia is clear and firm. We support the good intentions of the bill. For some time WAC has maintained that a state of emergency has been needed in the Murray-Darling Basin to manage the very real crisis that it faces, one that has been advocated by one of our supporting members, Fair Water Use (Australia). The very title of this draft legislation, the Water (Crisis Powers and Floodwater Diversion) Bill, is recognition of the dire state of the system. This bill gives the Murray-Darling Basin Authority power to manage the water resources of the basin as a single system during periods of extreme crisis—and that crisis is now. In this respect the bill is weakened by the very definitions that constitute the invoking of the necessary powers. In its submission WAC is arguing that the bill does not go far enough. We firmly believe that nothing short of a full public inquiry with the powers of a royal commission can unravel decades of bad policy at all levels, gross mismanagement and the ongoing exploitation of the waters of the Murray-Darling Basin that has continued to this very day. A royal commission is required to determine the systemic root causes and propose solutions fundamental to a proper corrective action process.

Despite the recent rains and floods which have brought renewed hope of recovery, the situation remains critical. We may not have experienced the tragic loss of life of the Victorian bushfires but what we are facing in South Australia is as serious as the consequences of the collapse of our state bank in 1991. Never before has an issue provoked such widespread debate and concern. Senator Xenophon was right when he declared at the second reading of the bill:

Now, more than ever, the state of the Murray-Darling Basin is the most pressing environmental and social crisis this nation faces.

His analogy was:

For more than a century, state and federal governments have treated this river like some kind of magic pudding.

That pudding has well and truly lost its magic. It is no longer palatable for all those who depend on its waters to sustain their livelihood and their quality of life.

Our call for a state of emergency to be declared and for a full public inquiry to be held is based on the representation of a diverse cross-section of the South Australia community. The Water Action Coalition is a broadly based movement of community groups and environmental organisations that has been formed in response to growing public concern about the state of the Murray and related water issues in South Australia. The authority of WAC is derived not only from our broad constituency but also from the authoritative knowledge of our scientific reference group and our international patron, Maude Barlow, who served as a senior adviser on water to the 63rd President of United Nations General Assembly during 2008-09.

The mission of WAC is to ensure a sustainable water future for South Australia, a future that ensures an equitable use of all water resources for future generations that does not compromise interdependent ecosystems, freshwater and marine. To promote those aspirations WAC has protested widely and organised rallies that advocate that water in all its forms remain the common property of Australia and its ecosystems, as intended by the founding fathers of Australia's Constitution. We have demanded actions that will secure all

water in the Murray-Darling Basin and all groundwater as the common property of Australia, not to be traded as a profitable commodity. We want to be sure that water is managed efficiently and effectively for community use today and conserved for future generations. Finally, we need to ensure recognition of Indigenous knowledge of water conservation and its importance to Australia's oldest culture, particularly the Ngarrindjeri people, who have occupied the bottom of the river for thousands of years. These are the key points that we make in our submission.

The solutions of governments, to date, to the water crisis are unacceptable. Further engineering interventions by building more dams and weirs will not restore the health of the system. Billions of dollars are being earmarked for and spent on pipeline projects, weirs, regulators and desalination plants in a desperate bid to be seen to be doing something about water security—but not the right things. These water solutions will only magnify the problem. The following will result: desalination will increase carbon emissions, significantly impact on marine life in the gulf and drive up the cost of water, making us uncompetitive. Substantial public funds are being wasted by all levels of government. The potential benefits from the restoration of vast areas of seagrass meadows as carbon sinks continue to be ignored by governments. The construction of so-called temporary weirs and regulators at the end of the River Murray is destroying the purifying ecosystems of the Lower Lakes and the Coorong. Any prospect of constructive cooperation between states and their communities remains at risk from ill-conceived litigation and a belief that we can trade our way out of the problem by purchasing or privatising water.

South Australia's water crisis, both freshwater and marine, is one of the most urgent ecological and human threats of our time. We believe that, in addition to the powers of the bill, a Commonwealth instigated national public commission of inquiry into the Murray-Darling Basin is required. It should resolve what changes need to be made by the Commonwealth, the states of Queensland, New South Wales, Victoria and South Australia and the Australian Capital Territory with respect to governance and management of the Murray-Darling Basin. The inquiry should also determine the environmental, social and economic consequences of the current management arrangements, including those that have resulted from the Council of Australian Governments' water reform agenda.

Our submission suggests draft terms of reference for consideration by this inquiry. WAC acknowledges that the proposed bill will give the Commonwealth the authority to achieve many of these things. Its weakness, though, is predicated on the definition of an extreme crisis when the level of water in Lake Alexandrina is continuously less than sea level for more than three consecutive months. Under the bill, only in this situation will the Murray-Darling Basin Authority have absolute power to intervene.

The crisis has already been with us for too long. The consequences of mismanagement are already plain to see. The reduction of flows into South Australia from the River Murray is having catastrophic effects and in many places is already a disaster. The economies of regional and country towns depending on the River Murray are struggling or at the point of collapse. The Lower Lakes and the fragile environments of the Coorong are being lost. Adelaide is being increasingly compromised as a viable city to live in given the state of its creeks, rivers and adjacent coastal waters. Ancient groundwater is being further plundered, risking its eventual depletion. There is accelerated loss of fresh water in marine natural habitats, putting at risk many unique species. Communities have become divided as result of water trading and rationing and increased water pricing. Bad policy has resulted in bad solutions. We are paying the price for massive investments in a desalination plant that will only add to the destruction of Gulf St Vincent and will increase the price of water tenfold within a decade. Upper Spencer Gulf is at risk from the threat of a desalination plant built by BHP.

Not only do we need a proper inquiry now; we also need parliaments, both state and Commonwealth, to pass laws that commit governments to conservation, protection and water equality for all Australians. Australians should decide the issues of water privatisation by a referendum; it should not just be those with vested interests or the most money. Apart from the intentions of this bill, we need immediate legislation and funding for more stormwater harvesting and wastewater recycling. We need laws that fund community action towards rainwater collection and conservation. These are far more important issues than the spending of billions of dollars to build stadiums and desalination plants. We must leave enough water in aquifers, rivers and lakes for their ecological health. Living in and with nature instead of over nature is our path to a water-sustainable future.

We should not lose sight of an important section of the Australian Constitution. Section 100 states:

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

That section enshrines the fundamental principle that water should not be traded as a commodity. Yet, by stealth over many years, this is now happening. The waters of the Murray-Darling system are becoming a valuable commodity on the open market. Water trading is portrayed as a solution to achieve fair redistribution of entitlements and allocations. 'Water trading' is spin for water privatisation. The costs to South Australia from this new market are considerable. Our minimum entitlement of 1,850 gigalitres has been progressively sacrificed to support the introduction of the new national water market. Our entitlement, which is supposed to be enshrined in the Constitution, is no longer guaranteed and there is clearly no commitment by the upstream states to meet that commitment during low flows. I would suggest that these actions have been unreasonable and therefore unconstitutional.

As many of you will know, South Australia has capped its diversions since the late sixties, while the eastern states increased their diversions by around 330 per cent. That diversion cap versus the minimum entitlement is only about 43.5 per cent, and I believe it is unreasonable for the new basin plan to cut South Australia's diversions.

Nobody should own the waters of the Murray-Darling Basin, especially companies that are not even Australian. We should not allow water shares—the new term for a water licence—to be owned by foreign interests. As custodians, we have a lot to learn from Aboriginal culture, which respected water and interdependent ecology as part of 'our place'. We ask that the fundamental human right to clean, affordable water as a common good be codified by parliament and enshrined in law. We need laws that do not automatically sanction weirs, pipelines, diversions and desalination as short-term solutions. A sustainable future without compromising our environment is the only acceptable outcome. A quantum change of policy is required.

As stated before, we support the good intentions of the bill. We ask of this inquiry that it take further action to resolve more than a decade of bad policy, gross mismanagement and progressive erosion of our constitutional rights to the water of the Murray-Darling system. I thank the members of the committee for their resolve to find a better way. Australia can only wait with bated breath to see whether the new Gillard Labor government will reflect on water reform—which the previous Keating, Howard and Rudd governments have failed to do—and own up to the privatisation of Australia's water.

I would also like to table three documents, most of which I can provide as electronic copies following the conclusion of today's meeting. One is a report for the Environmental Protection Agency, Adelaide, *Australian seagrass meadows as potential carbon sinks: focus on Gulf St Vincent, South Australia*. I have a brochure on the Water Action Coalition. I also have a booklet, which I will leave with the acting secretary, Geoff Dawson, produced by the Friends of Gulf St Vincent with an eco-forum grant; the booklet is called *Gulf St Vincent: a precious asset*.

CHAIR—Thank you both for your opening statements. We will go to questions.

Senator XENOPHON—Thank you for your submission. Mr Caldecott, you made reference to South Australia capping its diversions following the 1967-68 drought while upstream there had been a collective increase in diversions by over 300 per cent. You made reference to South Australia's entitlement of 1,850 gigalitres under the Murray-Darling Basin Agreement being a meagre share of the total resource. Could you elaborate on that, particularly in relation to the diversions and the capping? What is your source material in terms of what has happened upstream?

Mr Caldecott—It seems pretty clear to me that the way the basin operates has been in place for some time. As flows decreased, there was strong bias to irrigators, and the environment lost out. There has been no change to that right up until this point in time. I think South Australia's total cap for irrigation, industry, town water use and the city of Adelaide was approximately 724 gigalitres. It has been capped since 1968-69, so all the flow down the river that comes over the border in excess of our minimum entitlement flows to the sea. South Australia has been one of the most conservative states—in fact, I suggest it should already be considered a sustainable diversion limit and perhaps, as a fair share of the waters of the Murray-Darling Basin, our cap should be revised up, not down. Karlene Maywald in 2008 increased the diversion cap to I think around 805 gigalitres.

Senator XENOPHON—You may want to take that on notice.

Mr Caldecott—But in that very same year the 100-gigalitre desalination plant was announced.

Senator XENOPHON—There is an issue, isn't there, at the state level because the state government is not switching on the desalination plant but is drawing more water from the Murray? Is that what the intent is?

Mr Caldecott—Sorry?

Senator XENOPHON—As I understand it, the desalination plant has been left in hibernation and the effect of that is to draw more water from the Murray.

Mr Caldecott—South Australia's diversion entitlement is defined in the Murray-Darling Basin Agreement. As I understand it, there is no change to those arrangements. Adelaide itself has a rolling cap of 650 gigalitres. The average is 80 gigalitres: 40 gigalitres in a wet year, which is probably going to happen this year, and upwards of 200 gigalitres in a drought.

John Olsen recognised—and it is documented in Tikki Fullerton's book *Watershed*—the political significance of this idea of weaning Adelaide off the Murray because it would wean the people of Adelaide—over one million people—off their rights to the Murray. The other critical thing is that Adelaide, instead of spending \$1.8 billion on a desalination plant, could have invested in comprehensive stormwater and waste water recycling and that water could have been piped to Roxby Downs, saving the Great Artesian Basin and the upper Spencer Gulf from the threat of a desalination plant.

As many of you may know, our commercial species, such as the Western king prawn and the blue swimmer crab, are tropical species. Our gulfs are amazingly unique environments. That is one of the reasons why I tabled the booklet from the Friends of Gulf St Vincent. There is also a thicker natural history of Gulf St Vincent that was published in 2008 and that involved a number of the friends. It really illustrates how unique this ecosystem is—as is the Coorong, the Lower Lakes and the Murray—that we are messing with simply because we have not stood back and taken a whole of system view to managing water. The residents of South Australia have just as much right to use that water as the irrigators.

Prof. Bell—One of the frustrations with the plans for the desal is that it is not necessarily going to take any pressure off the Murray itself, so you add water rather than conserving the water and putting it into the environment. I think that is where you get a lot of frustration and anger from people.

Senator FISHER—So the health of the system goes from the bottom up, or the mouth—do you want to explain?

Prof. Bell—Rivers die from the bottom up, but the health of it relies on the system being connected—that is its resilience; that is its chance for recovery—and as soon as you start cutting pieces off it is like cutting off parts of the body. The wetlands act as nurseries, as the Ngarrindjeri like to call them, because that is where the young things grow. Once we start cutting those off, we cut into the life cycle and the regeneration and then we do not have intergenerational survival.

Senator FISHER—So it is like an anatomical circulatory system.

Prof. Bell—I would not want to push the analogy too close, but it is a living system where the integrity of the whole relies on the parts functioning together.

Senator FISHER—If you move the bottom, or the mouth, further up by some mechanical means—that is, you commit harakiri for a South Australian senator—that would not change your scientific view, would it?

Prof. Bell—If the mouth were to be, say, where the River Murray flows into Lake Alexandrina, which is what would happen if a weir were to be built above Wellington, you would then get the salinity that accumulates and comes out of the flood plains and down the river. That would then all be caught behind the weir. If there were not a sufficient flow over it into the lakes, to keep the function of the lakes, then you would have—

Senator FISHER—So it would be the same problem but in a different place.

Prof. Bell—Yes, but the function of the lakes, if you want to push that anatomical analogy, is that they act as a kind of lungs and kidneys. They are lungs in the sense that the wind goes up the river, turns over and brings the nutrients and pushes them out, and kidneys in terms of the flushing of the system. So, once you chop that off, you deprive the whole of the ecosystem, not just the lakes themselves, of that capacity.

Senator FISHER—Okay. Is there any dispute about that analysis?

Prof. Bell—No, I think the questions or the contention has to do with holding water in Lake Albert and Lake Alexandrina—the wilful behaviour of lakes to evaporate. Of course, we have to have evaporation as part of the water cycle.

Senator FISHER—However, if the Lower Lakes—the South Australia harakiri bit—were allowed to die, it would simply shift the same problem to further up, would it not?

Prof. Bell—The problem would go up—the salinity problem and the need for flushing—and you would lose the enormously large, productive area, which is both an environmental asset and—

Senator FISHER—All that, as well, which is part of the pros and cons. But, if the bottom line is that you are still left with the same problem in a different part of the circulatory system, but of course still in South Australia—

Prof. Bell—You are not actually left with the same problem; you are left with a much worse problem, because you do not have a way around it.

Senator FISHER—Is there agreement as to that, universally?

Prof. Bell—Yes, there are people who are prepared to study the science of it.

Senator FISHER—Is there disagreement with that view?

Prof. Bell—There is disagreement in terms of people who believe that the river is a resource and that the priority should be given to the productive activities, whether they are sensible ones or not, that have been established along the river.

Senator FISHER—Is there disagreement with your comment that, if you move the problem further up, it is a worse problem?

Prof. Bell—I think that anybody who has studied water quality and the hydrology of the area would agree with that, yes.

Senator FISHER—So why is there any debate more than how we achieve this?

Prof. Bell—The only considerations are not the considerations of the health of the ecosystem, and that is why I drew the comparison.

Senator FISHER—But, without the health of the ecosystem, there is no ecosystem, no debate about humans and no debate about farming.

Prof. Bell—One of the things we have campaigned on as groups down here is that a healthy river has to take priority, because without a healthy river you do not have healthy communities and you do not have healthy economies.

Senator FISHER—It is a no-brainer.

Prof. Bell—It is to me. It is to you; I am very pleased.

Senator FISHER—It is common sense.

Prof. Bell—There are other short-term interests. There are other ways of running the argument and giving it different criteria for the establishment of priorities on purely economic criteria. But then I would see that even those economic criteria have to be contextualised in terms of their social, cultural, spiritual and environmental influences.

CHAIR—In relation to that last discussion, I note that Tony Abbott, the Leader of the Opposition, on 26 June this year said:

The Coalition will provide holistic management of the whole Murray-Darling water system so that water can be distributed fairly and equitably among all those people who depend upon it.

I note there is no mention in that statement of the environment or of sustainable outcomes. Do you have a comment about that?

Prof. Bell—I would hope that the Leader of the Opposition could be convinced that the ecosystem itself is at the base of any way in which we may begin to talk about how we are to share and use. If we do not understand that then we cannot possibly be talking about any equitable sharing unless we understand that the river pre-exists all of that.

Senator FISHER—Was exactly that not implicit in what you said to me earlier and, as I said before, is it not a no-brainer that it must be implicit in the statement that Senator McEwen has just placed on record from the Leader of the Opposition?

Prof. Bell—I suppose it depends on which conceptual framework, which discipline and whose interests you are serving—

Senator FISHER—A bit of commonsense would help

Prof. Bell—Yes, common sense does help. My argument, which is in agreement with yours, is that if one takes the view that the health of the river should be privileged over all others, because otherwise the other considerations cannot come into play, then it is a no-brainer.

Senator BIRMINGHAM—Thank you very much for taking the time and expense to travel here and share your views with us today. I am sure most people around this table—if not all—would have a great deal of sympathy for many of the sentiments you have expressed. I want to come back to the detail of the bill that is before us and flesh out your views as to why this is needed in addition to the existing provisions of the Water Act, in particular in a long-term sense. In the short term, with obviously much of the Water Act still to take effect and the plan still being developed—let alone implemented—there are obvious gaps, and I can see the arguments you would mount. In the long term, if the plan is a plan for sustainability, why are these provisions necessary?

Mr Caldecott—For me, WAC's submission slide 14, 'Variability of relative levels of use', which was published by CSIRO, is the key to planning for sustainability. You need to bear in mind that for the regulated part of the system of the Murray-Darling Basin licences exist for 16,200 gigalitres, so it is going to be hopelessly overallocated. South Australia's share of that is just six per cent, so it is a bad deal for SA to purchase. But the key thing about slide 14 is that the Murray-Darling Basin Plan needs to be planned around that variability. It needs to plan for floods, normal flows, low flows, droughts and emergency situations. So it is one of the reasons why the intent of the bill should be part of the Murray-Darling Basin planning.

Everyone should know what they are going to get. If rice growers need to be cut out of the system once we hit an emergency, everyone should know the rules. Clearly the Murray-Darling Basin Agreement and the Water Act—nothing that has been done up until this point in time—have not actually planned for the wide variability, the natural variability, of the Murray-Darling Basin. The most recent 10 years the CSIRO has said are part of a once-in-a-300-year drought. We have actually already experienced the wide variability in the basin. It is about time we actually started managing that variability, setting priorities of water use and making sure that our critical eco, economic and social assets in the system are managed and maintained, not cut up and abandoned, which seems to be going on at the moment.

Prof. Bell—I come back to my point that this is a river with an erratic pulse, and it is very hard to manage unruly bodies. We do that at our own peril when we try to fit it into a box. The thing about the current bill is that it draws our attention to the fact that there will be times of enormous plenty. I am not encouraged by the behaviours that I have seen so far by the bodies that have been put in place to manage it. We have the Water Act, but it has not really been tried yet so the objects of it, which seem to me to be very good objects, have us working, it seems to me, very much inside those rather than taking them and being bold and brave. There were the floods in December and January—floods again—with enormous capacity to bring water through the system and flush it. The Menindee Lakes went over the trigger point and came under federal jurisdiction. So there was the moment when the Murray-Darling Basin Authority could have shown its mettle and shown how the Water Act could guide it. It could have shown that the powers that there were could be exercised. Instead, they retreated to the standard rules of sharing and we lost an incredible opportunity. We squandered a historical moment at that point. This bill focuses on how we deal with those kinds of moments that we cannot predict but, on the other hand, I am saying that I do not have enormous confidence in the structures that are there at the moment because they seem to be doing business as usual and not understanding that they did have this historic opportunity.

Senator BIRMINGHAM—A lot of my colleagues played devil's advocate with this morning's witnesses and it is an important part of this process. That is why I think that it is important to go through this. In terms of the arguments you just put, Professor Bell, they were focused in the short-term, the immediate term, and I acknowledge that in the immediate environment, this short-term environment, the Water Act remains, for the current management of the system, almost meaningless, essentially. We are still operating under the old rules. We are still operating under the old Murray-Darling Basin Agreement. That is what you highlighted and, indeed, the authority, I suspect—and we will put this question to them when they appear shortly—will say that they have no authority to have done anything different with this year's floods. However, depending on what is to come in the basin plan, they may have authority to do something different with floods post 2014 or, sadly, 2019, and there are certainly issues around time lines. But the issue I am looking at concerns what the deficiencies in the act are that require this bill for the medium and long term. Mr Caldecott, you spoke about the variability. Have either of you, or the Water Action Coalition, participated in the consultations with the authority?

Prof. Bell—Yes, we have.

Senator BIRMINGHAM—Have you posed questions in those consultations about whether the plan is going to have a capacity to respond to that extreme variability in the system?

Prof. Bell—Yes, I have.

Mr Caldecott—One of the hats that I also wear is as standing chair for the Environmental Standing Committee for the Conservation Council of South Australia, and through the Conservation Council of SA I have attended two peak body forums of the Murray-Darling Basin Authority. I have raised that very issue of climate variability. I think it is crucial. Clearly, the rules do not work very well when we have this ongoing drought. They work when there is a drought followed by restoration of normal events.

Everyone seems to know that inflows dramatically reduced from 1997 to 1998 and then dramatically reduced again from 2006 to 2007. But you look at that chart of diversions from the basin, and it was just gangbusters—go as hard as you can. I do not understand what actually happened in the late 1980s, but South Australia agreed to a reduction of storage levels that New South Wales and Victoria had to hold to guarantee SA's minimum entitlement of 1,850 gegalitres. It used to be 2,250 gegalitres and it was reduced to 835 gegalitres. When you bear in mind that all the water rights are owned, or held, by New South Wales and Victoria, it was in their interest to create a scarce resource situation and make South Australia buy its waters. I think our irrigators have been shafted, to be quite honest.

Senator BIRMINGHAM—From the discussions you have had with the MDBA, as part of their consultations, do you have any belief as to whether the plan will or will not address issues of variability in flow rates?

Prof. Bell—They certainly talk about it, but I keep saying that I am not encouraged, because it is the same people in new jobs. The Water Act does have in it a vision. I am a professor of anthropology, not of law, so I cannot give a legal opinion, but I have heard it said from a number of quarters that the powers exist to take the kind of action that should have been taken with those floodwaters that we have just seen soak into the ground and not come down and flush the system. So, in terms of the short term, yes, I am certainly making a short-term argument, because we are at code-catastrophic and we do need that flush. In terms of the long term, I have qualms that, for legislation to fulfil its vision, it has to be pushed, it has to be fleshed out. I do not see that vision, courage and boldness. In the way in which the flesh is being put on the legislation, I do not see that vision of the need for a robust, healthy river as your starting point. I see the willingness to negotiate out into the parts and to fragment and to manage piece by piece and sectional interest by sectional interest.

Senator BIRMINGHAM—I guess we will not know that until we actually see the draft plan.

Prof. Bell—No, but we can see the behaviour at the moment in terms of responses to challenges and responses to reports that are coming out.

Mr Caldecott—From attendance at these peak body forums—which I must thank the Conservation Council of SA for—the Murray-Darling Basin Authority emphasised the Water Act. They are a team player. They are not really a national authority. The team is made up of the Bureau of Met, who has to be the water accountants, the ACCC, who are the commercial department and so it goes on and on. Personally, I think it is a mess. It is one of the reasons that there really needs to be a serious public inquiry with the powers of a royal commission to get serious about this. We cannot talk about population growth and exporting our water. The majority of the water in the basin is exported. Not very much of it is really needed for growing food. Growing food for Australians should be its priority. In terms of irrigation, the highest priority for water use should be those who grow fruit and veg.

Reflecting on the self-imposed cap that South Australia has placed on it, it has probably helped South Australia grow. Professor Wayne Meyer gave an excellent presentation at a Water Wednesday event in 2008, and I recommend the committee to have a look at the slides. He pointed out that the most productive areas of the basin were in South Australia from an irrigation point of view and then above them was industry and water use by cities and towns.

Senator HANSON-YOUNG—What is your response to the issues raised by the various irrigation councils, both national and New South Wales, and the National Farmers Federation in that they believe the current weighting on the environmental outcome and value is too high in the current Water Act?

Mr Caldecott—I think the problem at the moment—and I saw this again at those peak body forums—is that irrigators are now not just seeing water to grow crops and make money from the selling of crops but also

seeing dollar signs around it. Probably in most cases they generate far more income trading their water as temporary water or permanent water than they could ever generate from—

Senator HANSON-YOUNG—We are running out of time, so I just want to be short and snappy. Do you see that the implementation of any type of basin plan that is going to deliver a sustainable solution may in fact be in doubt when we hear directly from the peak bodies—the National Farmers Federation and the National Irrigators Council—that they believe that the current Water Act is too weighted towards environmental outcomes?

Prof. Bell—I think it is very interesting that, the moment that the environment has somebody to speak for it in terms of legislation or as a body, we start talking about how we balance interests; whereas the interests you are talking about are very well resourced interests. So who speaks for the river? It appears that even departments of environment feel that they have to engage in this balancing act. So who speaks for the river if not the authority that is there to manage it according to the objects that are spelled out in the Water Act? That would be my response.

Senator HANSON-YOUNG—Do you believe that the plan should take into account the caps and water sharing arrangements of the past?

Prof. Bell—I think that, if we do not have an analysis of how we got ourselves into the situation, we will not get out of it. Gradual change is always very difficult and sometimes you really have to have a radical shift. If that is what is going to be necessary for the health of the river—which is going to be, as far as I am concerned, the ultimate health for the economy and the communities—then that has to occur. That means some people are not going to be happy. That is the nature of sharing.

Senator HANSON-YOUNG—What is your synopsis of where things are at the moment? Obviously we have not seen the draft plan yet.

Prof. Bell—We have not seen the draft plan but we already see the manoeuvring of the various interest groups. Again, I am concerned in terms of who speaks for the environment in these manoeuvrings? We are seeing very well resourced campaigns being run—and it is the right of those people to run those campaigns in a democracy—but who is running the really well resourced, vibrant campaign in the name of the environment?

CHAIR—Mr Caldecott, do you have a few last comments?

Mr Caldecott—I would just like to table the speech notes I prepared for today's talk. I would like to ask a question regarding the authority. On page 61 of my submission at item (7), regarding some specific recommendations for the MDBA plan. The Murray-Darling Basin Authority announced an independent review of drought water accounts early in January 2009 but they have not made that report public. I believe it has been completed but, unless the situation has changed, that really should be made public. This work at the very bottom of the inflows is where everything has got out of hand.

CHAIR—There being no further questions, I thank both of you for your submissions to this inquiry and for taking the time to come and appear before us today. As always, we appreciate your input into these matters very much.

[12.04 pm]

YOUNG, Professor Michael Denis, Private capacity

CHAIR—Welcome again, Professor Young.

Prof. Young—Thanks for having me, Madam Chair.

CHAIR—It is a pleasure. The committee has received your submission as submission No. 16. Do you have any amendments or alterations to it?

Prof. Young—No.

CHAIR—Would you like to make an opening statement?

Prof. Young—Yes, I would, if I may.

CHAIR—Please do so.

Prof. Young—Australia is recognised as a world leader in water resource management, and a lot of that has come from the leadership of federal parliament on both sides—in fact, all sides. The world is now looking at Australia, which is prepared to change the way rivers are managed, to change property rights, to develop markets and to use lots of innovative approaches.

This bill is truly state of the art in terms of global thinking about how to manage systems in crisis. I must stress that to the committee. It comes out of well-established business practices that have stood the test of time. It is robust, and the national water initiative uses the word ‘robust’ a lot. It recognises that when a system is in crisis and a system is surprised to find itself in crisis, so it was not planned, normally there is a need to change the management arrangements. There are very important reasons for doing that. One is that when a system is in crisis it normally pays to solve the problem quickly and corporate principles and practices establish that in such regimes you go back to fundamental principles, you do not try and write prescriptions and plan in detail what is going to happen. You can’t do it. You do not know what is going to happen. If a basin plan prescribed exactly what had to happen in every possible situation that existed, we would have a plan that was thousands of pages long, and it still would not work.

The concept which is used is to empower somebody to take the hard decisions. As others have said to you, when you do that you create a strong inducement for people responsible for managing the system to manage to avoid a defined crisis. The state of the art also says that the definition of crises and recognition often has to be incredibly simple. This bill proposes an upstream measure and a downstream measure, and I stress there is an upstream measure as well. When entitlements go below a certain level, a percentage, then you are in a state of crisis. High security has an expectation that water will always be there. The state of art, for example, in definition of high security pools is to have a system whereby if the world gets drier the size of the high security pool gets smaller. None of the legislative arrangements in any state do that inside the Murray-Darling Basin. The mechanism that is proposed is also one that looks at the bottom of the system and it is a very simple measure. We could define more complex ones but that makes it hard and complicated to get right. The state of the art is to keep it simple and to have a clear trigger.

The way the process starts is also very important, that one person recognises and is required to state, ‘We have a crisis,’ then somebody else makes the decision about whether the crisis powers come into play. But they must state publicly whether or not the crisis exists and if they say there is no need to change management they must say so publicly and transparently. The person who is responsible for naming the fact that we are in a state of crisis has to keep on restating that every six months so that the person responsible for making the decision has to go back and restate, ‘We do not yet have a crisis of sufficient magnitude to take the powers that operate.’

The powers that operate are those that you find in corporate management and many other governments and managements around the world which are state of the art, that the person appointed to manage in a crisis is allowed to suspend plans. Australia has already shown world leadership in this in that in 2007 when the Prime Minister of Australia realised on Melbourne Cup day that there was a crisis he called an emergency meeting and he put a new management regime in place. Management plans, sharing plans, were suspended. That was on Melbourne Cup day I think in 2007, if I have the year right, when the Prime Minister flew in the state premiers and said, ‘We have a crisis and we are now going to appoint a senior officials committee.’ They then immediately invented a term which we now talk about, critical human needs water, and the plans that existed were suspended so that we could change the way we managed. Australia has already demonstrated the need for

crisis management powers that suspend all the arrangements. It is important that we recognise that this should now become part of water management. We have demonstrated to the world the importance of doing it. This bill makes that possible.

In my submission I point out that it would be possible under the Water Act at the moment to bring these powers inside the basin plan. You do that under section 23 subsection 2 of the Water Act, which says that the Murray-Darling Basin Authority can define sustainable diversion limits in any way it likes. It could define that in a state of crisis, using triggers such as put in this bill, that it will announce what the sustainable diversion limits is day by day. That would be consistent with the act. They could say that we have not written a plan to deal with crises because we do not know what will be the best way to do it. We cannot predict what is going to happen and we will not try.

There are three issues which I think are really important for the committee to focus on. Firstly, what are the appropriate triggers and how do you identify a crisis upstream and downstream? That is in section 9. Secondly, what powers should be given to whoever takes over in a crisis, and who makes the final decision? In normal management we have a constellation of lots of managers: we have an authority, we have a ministerial council and we have a basin officials committee working in concert. That is the plan. In a crisis, the authority takes over. That is under section 17. What they do is something which will be decided at the time, looking at the nature of the crisis and the opportunities that arise. The third very important consideration is: what has to be taken into account in resolving the crisis? That is in section 21 of the bill.

I remind the committee of the state of the art in dealing with bankruptcy. The emphasis is on the speed of making decisions to try and keep a corporation alive and also on equity and dealing with all the stakeholders affected. I commend the bill to the House and to the committee. I would like to thank you once again for your role in making Australia a leader in global water management. People are coming to Australia because the legislation we are passing is amongst the best in the world.

CHAIR—Thank you very much for your opening statement. You said that, should the bill become law, the MDBA would be able to act in the situation of a crisis. What sorts of actions do you envisage them being able to implement? For example, the previous witness mentioned that irrigated rice production might have to cease. Do you envisage that a suspension of agricultural practice could be required in, for example, irrigation?

Prof. Young—I would be surprised if they did that. There was one good example that came out of the basin authority only few days ago. They released a fact sheet that reminded all people involved in the development of the basin plan that it would not fully come into operation until 2019. They could decide in a time of crisis that we could not wait until 2019 and the impact of the Victorian constraint on opportunities to solve a crisis was too great. They could move to say that we have to act now so that all the provisions of the plan will come into place tomorrow. It would not surprise me to see that happen. They could also in time of flood decide that opportunities to harvest could be reduced by some factor so that more water would come down through the basin.

The most important part of this bill is that, when you put an inducement like this into legislation, the people responsible for managing will manage differently. A ministerial council would not want to be embarrassed by the fact that a federal minister had to announce that their powers had to be suspended and their role changed from being a governing body to being an advisory body. So they would behave differently.

CHAIR—Previous witnesses today have suggested that the bill, if it became legislation, could open the gates to increased litigation around the constitutionality of the bill. Do you have anything to say about that?

Prof. Young—I am not a constitutional lawyer, but the thing that excites me about Australia is that we are not frightened of challenging our Constitution to sort out issues like this. I understand, and I have heard people from the Murray-Darling Basin Authority and authority members say, that they think that the referral powers are not necessary to have the Water Act; what they do is strengthen it and give greater confidence to it. But they think that the powers under the Water Act would stand up under constitutional challenge. I do not know if that is the correct answer. I would think that, if we have to have a constitutional challenge, we should have one, but more importantly we need to manage rivers with the best-known governance arrangements possible. One of these, which has been very well developed around the world, is that when systems go below a certain threshold you have to act. We all know that in our personal lives as well. When things are going seriously wrong, you do not go on managing as if they were not wrong; you deal with the issue quickly, equitably and fairly.

CHAIR—Thanks for that.

Senator XENOPHON—I have questions on two issues. The New South Wales Irrigators Council gave a view that the Commonwealth could not possibly cope with this—that you need that local knowledge and you could not have it done this way. Do you have a view on that in terms of implementing an approach such as is in this bill?

Prof. Young—There is a big difference between total takeover and having powers to make special arrangements on one part of a management regime. This bill does not make it possible for an authority to decide to take over totally. They do not have the capacity to do that but they do have a capacity to make high-level strategic decisions and to intervene strategically. Through time, you would expect them to have greater and greater capacity to do that. I would be quite relaxed if anybody or any group were given a capacity to acquire the knowledge to take over in a crisis. This is what happens with administrators in corporations. We have people who are trained to take over. They know how to do it. They do not take over everything—they keep all the staff in place—but they review decisions and review time lines and particularly they have a power to override agreements that have been made on the assumption that the crisis would not happen.

Senator XENOPHON—The Water Action Coalition in their submission said:
South Australia has capped its diversions from the River Murray for many decades following the 1967-68 drought ...
Their submission pointed out that the eastern states have increased their diversions by some 300 per cent, and they discussed South Australia's entitlement of 1,850 gegalitres under the Murray-Darling Basin Agreement. Do you have a view of that in terms of trying to frame the policy in dealing with a crisis? Do you look at existing efficiencies and sustainabilities and the history of how the water was allocated in the first place? Is that a relevant issue from your point of view, from a policy perspective?

Prof. Young—Yes, very much so. It is the reason why we need a bill like this or a power like this in the basin plan. What has happened is that agreements were put in place under various assumptions at various times, starting from over 100 years ago. The people who put each bit of the agreement in place did not understand where we would be today. Particularly, the last Murray-Darling Basin Agreement, which was largely negotiated in the late 1980s and early 1990s, did not imagine water trading. It did not understand the rigour and importance of understanding connections between groundwater and surface water. When those arrangements were put in place, people said you would have to change the sharing arrangements and you would have to change the water-accounting arrangements, but those recommendations were ignored, so we have ended up in a situation where in 2002, before this drought, before the shift to a drier regime, we had a crisis. We have then put a drought on top of that. We have put the National Water Initiative on top of it, and we have put several versions of a Water Act on top of that, trying to get this right—and the basin plan is the next one. The reason we are there is that we have not understood the importance of getting everything right, and hence we are in a crisis. This arrangement deals with an opportunity to reset the system while we get out of a crisis.

Senator XENOPHON—But we need to know where we have been, before where we go to next—that is from the Water Action Coalition.

Prof. Young—Yes, and that is why an authority is given the power in the way this bill is put together: proposed section 21 lists a series of considerations. You might like to include history and agreements in there and express the words differently, but I think it is important that the powers are not just *carte blanche* and that there are important considerations that need to be taken into account. You would expect an authority to do that. You would expect it to be mindful of the risk of constitutional challenges and to do so in a way that made sure that people were dealt with equitably so that, if there were a constitutional challenge under, say, section 100, its actions were seen, as required under the Constitution, to be reasonable. The word 'reasonable' is in the Constitution in section 100. The Commonwealth has to act in a way which is reasonable. If the authority acted in a way that was reasonable, given the status of the crisis, given the nature of international agreements and given the nature of trading rules and arrangements and investment, you would not expect a challenge to hold up.

Senator BIRMINGHAM—Professor Young, thank you for your contribution. I must say that I only glanced at your brief submission after I had posed the questions to the previous witnesses, but your comments under 'Is the bill necessary?' and some of your other comments address some of the issues that I was raising there. I will step back and pose the same question. Have you participated in any of the consultations with the authority?

Prof. Young—Yes.

Senator BIRMINGHAM—Have you raised with the authority issues of variability and the need for the plan to have the capacity to address different circumstances?

Prof. Young—Yes, and with the public, I think, exhaustively over about a decade.

Senator BIRMINGHAM—Indeed you have.

Prof. Young—Including this committee.

Senator BIRMINGHAM—On many very valuable occasions. Have the authority given you any comfort in terms of the approach they might be taking to the plan? Obviously they are not telling any of us the details, but I am asking about the approach and how they might tackle the variable inflows to the system.

Prof. Young—I am comforted by the change in language in recent times of the authority, in that they are no longer planning to first produce a draft plan but are going to give some high-level indications of the flavour and shape and hopefully will go through this. I am disturbed by a tone which suggests that, given the time frames they have been working under, they do not think they will be able to get it right in terms of state of the art, and there are compromises that are having to be made because of the time frames and pressures they are working under and also the constraints of the Water Act.

Senator BIRMINGHAM—Your interpretation of the Water Act—and you gave the example there at the beginning—is that they could set SDLs that in fact provided maximum flexibility if they so sought. Obviously there is a challenge to get those SDLs approved by the minister eventually after consultation with the states and the reaction of the states, but, if the authority wanted to set a framework of SDLs that gave flexibility in both times of crisis and times of plenty, do you think they have that capacity?

Prof. Young—I am very confident that they have that capacity. Parliament is to be commended in having in there section 23(2), which—having done it the way the Water Act unfortunately does, which is to prescribe lots of detail about one way to define sustainable diversion limits—puts up an opportunity for the authority or the plan to define sustainable diversion limits in any way it could. That could involve a sharing regime. It could establish priorities. It could establish triggers. And it could specify circumstances where the plan is silent on what to do. When a system in the corporate world becomes bankrupt and obligations to all people interested in the entity cannot be met in a legal sense, the rules get worked out according to the crisis and in understanding that it is impossible—for a system as complex as, for example, the basin is—to imagine all circumstances and all conditions and account for all technological changes and everything that is going to occur in the next few decades. Documents like that do not exist and can never be written. We know that. So, hopefully, this plan will imagine circumstances where the most appropriate thing to do is to just leave a capacity for somebody to be empowered to quickly work out what is to be done, to define the nature of that with clarity and to force people to admit that we have a crisis.

Senator BIRMINGHAM—My wife trained as an insolvency practitioner, so she will be delighted at your strong endorsement of her profession.

Prof. Young—You might like to talk to her.

Senator BIRMINGHAM—I will indeed. Lastly, issues of the established shares between the states under the Murray-Darling Basin Agreement have been raised with various witnesses. The last set of amendments to the act rolled that agreement into the act but also put in place provisions that it needs to then subsequently be amended to be consistent with the basin plan. Yet the agreement itself still contains veto powers et cetera that have historically been there. It strikes me that there is a potential clash between aspects of what is in the agreement and what the act requires. Have you looked at that issue at all? Do you think that the act is secure enough in ensuring that the states do and will have to comply with the plan or is there a concern that we could end up with a conflict within the act as it now is constructed, inclusive of the MDBA?

Prof. Young—I can see a need and lots of opportunities to amend the act and improve it. I have made recommendations to this committee on ways it could be improved. This would include, for example, an opportunity to improve the way states' shares are dealt with. One of the recommendations I made to this committee at the time the Water Act was going through parliament was that we should have a water register of state interests. Rather than doing it the way we have done it, we should set up a regime, much like the states do, where there is a formal register of state interests and state entitlements in a way which is state-of-the-art. We take what has developed as state-of-the-art at state level and bring it to the system as a whole. We have chosen, in the way this act has been put together, not to do that, not to take known best practice but to take the clumsy arrangement of the past. I would be delighted to see Australia leading the world in saying that sharing arrangements require sharing registers and the right way to deal with states' shares is to define them on a

register and to define them as shares done with a structure, as states do. We should do that as state-of-the-art. We have not done it yet. There are many other improvements like that that need to be done.

Would I go back now? No, I would not. I think the act is good enough. It is clumsy, but we must make progress and we must show leadership for the sake of the people in the basin, for the sake of the river and for the sake of the communities who depend upon it. We have to keep on moving forward, but I think we can move forward in a way which takes advantage of all the opportunities known. This bill and the ideas behind it are very important. The basin plan will be better if it is kept simple and if we recognise that circumstances will arise when we will have to suspend the basin plan.

Senator FISHER—Professor, had this bill been law in April of this year, at the point in time at which the waters in the Menindee Lakes exceeded New South Wales's management of them—so it fell, arguably, to the Commonwealth—would its provisions have been triggered, not because of the Menindee Lakes situation but at that point in time?

Prof. Young—They would already have been triggered well before, because as defined at the moment the level of the lakes was below sea level. The question then would arise if an authority, noticing a flood—first of all in January in northern New South Wales—might have raised the issue. Similarly, when we had the floods coming down from Queensland, they might have decided to shepherd water through Queensland and New South Wales in a way which was different to the way they have chosen to do it. It is also highly likely that the flavour of the negotiations that went on would have been very different, because the states themselves might have decided to make different decisions, as they have the capacity to do, to ensure that water came through.

Senator FISHER—If none of those hypothetical outcomes had happened, or if some had happened but the end result was still as it transpired in terms of the Menindee Lakes in April this year—that is, the volume exceeded New South Wales management of it—would the provisions of this bill at that point in time have materially changed the powers that were available to the minister, for example, back in April this year under the existing regime?

Prof. Young—Yes.

Senator FISHER—How?

Prof. Young—If this bill had been passed then there would be no need for a basin plan, so an authority could have acted as the system-wide manager and could have decided to override something a state was doing. It might not have chosen to do that; it might have chosen just to have a very serious discussion and say, 'We really think it would be a really good idea if you did X, and if you do X then we don't need to intervene at all.'

Senator FISHER—Could the minister have chosen to do that in April this year without this bill?

Senator Xenophon interjecting—

Senator FISHER—Senator, I am asking the witness.

Senator XENOPHON—Sorry, I was talking to myself.

Senator FISHER—That is the first sign of—no, I won't go there.

Prof. Young—I am not a lawyer, and my knowledge of the Water Act and the subtleties around it are insufficient for me to know if there is a mechanism in there that might make it possible. I cannot name one, but I also cannot say it is not possible.

Senator FISHER—From an entirely parochial South Australian perspective, you could reflect on what happened in April this year, in view of what you have said about this bill, and say that Minister Wong, as a South Australian senator, failed to do what she could have done to pass that water through to South Australia rather than have it evaporating in the lakes and that this bill—

CHAIR—Have you got a question, Senator Fisher?

Senator FISHER—Yes. You could say that this bill enables a minister of the day, whoever it may be, to hide behind the skirts of the MDBA, because this bill still leaves it to a group of people other than the minister to make the call, doesn't it?

Prof. Young—The experience in times of crisis is that you appoint somebody who is independent and outside a political process. That is the state of the art in terms of management. It has operated in Spain since the 13th century, with tremendous success.

Senator FISHER—You should be a politician. I could learn from you about how to answer the question.

CHAIR—Just let the witness answer the question.

Senator FISHER—Yes, keep going, Professor.

Prof. Young—What is important—I must state this—is that what has happened in the Menindee Lakes has a number of dimensions to it. One of them which is very important is that the predictions about how much water would arrive there were wrong. They were wrong because the situation which occurred had never occurred before and the models had not been built or calibrated in such a way that we got the prediction about the amount of water right. That is how crises emerge. There were management decisions made on the best available knowledge. In defence of Senator Wong, the authority and all the state authorities, they were managing expecting a certain outcome. Water has vanished, systems have been changed and the amount that arrived was different to the amount that was expected. So errors were made.

Senator FISHER—And the infrastructure had not been changed to ready itself for it.

Prof. Young—There were all those sorts of things. But we cannot undo history. It is easy, with hindsight, to say, ‘You made a management mistake.’ The right interpretation is that we must learn from this and understand that we do not have models—the CSIRO does not have models and the river managers do not have models—that are designed for every possible circumstance. As a result of that, in hindsight we can see how a decision could have been made which would have led to a much better outcome. The challenge is whether or not somebody back in January, when it was raining, could have seen what was going to happen in April, May, June and July and made the right decisions.

Senator FISHER—In hindsight, do you think the government should have carried out its election commitment to re-engineer the Menindee Lakes?

Prof. Young—I will not answer that question because I think it is a political question which would need political inquiry.

Senator FISHER—In hindsight, do you think the Menindee Lakes should have been re-engineered? Would that have benefited us today?

Prof. Young—I do not know because I have not looked at the engineering opportunities, I have not consulted engineers about opportunities, I have not looked at the cost of it and I do not know with precision whether those investments were worth making. I am aware of the issue and I am aware of the opportunity. But to answer that question you would have to put me on notice to do it and resource me and give me access to the people and the knowledge to make the proper inquiries. I would be willing to do that if the House commissioned me to do so, but it is not something which should be answered with a flippant response of yes or no.

Senator FISHER—So at this stage you do not have a view as to whether there should be any change to the infrastructure of the Menindee Lakes?

Prof. Young—I have recommended to the people of Australia, in one of the droplets that I have written, that we need to look at the question of engineering from top to bottom—in the Lower Lakes; in each of the wetlands throughout the system, including the Menindee Lakes and Lake Benanee; in the many weirs that exist in the Murray system, the Murrumbidgee system and each of the Victorian tributaries; and in the Darling system. This nation needs to plan properly for a drier regime, and that needs an inquiry not into the lake at the moment, or the structure at the moment, but into the opportunities to manage the entire system more efficiently from top to bottom.

Senator XENOPHON—I have a question further to Senator Fisher’s line of questioning. Is it your understanding that the Menindee Lakes, where New South Wales government control is maintained at 640 gegalitres, was unaffected by the intergovernmental agreement of 3 July 2008? You might want to take that on notice.

Prof. Young—I would need to think very carefully about that. I am not an expert on those things. But you might like to go back and look at the signatories of the original agreement that led to that. They included leading people such as Sir Robert Menzies and Sir Thomas Playford—and I have forgotten the names of the other state premiers, but they were famous people.

Senator XENOPHON—I am talking about the 2008 agreement.

Prof. Young—But it is a reflection of an earlier agreement back in the 1960s.

Senator XENOPHON—Perhaps you could take that on notice. My understanding is that the 640-gigalitre threshold, in terms of New South Wales control, was maintained in the agreement.

Prof. Young—It was, but it comes out of an acre feet agreement way back.

Senator BIRMINGHAM—By putting the agreement into the act, it is now in trouble.

Prof. Young—Yes.

CHAIR—Thank you very much Professor Young for your submission to an inquiry about water and for taking the time to appear before the Senate committee today. We appreciate your assistance.

Prof. Young—My pleasure.

[12.39 pm]

MUES, Mr Colin John, Assistant Secretary, Water Recovery Branch, Department of the Environment, Water, Heritage and the Arts

NETHERCOTT-WATSON, Ms Suzanne, Assistant Secretary, Irrigation Efficiency Southern Division, Department of the Environment, Water, Heritage and the Arts

SLATYER, Mr Anthony James, First Assistant Secretary, Water Reform Division, Department of the Environment, Water, Heritage and the Arts

CHAIR—Welcome. I note that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. Would somebody like to make an opening statement before we go to questions?.

Mr Slatyer—No, we do not have an opening statement.

CHAIR—Do you have an overview of the bill that the committee is considering today, particularly in light of evidence given by previous witnesses as to its constitutionality?

Mr Slatyer—No, we have not.

CHAIR—Thanks very much.

Senator XENOPHON—Do you have any view on the bill?

Mr Slatyer—We are here to answer questions, but we are not here to express views or opinions.

Senator XENOPHON—Can you indicate what the current policies are in terms of any flood events in the basin? As I understand it, there is an interface between the intergovernmental agreement and, for instance, the New South Wales flood-plain management plans and also the issue of the Menindee Lakes in terms of how we deal with floodwaters under the current framework that exists now. Could you give us an overview of that?

Mr Slatyer—Briefly, our policy is to implement and administer the Murray-Darling Basin Agreement, which is a formal agreement that the government has approved and that is incorporated in the Water Act. In addition to that, you would be aware that a recent flood event at Toorale, affecting a flow through Toorale Station, was implemented in such a way that it was agreed that water would flow through the system. That is an example of the Commonwealth working with states to ensure a result for a particular event. But the broad answer to your question is that our policy is to fully implement the Murray-Darling Basin Agreement requirements and to endeavour to work with states in the framework of that agreement to ensure that the best use is made of available floodwater.

Senator XENOPHON—My specific question was: how does the agreement interact with, and what powers would the MDBA and indeed the minister have in terms of, the New South Wales flood-plain management plans and also the issue of the engineering works or any other mechanisms to reduce the evaporation from the Menindee Lakes, which seems to be a factor in flood events?

Mr Slatyer—It is a very, very broad question that you are asking, but of course the Commonwealth does have a capacity to assist states with projects through funding arrangements, and the government's policy has been to work with states to develop what it calls the state priority projects, which were the subject of the 2008 intergovernmental agreement. It is quite consistent with that framework that the Commonwealth may support state initiatives of the type you have mentioned, but that is the primary role of the Commonwealth in regard to that type of project.

Senator XENOPHON—Perhaps we could drill down to the issue of, for instance, the New South Wales flood-plain plans. As I understand it, there have been some issues as to the plan being finalised by the New South Wales government. Is that your understanding?

Mr Slatyer—I am not aware of the formal status of that flood-plain harvesting plan at the moment. We do not have that information with us. We are aware that New South Wales has been developing a flood-plain policy, but I am not aware of the exact state of play of that policy at the moment.

Senator XENOPHON—But insofar as this bill deals with flood events, and while you cannot comment on this bill and while the subject of this bill relates to flood events, it would not be unreasonable to consider the New South Wales flood-plain plans in the context of the overall existing government policies in terms of dealing with flood events and the inter-relationship between Commonwealth management of the basin, or through the MDBA, and the way the New South Wales government deals with flood events.

Mr Slatyer—Yes, state policies on water diversion on flood plains will have an influence on flood events.

Senator XENOPHON—Sure. So, therefore, would you be able to take this question on notice: to what extent do the New South Wales flood-plain plans interact with the management of the river system and the interaction with the MDBA in terms of the intergovernmental agreement as well?

Mr Slatyer—I suppose we can take anything on notice if requested, but the question you are asking us is fairly hypothetical because there is a flood-plain policy in development by the New South Wales government. But if you are asking me to advise on the relationship between their final policy and Commonwealth powers and so forth, then it will have to await the finalisation of that policy.

Senator XENOPHON—Or, alternatively, could you not advise on what the status is of the current plan and the interaction with current policies?

Mr Slatyer—To the best of the Commonwealth's knowledge we can advise on that.

Senator XENOPHON—That would be useful.

Senator BIRMINGHAM—In your understanding of the basin plan that is being developed, do you expect it to be developed in a manner that responds to the variability of inflows into the basin?

Mr Slatyer—Yes, we expect it to be developed in the way that the Water Act sets out. The water act requires that long-term diversion limits are set in the plan, and the authority needs to figure out what hydrological factors should be taken into account in doing that, including issues of natural variability.

Senator BIRMINGHAM—And those limits need not necessarily be a fixed amount essentially based on 'here's an average inflow, here's an average sustainable extraction limit, that's what we're going to work with'? The limits could be set in a manner that responded to times of drought and times of plenty?

Mr Slatyer—I may have to take that one on notice. You are asking me to unpick some fairly complex provisions that the authority is working through currently in settling these matters, and its assessment of how much flexibility it has in that regard would be its assessment. I am happy to give advice if you wish on the relevant provisions of the act that would be applicable to this work by the authority.

Senator BIRMINGHAM—If you could take that on notice. For the sake of it being a complete response, Professor Young put some hypothetical situations in his evidence about how the authority could construct the SDLs. If the department, or indeed the department through consultation with the authority, can at least respond as to whether that is possible, obviously we will see in due course as to what the authority actually does do. Thank you for that.

I want to ask about a slightly current matter: has the department seen or been made aware of an announcement by the New South Wales water minister about the management of entitlements in the Barwon-Darling system?

Mr Slatyer—Yes, I am aware. I have not seen the announcement directly but I have seen media reporting of it.

Senator BIRMINGHAM—This is an announcement that defers by 12 months a reduction in entitlements in that system.

Mr Slatyer—That is how it has been reported.

Senator BIRMINGHAM—Are you aware of whether this process of reducing entitlements in that system is part of an NWI process?

Mr Slatyer—It is part of the process of implementing the cap on diversions as a result of decisions taken by the former Murray-Darling Basin Ministerial Council but which are still policies of the partner governments. New South Wales has been reporting to the Murray-Darling Basin Ministerial Council on its efforts to bring water consumption in that particular valley into line with the cap requirements. I believe that is what the announcement was probably alluding to.

Senator BIRMINGHAM—Has there been any communication between New South Wales and Commonwealth departments or between New South Wales and Commonwealth ministers that you are aware of?

Mr Slatyer—I am not aware of any formalised discussions between our department and the New South Wales department on this specific topic, but I am happy to take that question on notice in case there have been. We do have general and wide-ranging discussions with state colleagues on matters all the time, but I am not conscious of anything specifically focused bilaterally on this topic.

Senator BIRMINGHAM—In a general sense the slower progress on implementing the previously agreed to caps is likely, I would have thought, to make for even harder going in ultimately achieving the SDLs; is that a fair general principle?

Mr Slatyer—As a general principle, the more that water use is constrained to the previously agreed caps the more progress that makes towards any limits that are set through the basin plan.

Senator BIRMINGHAM—Are you aware of the statement by the MDBA earlier this week in a media release headlined ‘Additional consultation on draft Murray-Darling Basin Plan’?

Mr Slatyer—Yes.

Senator BIRMINGHAM—It says that the authority ‘will hold an additional stage of consultation on the Murray-Darling Basin Plan, before the release of the proposed basin plan later this year’. It goes on to say that it will release ‘a comprehensive guide to the proposed basin plan’, which will be in plain English et cetera. Is it the understanding of the department that this ‘Guide to the proposed basin plan’ is in fact the plain English summary of the proposed basin plan required under section 43, part 2 of the Water Act?

Mr Slatyer—No. Our understanding is that it is just what the authority announced it would be: a guide to the plan that would be issued prior to the release of the formal material required under the act. So the formal documentation that the act requires, including the plain English summary document, would be issued in due course, but the authority has announced that, prior to the release of that formal documentation, it would be issuing this document called ‘A guide to the basin plan’.

Senator BIRMINGHAM—So when do we expect the plan and the accompanying plain English summary of the legislative instrument that is the plan to be released?

Mr Slatyer—That is a question that only the authority can answer.

Senator BIRMINGHAM—The authority has not. Has the department perhaps thought to ask the authority? They told us at Senate estimates that it would be released in July or August. We now understand that, instead, a guide will be released in August, which I assume means that the draft plan will not be released until later than August. Do you have any indication from the authority of how much later?

Mr Slatyer—Only the authority can authoritatively advise the dates of release of those documents. It is their responsibility, not ours, to determine those dates.

Senator BIRMINGHAM—What is your understanding of the stage of consultation that the authority is going to undertake as part of the release of the ‘Guide to the proposed basin plan’?

Mr Slatyer—I do not have the authority’s announcement with me so I am at a disadvantage to you in that regard. But my recollection is that they have portrayed it as an opportunity for initial feedback to be provided to the authority and an opportunity for people to have some time to prepare for the availability of the formal documentation later. So I think the announcement was quite clear in indicating that this will provide an earlier consultation opportunity than would have been possible if everyone had to wait until the formal documentation becomes available.

Senator BIRMINGHAM—Will feedback from the release of the guide inform the draft basin plan?

Mr Slatyer—Again, how the authority treats the feedback and the relationship between that feedback and the contents of the formal document is a matter that only they can answer.

Senator BIRMINGHAM—Obviously, if it does not all it is providing for is perhaps a longer consultation period not necessarily an additional consultation period. It will not inform any changes.

Senator XENOPHON—Following on from Senator Birmingham’s line of questioning, can you clarify whether consultation for the guide will lead to changes in the draft plan?

Mr Slatyer—I cannot clarify that. The authority would need to be asked that question. What they take into account in finalising the formal documents is entirely their business, but they have signalled that this would be a consultation phase prior to that occurrence. I can only basically reiterate what they have said publicly about this.

Senator XENOPHON—Finally, in terms of earlier questions about flood plains and the like, perhaps I should be more specific. Is it the case now that the Murray-Darling Basin Authority does not actually have any jurisdictional power at this stage to deal with flood events and interception before the water actually goes into a river system covered by the intergovernmental agreement?

Mr Slatyer—Broadly, one of the key reforms embodied in the Water Act and the basin plan approach is that, for the first time, there will be capacity to address interception issues through the planning process and the role of the authority.

Senator XENOPHON—But not until the plan comes out; is that right?

Mr Slatyer—Yes. That will be a key benefit of the plan coming into effect.

Senator XENOPHON—Is it your understanding that, once the plan comes into effect, it could override, for instance, the New South Wales flood-plain plans?

Mr Slatyer—In its water-sharing arrangements the state will need to adopt policies that align with the requirements of the basin plan. The state will have the time until the rollover of those existing plans in which to work that out, but it is the state's responsibility to ensure that its next-generation of water-sharing plans accord with the requirements of the basin plan.

Senator XENOPHON—In some cases the rollover may take a number of years, though, mightn't it?

Mr Slatyer—Generally, in New South Wales the rollover occurs in 2014.

Senator XENOPHON—So we are still four years away.

CHAIR—As there are no further questions, I thank the officers of the department for appearing before us today. The date for responses to questions on notice is set for three weeks from today. That concludes today's proceedings. I thank all witnesses for their presentations and I thank Senator Moore for making herself available to the committee.

Resolved (on motion by **Senator Fisher**):

That this committee authorises payment of witness expenses in the terms circulated to committee members.

Resolved (on motion by **Senator Fisher**):

That this committee accepts documents tabled today and authorises publication of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 1.01 pm