



*A Community Legal Centre specialising
in public interest environmental law.*

11 September 2008

Committee Secretary
Senate Rural and Regional Affairs and Transport Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam

SENATE INQUIRY INTO WATER MANAGEMENT IN THE COORONG AND LOWER LAKES

Background

The Environmental Defenders Office (SA) Inc ("EDO") welcomes the opportunity to provide comment to the Senate Inquiry into Water Management in the Coorong and the Lower Lakes.

The EDO is a community legal centre specialising in public interest environmental law. This organisation has more than 10 years experience in litigating environmental matters and participating in environmental law reform processes. EDO functions include legal advice and representation, law reform and policy work and community legal education.

Executive Summary

The Commonwealth can make laws to obtain and deliver water using the following Constitutional avenues:

- various heads of power under section 51 of the Constitution, in particular, the external affairs power in tandem with a relevant international convention and the acquisition power;
- the grants power under section 96 of the Constitution;
- with a referral of power from the States.

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Given this, the Commonwealth must act immediately to allow environmental flows to be released to the Coorong and the Lower Lakes and if need be to purchase water to achieve this end.

Ramsar Convention

The Coorong, Lake Alexandrina and Lake Albert are listed under the Ramsar Convention's List of Wetlands of International Importance¹.

The Ramsar Convention on Wetlands binds Australia in international law. This has been the case since 21 December 1975.

Pursuant to the Convention, the Coorong, Lake Alexandrina and Lake Albert are:

*“a saline to hyper-saline lagoon separated from the ocean by a dune peninsula and connected to two lakes forming a wetland system at the river's mouth. The lakes contain **fresh to brackish² water** (emphasis added).*

*The site is of international importance for migratory waterbirds, providing habitat for more than 30% of the waders summering in Australia. The site includes important nesting colonies of cormorants, herons, egrets, ibises and terns. The globally endangered orange-bellied parrot (*Neophmea chrysogaster*) over-winters on the reserve. Human activities include camping, boating and regulated duck hunting. The area is noted for its extensive aboriginal, historic and geological sites.”³*

Under the Ramsar Convention the Commonwealth government has an obligation to protect the internationally recognized area of the Coorong and the Lower Lakes. The failure to properly protect this area is in contravention of the Convention.

Terms of Reference: Commonwealth Powers

The EDO responds to item 1(a)(iv) of the Terms of Reference which considers:

“options for sourcing and delivering [this] water, including:

....

- iv. Commonwealth powers to obtain and deliver water and possible legislative or regulative impediments”*

Whilst the Australian Constitution does not grant to the Commonwealth government a specific head of power with respect to the management of water, there are several avenues through which the Commonwealth may make laws on this topic.

Non specific heads of power may afford the Commonwealth legislative ability with respect to water. For example, the federal Water Act was legislated in reliance on the following sections of the Australian Constitution⁴:

- s51(i) trade and commerce;
- s51(v) postal, telegraphic, telephonic and the like;

- s51(viii) astronomical and meteorological observations;
- s51(xi) census and statistics;
- s51(xv) weights and measures;
- s51(xx) trading or financial corporations;
- s51(xxix) external affairs;
- s51(xxxix) incidental matters; and
- s122 the territories power.

The reliance on these provisions has not been tested in the Courts. However, any argument that section 100 of the Constitution⁵ unduly limits the Commonwealth's power is unfounded. The High Court has previously held that section 100 does not limit the operation of the corporations power (s51(xx)) and only constrains the Commonwealth's unreasonable use of the trade and commerce power (s51(i))⁶.

Further, the High Court has endorsed Commonwealth legislation based on the external affairs power (s50(xxix)), together with a relevant international treaty which binds Australia in international law⁷. As a result, the external affairs power together with the Ramsar Convention provide constitutional authority to support Commonwealth legislation enabling environmental flows to the Coorong and the Lower Lakes.

The grants power in section 96 of the Constitution gives the Commonwealth indirect power to legislate "as it sees fit". It is a very broad power which provides:

"...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

This power could be used by the Commonwealth to encourage the States to legislate for environmental flows to the Coorong and Lower Lakes.

In the absence of reliance on a specific constitutional power, the Commonwealth may legislate with a referral of power from the relevant states and territories as also occurred with the Water Act⁸.

The Commonwealth may rely on any of the above provisions to allow, for example, South Australian individuals or organizations to buy water from interstate counterparts to provide much needed water flows to the Lower Lakes and the Coorong.

To a limited extent, the National Water Initiative allows for such purchases. Whilst not law, the National Water Initiative sets out the current combined position agreed on by the Commonwealth and the States and Territories with respect to the management of water. Most relevantly, it provides in clause 60:

"iv) in respect of any existing institutional barriers to intra and interstate trade:

...

- b) *immediate removal of barriers to permanent trade out of water irrigation areas up to an annual threshold limit of four percent of the total entitlement of that area, subject to a review by 2009 with a move to full and open trade by 2014 at the latest,.....”*

The State Governments of New South Wales and Victoria have made law to bring this four per cent cap into effect⁹. The South Australian government has not made such a law with respect to the four per cent cap, but apparently is in the process of amending the Natural Resources Management Act (SA) 2004.

The four per cent cap results in a restriction of trade between the States. This is directly contrary to section 92 of the Australian Constitution which provides:

“On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.”

Given this, the four per cent cap is unconstitutional. It is critical that the four per cent cap is removed forthwith and that there be no cap on such trades.

Finally, section 51(xxxi) of the Constitution enables:

“the acquisition of property [by the Commonwealth] on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”

As a result, the Commonwealth should acquire relevant properties or water licences to maximize environmental flows to the Coorong and the Lower Lakes.

Terms of Reference: Emergency Water (Murray-Darling Basin Rescue) Bill 2008

The EDO endorses the Emergency Water (Murray-Darling Basin Rescue) Bill 2008.

The Bill is drafted from the premise that the Murray-Darling Basin is over allocated and it seeks to redress that issue by balancing environmental needs with those of other water users.

It responds to the current crisis facing the Coorong, the Lower Lakes and the Murray-Darling Basin generally by:

- enabling the Minister to introduce an Interim Basin Plan as an emergency measure¹⁰;
- considering the interests of “sustaining and protecting the environment” and names “the environment as a separate and clearly identifiable holder of an inalienable entitlement to water allocations”¹¹. In doing so, the Bill acknowledges that without an environmentally sustainable river, there will be little potable water to share;

- preventing companies from impeding the flow of water from the system and addressing taxation schemes which are detrimental to the management of Basin water resources¹²;
- legislating for the Commonwealth's acquisition of property on just terms to "return water use to sustainable limits"¹³; and
- creating accountability by reducing the water entitlement of a Basin States if it fails to comply with the Interim Basin Plan¹⁴.

The Emergency Water (Murray-Darling Basin Rescue) Bill 2008 will enable the Commonwealth to provide for environmental flows and so should be passed and implemented in order to protect the Coorong and the Lower Lakes.

Conclusion

The Constitution gives the Commonwealth the power to legislate to obtain and deliver water.

The Ramsar Convention binds Australia in international law to protect the Coorong, Lake Alexandrina and Lake Albert.

If urgent action is not taken, the Coorong and the Lower Lakes will face environmental devastation.

The Commonwealth must use its constitutional powers to immediately:

- legislate for the release of environmental flows for the Coorong and the Lower Lakes and if need be, acquire land and water licences to do so; and
- negotiate with the States to amend the National Water Initiative and relevant State legislation to remove the four per cent cap on water trades between the States and to have no cap on such trades; and
- pass and implement the Emergency Water (Murray-Darling Basin Rescue) Bill.

If you have any queries regarding this submission please contact Ruth Beach or Melissa Ballantyne.

Environmental Defenders Office (SA) Inc

Endnotes:

1. The Ramsar Convention means the Convention on Wetlands of International Importance especially as Waterfowl Habitat created at Ramsar, Iran, on 2 February 1971
2. The Ramsar List of Wetlands
3. brackish: slightly salty; *Dictionary.com*
4. s9(1) Water Act (Cth) 2007
5. s100 of the Constitution provides that *“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.”*
6. *Morgan v Commonwealth* (1947) 74 CLR 421 at 455 and obiter dicta in *Commonwealth v Tasmania* (1983) 158 CLR 1
7. *Commonwealth v Tasmania* (1983) 158 CLR 1
8. s5 & 9(2) Water Act (Cth) 2007
9. Water Management Act (NSW) 2000 and Water Act (Vic) 1989
10. Part 2
11. s10
12. ss17 and 19
13. s18
14. s20