

Chapter 2

Issues raised during the inquiry

2.1 Overall there was broad consensus from the evidence received that the Bill should be passed as expediently as possible. It was felt by most witnesses that the situation in the Murray-Darling Basin required urgent action and that it was critically important to pass the bill and enable the MDBA to begin operating in its new role. Issues individual groups raised in relation to the Bill were not regarded as sufficiently significant to warrant a delay while amendments were negotiated with state governments.

2.2 This sentiment was shared by both irrigators and environmental groups. Mr Gregson from the NSW Irrigators Council summed up his organisation's view:

The detail that is in that basin plan is what will affect irrigators. It is what will affect their communities and it is what will affect everybody right across the Murray-Darling Basin. It is the basin plan that needs to be focused on, where the detail needs to be right, and it is time to get on with that. In that respect we ask that this legislation now be passed so that we can get on with the process of formulating the basin plan.¹

2.3 Dr Arlene Buchan, from the Australian Conservation Foundation echoed this sentiment:

I really think, spurred on by Ms Mattila, that the most important thing that I can say today is that the sooner the amendment bill is passed and these reforms come into being the better.....the worst thing we can do is delay, delay and delay, more and more and more, because that is why we are in the situation that we are in. There is no reason to delay any further in rolling out the reform program.²

2.4 However, despite this agreement there were several issues that emerged as consistent concerns.

Critical Human Water Needs

2.5 The definition in the Bill of Critical Human Water Needs was the most common issue. The inclusion of 'non-human consumption requirements' proved to be contentious for many witnesses, and the assessment of these requirements against social, economic or national security costs was regarded by some witnesses as vague

1 Mr Andrew Gregson, NSW Irrigators Council, *Committee Hansard*, 12 November 2008, p.32.

2 Dr Arlene Buchan, Australian Conservation Foundation, *Committee Hansard*, 13 November 2008, p. 11.

or imprecise and left open the potential for some inequities in water consumption between irrigators and other general water users. The general opinion was summed up by Dr Buchan:

Take the definition of ‘critical human needs’, which I think is very confusing, very ambiguous and incredibly broad. In the discussion of, ‘What are critical human needs?’, it is right and proper that critical human needs should be seen as a priority. But whatever was wrong with health, drinking water and sanitation? They are critical human needs. The way I read the amendment bill, ‘critical human needs’ could cover anything—and, in fact, they have covered things from abattoirs to golf courses.³

2.6 The definition of Critical Human Water Needs is established by the Bill, but it has been based on negotiations among the state and federal governments. Dr Horne of DEWHA stated that:

The scope of this definition was subject to very extensive negotiations with the states during the negotiation of the intergovernmental agreement on Murray-Darling Basin reform. The current definition was considered to reflect the interests of all communities in the basin.⁴

2.7 While a common sense approach to the term would tend to restrict the definition to water critical to sustaining human life and health, it is also apparent to the committee that the economic activity of towns and communities is dependent on access to water above and beyond that required for ‘drinking, sanitation and health’ and the committee recognises that there is an argument for extending the definition beyond the most basic essentials.

2.8 Although the definition was criticised as vague, the committee notes that the real mechanism for managing water resources in the Basin is the Basin Plan and the less prescriptive definition allows the MDBA greater flexibility in formulating strategies for managing water resources. Dr Horne clarified this:

Through the Basin Plan, the Murray-Darling Basin Authority will be required to specify the amount of water required to meet critical human needs of communities dependent on the River Murray system. The Water Amendment Bill recognises that each state is responsible for meeting its own critical human needs and that each state has autonomy over decisions on how water from its state’s waterfare is used. If a state considers that critical human needs should be limited to drinking water and water required for sanitation and health, they could seek to have their critical human needs requirement as specified in the Basin Plan reflect this.⁵

3 Dr Buchan, ACF, *Committee Hansard*, 13 November 2008, p. 11.

4 Dr James Horne, Department of the Environment, Water, Heritage and the Arts, *Committee Hansard*, 13 November 2008, p.26.

5 Dr Horne, DEWHA, *Committee Hansard*, 13 November 2008, p.26.

2.9 While industries in towns and urban areas currently consume water in a manner which is distinct from irrigators, the NSW Irrigators Council highlighted that this need not necessarily remain the case.

We can see a process by which industry can enter the water market to purchase their water rights in the same way that irrigators have to. Under the provisions of it being a high economic cost to an industry of not having water, I am sure you would appreciate the cost of an irrigation entity not having water is also extremely high.⁶

2.10 The committee notes that there is nothing in the current definition of Human Critical Water Needs that would prevent this from occurring in the future under a revised Basin Plan or Agreement.

2.11 The committee also notes that this definition has emerged out of a protracted process of negotiation and is among the powers referred by the states. Amendment of this definition would likely result in a further round of negotiation, potentially delaying the entire process.

States use of water

2.12 The committee heard from several witnesses who were concerned about the extraction of water from the Basin by state governments. Of particular note was the issue of the construction of a pipeline from the Goulburn River to provide drinking water for Melbourne, the Sugarloaf Pipeline.

2.13 The committee heard that the pipeline's proposed extraction of 75 gigitalitres would be a net loss to the basin water resources, and as such was equivalent to a much higher allocation to irrigators or other users, where a substantial proportion of the water used actually returns to the river system.⁷ The committee also heard that although the volume was not high overall, in a period of extreme drought it represents a substantial fraction of the available water.

2.14 As explained by Dr Tony McLeod of the MDBA, the use of the Sugarloaf Pipeline for human critical needs is not covered by the Bill or the Basin Agreement:

In the case of the pipeline project it is a form of extraction on one of the tributary systems to the River Murray system, and not the River Murray system itself, and thus is not directly affected by these provisions.⁸

2.15 The pipeline water is considered an extraction under the state's share which is a management matter for the state and not affected by the provisions of the Bill. In this respect it is consistent with other water uses across the basin. Dr Horne of DEWHA stated that:

6 Mr Gregson, NSW Irrigators Council, *Committee Hansard*, 12 November 2008, p. 33.

7 Prof Mike Young, *Committee Hansard*, 12 November 2008, p. 3.

8 Dr Tony McLeod, MBDA, *Committee Hansard*, 12 November 2008, p.31.

There are several existing pieces of infrastructure that divert water from within the basin to elsewhere. There are, I think, seven such pieces of infrastructure in Victoria, five in South Australia and two in New South Wales, and these pieces of infrastructure have implications for Adelaide, Whyalla, Lithgow, Ararat and Bacchus Marsh, just to name a few areas. The basin plan will set a limit on the amount of water that can be diverted from basin water resources, and this limit will be set at a level of individual resource plan areas identified in the basin plan. The act does not constrain how the water is subsequently used, whether inside or outside the basin. What is relevant to the protection of the environment of the Murray-Darling Basin is the amount of water that stays in the system. It remains a matter for the states to allocate water for consumptive use.

Construction of the Sugarloaf Pipeline has been approved under the Environment Protection and Biodiversity Conservation Act 1999, subject to a number of conditions, including that the water it transports is demonstrably acquired through water savings achieved through the Food Bowl Modernisation Project. An independent audit is required under the conditions of EPBC Act approval to demonstrate this. These approval conditions are enforceable under the act.⁹

2.16 The committee notes that under the Basin Agreement, it is the states responsibility to allocate their share of the sustainable diversion limits as they see fit. The committee also notes, that while the Ministerial Council is required to agree any changes to state water shares on the River Murray System, the level of utilisation of the water available to each state from such sharing is determined by the Basin Plan, upon which the Commonwealth Minister is the decision maker.

2.17 The state shares arrangement applies only to surface water in the River Murray system, which includes the Darling south of the Menindee Lakes. The requirements of the Basin Plan will take into account changes in runoff from the effects of climate change throughout the Basin. Given that the state shares arrangement only applies to the River Murray system a change in rainfall and runoff in the northern Basin would not be impacted by the state shares arrangement.

Amendment of the agreement

2.18 The Murray-Darling Basin Agreement forms the basis of the powers of the MDBA and the Basin Plan. Any future change to the Murray-Darling Basin Agreement, such as a change to the water sharing rules between states on the River Murray System, can be effected by a decision of the Ministerial Council.¹⁰ The

9 Dr Horne, DEWHA, *Committee Hansard*, 13 November 2008, pp. 26,27.

10 A decision by the Ministerial Council will be reflected in regulations that amend the copy of the Murray-Darling Basin Agreement set out in proposed Schedule 1 to the Water Act 2007 (as amended by the Water Amendment Bill 2008), and the amendment to the Agreement will take effect when those regulations are registered on the Federal Register of Legislative Instruments (see clause 5(3) of the Agreement, also reflected in section 18C of the Bill).

Ministerial Council must meet at least once per year, but can meet at other times as it sees fit.¹¹ This arrangement allows for flexible amendment of the Agreement without requiring the passage through the Parliament of an amendment to the Water Act.

2.19 Some members of the committee expressed concern that the requirement for unanimous decisions by the Ministerial Council would mean that states have an effective power of veto over major decisions, which would limit the ability of the Council to respond to future issues, such as the potential need to adjust state water sharing rules to take into account changing circumstances.

2.20 Basin States, however, have clearly indicated that they wish to retain the requirement that decisions to amend the Murray-Darling Basin Agreement be unanimous.

2.21 It should be noted however, that this decision making arrangement will not apply to the new Basin plan. Whilst the new Basin plan will involve consultation with the Ministerial Council, the final decisions rests with the Commonwealth Minister.

Water trading rules

2.22 The Bill provides for an expanded role for the ACCC in determining water market rules. In accordance with its role under the current Water Act, the ACCC has prepared draft water market rules for public consultation. The committee heard evidence arguing that these proposed rules, if adopted, could have adverse consequences for private irrigation schemes. Specifically, the committee heard that the ACCC has interpreted the transformation arrangements in the Bill in a way that could undermine certainty for irrigation corporations.

My main concern relates to the transformation issue. My understanding was at the time that transformation issue was only meant to relate to transfers of water entitlements from an irrigation scheme to an external third party—what is called in the business an ‘external permanent transfer’. However, the ACCC has chosen to interpret it to allow an irrigator who is currently within an irrigation scheme to convert that entitlement to the state register. The significance of that in terms of trying to run one of these businesses is actually profound because it would result potentially in the break-up of that irrigation scheme.¹²

2.23 The committee also heard that the ACCC has interpreted state irrigation corporations as representing the crown:

The ACCC’s brief does not go that far; it is only about the water market and trading rules. The thing that I would come back to, which I think is straightforward in the act but which seems to have got confused, is that the government owned corporations, in my view, should be caught by the

11 See clause 13 of the Agreement.

12 Ms Jenni Mattila, Bondi Group, *Committee Hansard*, 13 November 2008, p. 3.

Water Act, but for some reason the ACCC has taken the view that they are the Crown. However, as a lawyer I say that they are not the Crown; they are statutory corporations. Statutory corporations, as a matter of law, are generally not the Crown unless they are so closely linked to government that they have virtually no separate, independent existence. So it seems that that area under the act needs to be looked at more carefully because it seems to me that entities such as State Water, Goulburn-Murray Water and Lower Murray Water are not the Crown; they should be covered by the Water Act.¹³

Risk Assignment

2.24 The ambiguity inherent in the Bill arising from the concept of risk assignment in apportioning the risk accrued from the effects of climate change, versus a change in government policy in response to climate change was raised by several witnesses.

2.25 This issue relates to the National Water Initiative, Clauses 48 and 50. Clause 48 states:

Water access entitlement holders are to bear the risks of any reduction or less reliable water allocation, under their water access entitlements, arising from reductions to the consumptive pool as a result of:

- (i) seasonal or long-term changes in climate; and
- (ii) periodic natural events such as bushfires and drought.¹⁴

2.26 While under clause 50:

Governments are to bear the risks of any reduction or less reliable water allocation that is not previously provided for, arising from changes in government policy (for example, new environmental objectives).¹⁵

South Australian carry over

2.27 The NSW Irrigators Council expressed concern that South Australia's ability to store carryover water upstream could potentially result in them extracting more than 100 per cent of their entitlement in a single year.

Limitation on carryover for SA is not provided. In NSW and VIC, only a maximum of 100% of entitlement can be extracted in any one year. If such a maximum is not enforced on SA, there is significant potential for a breach

13 Ms Mattila, Bondi Group, *Committee Hansard*, 13 November 2008, p.3.

14 Intergovernmental Agreement On A National Water Initiative, <http://www.nwc.gov.au/resources/documents/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>, pp. 8, 9.

15 *Ibid.*

in the cap on annual extractions, the impact of which will be felt by NSW and VIC irrigators as a drop in reliability.¹⁶

2.28 Mr Andrew Gregson of the NSW Irrigators Council explained in greater detail why this might occur:

Potentially under the provisions of the bill an irrigator in South Australia could carry water over to the extent that they extract in excess of 100 per cent of their entitlement, which means in that year South Australia would breach cap, and there is the potential then for liability impacts to irrigators upstream, particularly in New South Wales and Victoria. We understand that South Australia will be under an obligation not to breach the cap and, as a result, is likely to enter into negotiations to have that 100 per cent limit.

2.29 Mr Gregson acknowledged that South Australia has a history of abiding by the cap and stressed that his organisation believes the issue could be dealt with via the provisions of clause 50 of the NWI, rather than amending the bill:

We would prefer that the bill had said explicitly that there would be a limit on 100 per cent of extraction. That said, we do not want to delay the passage of the bill and, again, if the clause 50 risk assignment provisions of the NWI are allowed into place by mention of this being a policy change, that will be covered.¹⁷

2.30 The committee noted that access to carryover by South Australia is subject to a 'no disadvantage' test. According to Dr Horne:

The revised agreement in the bill sets out a no disadvantage test that limits South Australia's new storage rights in relation to water for critical human needs. The agreement ensures that South Australian storage of water for critical human needs must not affect water availability for New South Wales and Victoria. The agreement also ensures that carryover for private purposes in South Australia must not affect either water availability or access in New South Wales or Victoria.¹⁸

Variability and averages

2.31 Professor Mike Young and the Wentworth Group highlighted the variability of the upper reaches of the river system and questioned the suitability of the concept of averages throughout the Basin Agreement.

The act as drafted at the moment talks about using averages, but this misunderstands the skewed nature of water supplies. In particular, if you work it out, the variability for the River Murray system is 15.5, but for the Darling system it is 300 times greater than that. It is actually 4,705.2. Hence to put into a basin plan a framework that says manage on averages over

16 NSW Irrigators Council, *Submission No. 7*, p. 4.

17 Mr Gregson, NSW Irrigators Council, *Committee Hansard*, 12 November 2008, p.33.

18 Dr Horne, DEWHA, *Committee Hansard*, 13 November 2008, p. 26.

constrains the options. I would like to recommend that we delete the word 'average' so that the authority when it prepares the basin plan can contemplate using means, medians, shares and all other mechanisms to set a sustainable limit. To constrain it to averages makes a mistake for the future of Australia. I recommend to you that you consider taking the word 'average' out so that we invite the authority in its basin plan to define the long-term sustainable diversion limit.¹⁹

Indigenous water

2.32 The Murray Lower Darling Rivers Indigenous Nations highlighted the lack of any provision in the Bill or the Basin Agreement to recognise Indigenous water rights.

Indigenous Nations are and have been since time immemorial connected and responsible for their lands and waters, and the peoples of each Indigenous Nation obtain and maintain their spiritual and cultural identity, life and livelihood from their lands and waters. In addition, Indigenous Nations each have responsibilities and obligations under their Indigenous Law/Lore and Custom to protect, conserve and maintain the environment and the ecosystems in their natural state to ensure the sustainability of the whole environment.²⁰

2.33 The submission seeks the recognition of the rights of Indigenous peoples in the Basin to 'Cultural Flows' and greater consultation by the MDBA with Indigenous communities.

"Cultural Flows" are water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations.²¹

Conclusion

2.34 The committee believes that the Bill will enable water resources in the Murray Darling Basin to be managed in the national interest, optimising environmental, economic and social outcomes. The Bill represents the basis for the long term reform of water management in the Murray-Darling Basin.

2.35 The committee notes that the Bill allows the Basin Agreement to be independently and regularly amended and considers that this will ensure that future issues are dealt with expeditiously and efficiently.

2.36 While a number of issues were raised in relation to the legislation during the inquiry it is in the implementation of the Basin Agreement and the development of the Basin Plan that the benefits of this Bill will materialise. The Committee agrees with

19 Prof. Young, Tabled Document, 12 November 2008.

20 Murray Lower Darling Rivers Indigenous Nations (MLDRIN), *Submission* No 6, p. 6.

21 MLDRIN, *Submission* No 6, p. 8.

the submitters and witnesses that a rapid and smooth progress of the Bill is in the best interests of all parties.

Recommendation

2.37 The committee recommends the passage of this legislation without amendment.

A handwritten signature in blue ink, consisting of a stylized 'G' followed by a large, circular flourish.

**Senator Glenn Sterle
Chair**