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Submission to Senate Environment, Communications and the Arts Committee

Water (Crisis Powers and Floodwater Diversion) Bill 2010

100608

Submit to eca.sen@aph.gov.au by 5 pm on 10 June

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Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators access regulated, unregulated and groundwater systems. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

This document represents the views of the members of NSWIC. However each member reserves the right to independent policy on issues that directly relate to their areas of operation, or expertise, or any other issues that they may deem relevant.

General Comments

New South Wales Irrigators Council (NSWIC), as the peak body representing 12,000 irrigators in this state, opposes the concept of Commonwealth control of the Murray-Darling Basin and the river systems in it.

This Bill is an attempt to effectively remove power from States, to centralise power in Canberra for the benefit on one State over others and to remove elements of certainty from irrigated agriculture. Adoption of this Bill would be an unmitigated disaster for rural and regional NSW at very least and likely the balance of the Basin also.

Furthermore, it will serve to significantly undermine the water policy process upon which Australia embarked in 1996. A Council of Australian Governments (COAG) agreement in that year set the country on the path of issuing private entitlements to water which would establish the market as a foundation for reform. This was further strengthened in the National Plan for Water Security and was key to the *Water Act* (Cth) 2007. Reversing the level of certainty and security that exists within the property right of water through an attack on its fundamental will set the cause of water reform back in excess of a decade.

The Bill is ill considered in its policy aims, poorly structured in terms of defining activity and triggers, and has the capacity to seriously undermine the significant efforts on behalf of the Commonwealth, the States and a vast array of stakeholders in the moves to sustainable water management to the benefit of all undertaken in the past two decades.

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. In light of that, we seek the leave of the Committee to appear before it to provide further evidence and to answer any questions that Senators might have on behalf of water users in NSW.

Analysis of Bill

4 Constitutional basis for Act

This Bill attempts to impose Commonwealth power where it was specifically precluded by the States. Responsibility for the management of water resources was clearly not ceded to the Commonwealth at Federation.

NSWIC submits that Section 100 shows such withholding was entirely deliberate – the States deliberately did not cede power. The inclusion of Section 51(i), trade and commerce between the States, is specifically precluded by Section 100 as a means of abridging "the right of a State or of the resident therein" in respect of water from rivers.

Whilst noting the further raft of powers referred to (other than xxix), we do not believe that any provide sufficient jurisdiction either in themselves as collectively to underpin the legality of this Bill were it to be enacted.

In our opinion, the Constitutionality of the Bill rests primarily (if not solely) on Section 51 (xxix); more commonly known as the *external affairs power.*

We do not believe that this is a legitimate power with which to remove state rights withheld pursuant to the Constitution. From a practical perspective, it is our opinion that an attempt to wrest power in this fashion will result in the loss of any and all State-Commonwealth goodwill in water policy development to date. This Bill is a pathway directly to the High Court, which will set the cause of management in the interests of all back several decades.

Section (2) provides a series of assertions that "single, efficient management" (which we contend are not mutual requisites and imply that current management arrangements both in force and planned are inefficient) is necessary. The veracity of these assertions aside, they do not provide any further Constitutional basis for the Bill.

7 Interpretation

Pursuant to submissions later in this document, the term "high security" is used in a manner which creates significant ambiguity. For the Bill to have meaning, the term should be defined in Section 7(1).

9 Extreme crisis

NSWIC notes that Section 9 provides 2 criteria for the implementation of this Bill should it be adopted – the levels of Lake Alexandrina at the downstream end of the Murray River and the allocation to "high security" entitlements in "any irrigation district". We submit that both are inappropriate, ill-defined and poor triggers for the implementation of a management system nothing short of inefficient and draconian.

The delineation of lake level comparative to height datum of Lake Alexandrina shows the clear political bias of this Bill. It is widely recognised among stakeholders, including NSWIC, that Lake Alexandrina is but one of a significant number of important environmental assets across the Murray-Darling Basin. Reference to only one of those assets for the introduction of draconian measures, which NSWIC disagree with in any event, is neither good policy nor sensible environmental management.

NSWIC submits that were this Bill in the interests of the Basin as a whole then the criteria would have been set pursuant to environmental, social and economics requirements of the Basin as a whole. We note that the MDBA have recently published a list of not 1, but 18 key indicator sites to cover environmental requirements (but have specifically not considered economic or social requirements in public documents to date).

Data provided by the Murray-Darling Basin Authority to NSWIC shows that the monthly average water level in Lake Alexandrina fell below 0.4m AHD in February of 2007 (not for the first time) and has been below that level since that date. More detailed data shows that this occurred on or about 13 February, although we note that wind conditions on the Lake are sufficient to alter daily readings.

That is, the criteria listed in Section 9(2) would have been met in February of 2007 and a "period of extreme crisis" would have existed *at least* since that time.

In contemplation of Section 9(3), the second criteria which can also trigger a "period of extreme crisis", NSWIC notes that no definition of "high security water" has been provided and, further, that the existence of the trigger point in "any irrigation district" is sufficient to implement the "extreme crisis" provisions. That is, there is no requirement that the district be *inside the Murray-Darling Basin* in order to trigger the provisions of the Bill.

We note that entitlements issues by the various Basin States use varying names. In NSW, regulated entitlements in the main are either General Security or High Security. In Victoria, entitlements in the main are either High Reliability or Low Reliability. In South Australia, only one form of entitlement is issued for MDB surface water.

On strict interpretation, it would appear that the ill-defined trigger point in 9(3) references only water allocation in NSW. To highlight the absurdity of the situation proposed by this Bill, we note the current allocation status of the Lachlan River, where High Security allocations for the 09/10 season are 10%, having reached only 30% in 08/09. On the basis of current storage levels, it is entirely possible that this situation may be repeated next year which would trigger this Bill. The result of such triggering would be the management of the entire Basin – from Queensland to South Australia – being concentrated to Canberra based on conditions for a river system *which does not regularly connect to the Murray*[1]*!*

NSWIC believes that the proponents of the Bill have a wider interpretation of "high security" in mind. Without the provision of a clear understanding – by way of the inclusion of a definition – NSWIC finds it difficult to provide a detailed submission in

[1] The Lachlan enters the Great Cumbung Swamp, requiring a one in one hundred year event to connect to the Murrumbidgee and thence to the Murray.

this respect. At this stage, we submit that the only possible additional inclusion is Victorian High Reliability entitlements. We submit that part of the consideration of what forms “high security” must be the capacity to compare it against an alternate; General Security in the NSW instance and Low Reliability in the Victorian instance. To that end, we submit that South Australian entitlements cannot be considered “high security” as there is no alternative against which to compare. We submit that an interpretation of *all* entitlement on issue as “high security” is a logical misnomer.

We note further the criteria in (3)(a) refers to “any irrigation district”. Again, this term is not defined; which we submit is a grave error in the drafting of this Bill. “High security” entitlements, however defined, are able to be extracted in formally defined Irrigation Districts (infrastructure operator’s areas) or via direct extraction from rivers. The capacity exists, pursuant to the *Water Market Rules,* to freely transfer these entitlements from one to the other or even to hold the entitlement without a specific extraction point thereby making the determination of inside or outside an “irrigation district” impossible.

Moreover, the Bill does not determine whether the entitlement must be *inside or outside the Murray-Darling Basin.* That is, the instance of “high security” entitlements in the Harvey Irrigation District of Western Australia could trigger the “extreme crisis” provisions of this Bill in the Murray-Darling Basin. NSWIC submits that this is a clear and grave omission of clarity from this Bill.

15 Objects of Part (15)

NSWIC submits that the Commonwealth does not have the Constitutional capacity to “give ... overall control of the water resources in the Basin” to the Murray-Darling Basin Authority (MDBA), nor do we believe it practical, efficient or wise to do so.

The MDBA does not currently employ either sufficient staff or staff with sufficient knowledge to operate the intricate, complex and vast river systems across the Basin. In order to carry out its potential role contemplated by this Bill, the MDBA would have to source and employ those staff – a near impossible task given the well recognised skills shortage internationally in water resource management and operations.

Moreover, the Bill contemplates the regular shift in operational responsibility between those that currently hold it (the States) and the MDBA pursuant to Part 2. This will require the retention of *two* extensive sets of management and operational staff whom will, at any one time, be a minimum of 50% underemployed. That is, the agency whom retains staff but is not currently responsible for river management and operations will find themselves with a highly qualified staff engaged in nothing. This is clearly a massive inefficiency for no apparent gain. NSWIC submits that the aim of full cost recovery pursuant to the National Water Initiative will see these costs passed through to water access license holders, who will make legitimate submissions to pricing regulators (IPART and/or the ACCC) that they ought not pay for two sets of services when only one is efficiently required.

15(b) contemplates the capacity to “empower the Authority” to vary and suspend legitimately drawn and implemented water resource plans (Water Sharing Plans in NSW). These plans form the basis of security for irrigated agriculture production and

for environmental management pursuant to the Basin Plan. Removing the level of certainty that they bring will significantly impact the capacity of agricultural and environmental managers to operate. We submit that they are the basis around which sustainability of social, economic and environmental management of the Basin is built and to undermine them would undermine the entire structure. This process would see the replacement of a known and secure allocation system being replaced by an unknown, unverified and untried system based on uncertain rules emanating from an office in Canberra with little or no local knowledge or understanding.

15(4) seeks that a provision of "any water plan, arrangement or agreement" that is inconsistent with the Bill be of "no effect." "Water plan, arrangement or agreement" is one of only two terms in the Bill that is defined pursuant to Section 7. It includes "any interstate sharing agreement"[2]. NSWIC notes that this is likely to include the Murray-Darling Basin Agreement entered into between each Basin State and Territory which is now annexed to the *Water Act (2007).* As a basic principle of common law, contractual agreements between parties can only be varied *by agreement* between parties. Whilst noting that Commonwealth legislation can override contract at common law, NSWIC submits that any attempt to do so in this instance will clearly result – as it should – in a revolt from the States which will be supported by irrigators. The MDB Agreement was negotiated in good faith. Its effective undermining by one of the parties to it – the Commonwealth – will essentially render it worthless.

21 Matters to which the Authority must have regard

It is by omission rather than inclusion that this Section of the Bill lays bare the parochial interests evident in its creation. Section 21(g) notes that the Authority must have regard to "the importance to the economy and communities of maintaining *permanent plantings* (emphasis added)."

This preference for one type of agriculture over another is, in our submission, a blatant parochial measure designed in favour of the State in which the Senator introducing this Bill and the Senator moving this Inquiry reside. In our submission, this is an entirely illegitimate motivation.

Moreover, favouritism to one State and/or one type of agricultural undermines the market-based approach that Australia has chosen to take to water management in times of both flood and drought. Theoretically, a market system will see water move to its highest value use. This theory was agreed to, in essence, through the adoption of the National Water Initiative. To undermine this position through administrative interference is not only inefficient, it is also a complete reversal of policy initiatives to date.

[2] Section 7(1)(b).