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Briefing Note

The Water Act

“How did we end up with this?”

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Member Organisations: Bega Cheese Limited, Border Rivers Food & Fibre, Coleambally Irrigation Co-Op Ltd, Cotton Australia, Gwydir Valley Irrigators' Association Inc., High Security Irrigators Inc, Hunter Valley Water Users' Association, Lachlan Valley Water, Macquarie River Food & Fibre, Mid Coast Dairy Advancement Group, Mungindi-Menindee Advisory Council, Murray Irrigation Limited, Murray Valley Water Diverters' Association, Murrumbidgee Groundwater Inc., Murrumbidgee Irrigation Ltd, Murrumbidgee Private Irrigators' Inc., Namoi Water, NSW Farmers' Dairy Committee, NSW Farmers' Association, Ricegrowers' Association of Australia, Richmond Wilson Combined Water Users Association, Riverina Citrus, Southern Riverina Irrigators, South Western Water Users', West Cororgan Private Irrigation District, Wine Grapes Marketing Board.

Introduction

The *Water Act* (Cth) 2007 (“the Act”) is an Act of the Commonwealth Parliament. It deals with a range of issues relevant to the use and management of water across the Murray-Darling Basin (MDB). These matters include;

- The MDB Agreement (or interstate water sharing agreement), which is an Inter-Governmental Agreement (IGA) between the Commonwealth and relevant States;
- The management of Basin water resources (including the Basin Plan);
- State water resource plans;
- Risk allocation in the event of a reduction water availability;
- Critical human water needs;
- Rules for management of the water market and the regulation of operators who deliver water;
- Water information;
- Commonwealth environmental water management; and
- The establishment and operation of the MDB Authority.

From the perspective of NSWIC Members and levy payers, the Basin Plan is the critical component of the Act.

Background

The Act has been before the Commonwealth Parliament twice – once under a Coalition Government and once under a Labor Government. It initially came before the Parliament under Minister Turnbull in 2007 and then had a series of amendments (primarily additions – matters other than the Basin Plan) made to it in late 2008 under Minister Wong.

To adequately understand how the Act became what it is – an environment focused process with social and economic considerations an afterthought – it is necessary to understand the political scenario at the time it was being developed.

Then Prime Minister Howard needed an environmental issue. For a variety of reasons, he chose water and focused on the MDB. The “blueprint” for that reform was the National Water Initiative (NWI) – still called the “blueprint” by Minister Wong and still overseen by the National Water Commission (NWC). The NWI, itself an IGA, set out the triple bottom line approach to resource management (social, economic, environmental). There was a clear goal in the NWI for the Commonwealth to legislate to enforce its provisions.

In order to get that legislation right, the Commonwealth needed the cooperation of the States (either simultaneous legislation or, preferably, a referral of powers). Of course, the period during which this was occurring was becoming increasingly unstable for political reasons. Eventually, the relationship between Canberra (Coalition) and the States (all Labor) broke down to the extent that one State, Victoria, essentially withdrew completely.

By this stage, the Act was at version 63 or thereabouts. That is, it had undergone significant consultation and change in the drafting process. Without the political will of the States, however, the Act's very Constitutional validity was in question. Did the Commonwealth have the power to "go it alone"?

It appears that the Coalition Government instructed Parliamentary Counsel to find sufficient Commonwealth power to implement the Act.

Constitutional Capacity

The Australian Federation is constructed such that all power is reserved to that States except that which they specifically provided to the Commonwealth at Federation. The powers which were granted to the Commonwealth are contained within the Constitution.

To properly implement the NWI, an additional referral of powers from the States would have been necessary. As it was not to be provided at the time of its first passage under Minister Turnbull and the Coalition, a consideration of what capacity the Commonwealth had was necessary.

Evidence of that consideration can be found in Section 9 of the Act which references Section 51 of the Constitution wherein the legislative powers of the Commonwealth Parliament can be found. Section 9 identifies each power that the Commonwealth believes it has in order to implement the Act:

- (i) Trade and commerce;
- (v) Postal, telegraphic, telephonic and like services;
- (viii) Astronomical and meteorological observations;
- (xi) Census and statistics;
- (xv) Weights and measures;
- (xx) Foreign corporations;
- (xxix) External affairs; and
- (xxxix) Matters incidental.

This is, in essence, a "grab bag" of every possible head of power that the Commonwealth might bring to bear.

The key provision is the External Affairs power. The clearest example of the use of this power by the Commonwealth is in respect of the Tasmanian Dams case in 1983, where the power was considered (in the Commonwealth's favour) by the High Court. The Tasmanian Government was preparing to build a dam in a wilderness area. The Commonwealth had executed certain international conventions to protect certain wilderness areas. By virtue of the External Affairs power, the Commonwealth were able to stop the construction of the dam to ensure that Australia complied with its external agreements.

External Affairs and the Water Act

With the External Affairs power in mind, the Commonwealth turned to international agreements that Australia had executed in order to affect this head of power. The primary agreement identified was the Ramsar Convention, although the Act does

reference 8 specific *relevant international agreements* in Section 4 together with “any other international convention”.

A full Briefing Note on the Ramsar convention (its full title is the Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971) is available on the NSWIC website. For the purposes of this document, all that is necessary is to recognise that Ramsar (and the other agreements) all focus solely on environmental outcomes.

The Water Act as it Now Appears

The Objects of the Act are essentially all that remains of the intent of the NWI to adopt a triple bottom line approach. The balance of the Act – for the simple reason of legislative capacity – focuses wholly and solely on environmental considerations. Social and economic considerations are descriptive only. That is, the economic and social damage that the Basin Plan will bring about must be *described*, but are not taken into account as environmental implications are in setting Sustainable Diversion Limits (SDLs).

So what of the amendments during the second passage of the Act? Did they not contain a referral of powers?

Yes – to an extent and only on certain matters. There was a limited referral (varies across States) to achieve a number of matters (primarily related to water markets), but none of the amendments was (substantively) in respect of the Basin Plan.

Why Must the Act Change?

Both major political entities at the Commonwealth level have supported the passage of the Act through Parliament – twice.

So what has changed? What has altered to the extent that parties at the national level should adopt a policy to bring the Act back to the Parliament?

In essence, there are two things;

1. The ramifications of the Act are now far better understood – and are likely far (far...) worse than anybody contemplated.
2. The opportunity for “good policy” has reopened. On the assumption that the NWI can really only be met (the triple bottom line approach) by a sensible and practical referral of powers, now (or next year) is the time to achieve it. There’s a mixture of political parties across State and Commonwealth levels and – more to the point – each has an incentive to “get it right” when they see exactly how “wrong” the Basin Plan will be. Frankly, a negotiated outcome is the only way for Governments (State and Federal) to avoid social and economic Armageddon under the Plan. Clearly, neither want to be responsible for that.