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Policy for Interaction of Social and Economic Considerations in Setting Sustainable Diversion Limits in the Murray-Darling Basin Plan

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Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators are on 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.

Important Disclaimer

This policy is not – and must not be read to be – endorsement of the *Water Act* or the Basin Plan process. It is merely a practical reflection of the current process – the drawing of a Basin Plan – and an attempt to restore some balance to that process vis a viz the treatment of social and economic considerations.

NSWIC – and its Members – reserve the right to disagree with the *Act* and possibly to lobby for its amendment (or rewriting) as a means of restoring the process of the Basin Plan to equitable treatment of the Objectives contained within it.

Background

It is the firm view of NSWIC that the Objects of the *Water Act* (Cth) 2007¹ are not reflected in the balance of the *Act* and, in particular, in the priorities of the Basin Plan.²

The Objects of the *Act* provide for equal treatment between economic, social and environmental outcomes.³ The process for creating the Basin Plan and, particularly, the Sustainable Diversion Limits is focused solely on the latter of these.⁴

Section 21 (1) notes that the Basin Plan is to be prepared so as to “...give effect to relevant international agreements...”, subsection (2) requires it to have “regard” to “conservation” and “biodiversity” and to “protect and restore the ecosystems, natural habitats and species” and subsection (3) specifically refers to the Ramsar convention in respect of environmental wetlands.

In short, the *Act* is written such that the environmental objective prevails over social and economic objectives at each turn.

In contemplating the Constitutional basis for the *Act*⁵ and recalling the political situation vis a viz the States and Commonwealth at the time of drafting, it is reasonable to suggest that the environmental preference is merely a reflection of the heads of power held by the Commonwealth and not an actual intent. In considering Section 9, the *Act* relies on Commonwealth powers over;

- Trade and commerce⁶;
- Postal, telegraphic, telephonic and other like services⁷;
- Astronomical and meteorological observations⁸;
- Census and statistics⁹;
- Weights and measures¹⁰;
- Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth¹¹;
- External affairs¹²; and
- Matters incidental to the execution of any power¹³.

Given specific reference in the *Act* to the Ramsar Convention, it appears clear that the foreign affairs reference is the key head of power on which the *Act* gives the Authority direction to write the Basin Plan and, in particular, determine the sustainable diversion limit.

¹ Section 3.

² Part 2 and particularly Division 1.

³ Section 3 (d).

⁴ See specifically Section 23 (1) and further Section 21 (1) and (2).

⁵ Section 9.

⁶ *Commonwealth of Australian Constitution Act* (Cth) Section 51 (i).

⁷ *Ibid* (v).

⁸ *Ibid* (viii).

⁹ *Ibid* (xi).

¹⁰ *Ibid* (xv).

¹¹ *Ibid* (xx).

¹² *Ibid* (xxix).

¹³ *Ibid* (xxxix).

NSWIC is of the opinion that this limited basis of power is the reason for the environmental slant of the *Act* and, more particularly, the reason why it is in quite direct contravention to its stated objects.

When the *Act* was brought before the Parliament to consider a series of amendments¹⁴, the political circumstances had changed considerably. The *Act* had initially been introduced by a Coalition Government who had been unable to achieve a referral of powers¹⁵ from the States. Several months subsequent to that, a change of Government occurred and the new ALP Government were able to negotiate, via the Council of Australian Governments (COAG), a referral of powers which provided a more secure capacity for the Commonwealth to have the MDBA write and enforce a Basin Plan.

Unfortunately, the *Act* was not rewritten in its entirety – a process which could have provided conformity between the objects and the balance. Instead, the basis of the original *Act* was left in place with the referral of powers being limited to a new section 9A. The result is that environmental considerations remain primary, social and economic considerations remain secondary and the objects of the *Act* are in tatters.

Policy Position on the Objects of the *Act*

NSWIC believes that the ultimate solution to the imbalance of the *Act* is for the Parliament to reconsider it.

It is our opinion that the *Act* favours environmental use above all other use. Further, we believe that such favouritism was never the intention of the Parliament but was merely a function of the capacity available to the Commonwealth at the time of the *Act* being considered.

For the avoidance of doubt, NSWIC believes that the *Water Act* (Cth) 2007 needs to be rewritten to provide balance between social, economic and environmental considerations in the allocation of limited water resources.

In the event that Commonwealth does not hold sufficient Constitutional power to do so, NSWIC believes that the States should refer sufficient power to the Commonwealth to enable such action.

Role of the MDBA

Notwithstanding our position above, NSWIC recognises that the MDBA are tasked with implementing the content rather than the spirit of the *Act* and must do so within a limited timeframe. The MDBA has no capacity to implement the Objects of the *Act* but

¹⁴ December of 2008.

¹⁵ Providing the Commonwealth with a head of power external to Constitutional powers.

must follow the process described in Division 1 of Part 2 in drawing the Basin Plan and setting SDLs.

The balance of this document provides a means through which social and economic considerations can be taken into account in setting the SDL rather than simply be descriptive of the social and economic impacts that will be occasioned.

Setting a Sustainable Diversion Limit

The *Act* determines that the SDL must reflect “an environmentally sustainable level of take.”¹⁶

This simple statement, however, denies the extraordinary complexity of the variables involved in setting an SDL. This is reflected in the following section of the *Act* which recognises that the SDL might be described via a range of methods;

- As a quantity of water per year; or
- As a formula or other method that may be used to calculate a quantity of water per year; or
- In any other way that the Authority determines to be appropriate.¹⁷

NSWIC is of the opinion that the SDL has to be a number, howsoever derived. We are not aware of any proposals – from the MDBA or any other entity – to formulate an SDL based on 23(2)(c) in “any other way”.

The SDL must, in our opinion, be set based on a significant number of variables, the most obvious of which being total resource availability in any given period. Further variables will include water availability in previous periods (consecutive wet periods may result in less water being required to sustain given environmental assets), projected water availability in subsequent periods and likely conditions affecting assets receiving water to determine quantity necessary.

In light of the number of variables, NSWIC is of the opinion that the SDL will be best described by reference to a formula pursuant to 23(2)(b). That formula will take account of variables (in a manner yet to be determined) which will result in a numerical SDL at a Water Resource Plan Area level.

Variance in Sustainable Diversion Limit Calculation

It is widely recognised that the Basin Planning process is based on leading edge science. The corollary of such leading edge work is imprecision. NSWIC asserts that it is widely recognised that the Basin Plan must deal in imprecise science in order to derive the SDL.

There is a clear difference between precision and accuracy. A figure can be precise without being accurate. A range between figures can be accurate without providing precision. We submit that the *Act* anticipates the provision of both accuracy and

¹⁶ Section 23(1).

¹⁷ Section 23 (2) (a), (b) and (c).

precisions, but the practical reality of our current science is that this cannot currently be delivered.

Science is still to gain a full understanding of such complex issues as connectivity, hydrological movement and ecosystems demand at a macro level let alone at the micro level required for each and every system across the Basin.

Each of these issues is, of course, a variable to be taken into account in the formula pursuant to Section 23(2)(b).

The formula-based approach must then necessarily mathematically perpetuate and possibly magnify any imprecision. To express the problem in the Australian vernacular, an average of averages produces a very average result. That is, the scope both for error and the statistical significance of that error is large.

Within each variable lies a given quantity of variance at specific confidence intervals. When considered together a separate variance manifests.

In that large scope, however, lies the possibility of social and economic considerations having a material input to the SDL as contemplated by the objects of the *Act*.

Social and Economic Factors to Temper Variance

Rather than identify a SDL as a quantum based on random selection of a point within a range followed by a description of the social and economic impact that such SDL will have, NSWIC believes social and economic impacts can be considered in selecting the point of variance. That is, social and economic impact can become a *part of the formula* pursuant to Section 23(2)(b) simultaneously fulfilling the requirements of the *Act* whilst partially reconciling it with the objects.

In practice, the process would be staged:

1. Environmental assets pursuant to the Act are identified (a desktop function, not a scientific function);
2. The water requirements of each asset to be determined at a reasonable degree of confidence (say, 90%) and expressed as both a *minimum* and a *maximum* value of water required based on available science;
3. The total Water Resource Plan Area requirements – at both minimum and maximum levels – be summed;
4. The resulting drop (if any) occasioned by a new SDL then be tested against social and economic data;
5. Should the analysis of social and economic data show minimal change, the SDL should be set at the resultant level;

6. Should the analysis of social and economic data show significant change, the SDL should be reanalysed within the minimum and maximum range.

In essence, the process would reflect the variance between accuracy and precision through reference to social and economic impacts. Accuracy would be provided – at an appropriate confidence index – as a statistically significant range. Precision would then be based not on random selection but on guidance from social and economic impact.

The selection of the final quantum of SDL would thus be directly influenced by social and economic factors at least partly fulfilling the Objects of the *Act*.

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