



Response to:

2008-2009-2010

The Parliament of the
Commonwealth of Australia
THE SENATE

Presented and read a first time

Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010

- ➔ The bill is a good step but needs to be focused.
- ➔ Please allow for the fact that the notes below are not necessarily fully integrated with the details of the Act, due to the time available to respond.
- ➔ Further Bills should be developed to address wider crises that could occur, particularly from chemical or biological contamination. The increasing use of fertilisers and pesticides, for example, could unexpectedly pass a threshold point. This further illustrates the need for on-going management.

(Senator Xenophon and Senator Hanson-Young)

A Bill for an Act to enable the Murray-Darling Basin Authority to manage the water resources of the Basin as a single system during periods of extreme crisis, and for related purposes

- ➔ Modify as below.

i Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010

Contents

Part 1—Preliminary 1

1 Short title	1
2 Commencement	2
3 Objects	2
4 Constitutional basis for Act	2
5 Interaction with the Water Act	3
6 Inconsistent Commonwealth laws	3
7 Interpretation	3
8 Regulations	4

Part 2—Declaration of period of extreme crisis 5

9 Extreme crisis	5
10 Chief Executive's advice	5
11 Advice to the Minister	6
12 Declaration of extreme crisis	7
13 Declaration of end of crisis	7

Part 3—Crisis powers 8



Division 1—Application, objects and effect of Part 8

14 Application of Part 8
15 Objects of Part 8
16 Effect of Part 8

Division 2—Crisis powers and functions of Authority 9

17 Authority to manage Basin water resources 9
18 Authority may suspend or vary agreements etc. 9
19 Powers of Authority in relation to implementation and
compliance 10
20 General powers of Authority 10
21 Matters to which Authority must have regard 10

Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010 1

**1 A Bill for an Act to enable the Murray-Darling
2 Basin Authority to manage the water resources of
3 the Basin as a single system during periods of
4 extreme crisis, and for related purposes**

- ➔ Plans should be made and management undertaken to avoid crises rather than react when they occur. Therefore the Bill should address planning and management of the system in general and not just responses to extreme crises.
- ➔ Extreme crisis can happen in many ways, not just hydrological - e.g. major toxic spills or microbial infestations. The Bill only addresses one type. Thus further Bills will be needed.
- ➔ The Bill may be designed for water volume crises in the first instance but wider issues should also be addressed and environmental issues integrated into the solution as the basic focus. Therefore there needs to be a controlling environmental partner in the management, such as the Department of Environment.

Recommendation: "A Bill for an Act to enable the Murray-Darling Basin Authority to have the powers to ensure environmental survival on an on-going basis and with emergency powers during periods of extreme shortage of fresh water in the Lower Lakes."

5 The Parliament of Australia enacts:

6 Part 1—Preliminary

7

8 1 Short title

9 This Act may be cited as the *Water (Crisis Powers and Floodwater
10 Diversion) Act 2010*.

Part 1 Preliminary

Section 2

1 2 Commencement

2 This Act commences on the day on which it receives the Royal
3 Assent.

4 3 Objects

5 The objects of this Act are to enable the Murray-Darling Basin
6 Authority:



7 (a) to take full responsibility for the management of the water
8 resources of the Basin as a single system during periods of
9 extreme crisis; and

➔ With regard to a single authority, the survival of the system as a whole has to be maintained but the management to achieve this will most likely be at a regional level. Thus although a single-system view is needed for the connected parts of the Basin as a whole, the management required will be a network style rather a centralised one, with a mandate to over-ride owners who withhold water unjustifiably.

Recommendation: Lines 7-9: (a) to take full responsibility for ensuring the on-going viability of the system, including emergency powers at times of crisis.

➔ The on-going management should include agricultural advice, particularly water conservation measures and the minimisation of the artificial transport of water through pipes and channels.

10 (b) to exercise broader powers in the management of floodwaters
11 and waters from significant rainfall events.

12 **4 Constitutional basis for Act**

13 (1) This Act relies on:

14 (a) the Commonwealth's legislative powers under paragraphs
15 51(i), (v), (viii), (xi), (xv), (xx), (xxix) and (xxxix), and
16 section 122, of the Constitution; and

17 (b) any implied legislative powers of the Commonwealth.

18 (2) The basis for the extended application of Commonwealth
19 legislative powers to meet the objects of this Act is that:

20 (a) the matters set out in subsection 10(2) of the Water Act,
21 relating to the physical interconnectedness of Basin water
22 resources, and the environmental, economic and social
23 consequences of that interconnectedness, apply even more
24 strongly during periods of extreme crisis;

25 (b) the only way to secure sufficient water for use for competing
26 environmental, conservation and irrigation purposes is to
27 implement a single, efficient system for the management of
28 Basin water resources during periods of extreme crisis, which
29 equitably deals with matters of water allocation and sharing;

➔ There is a strong order of priority that must be recognised and in each case the by-product, particularly the water output, must be non-polluting:

1. Environmental survival, measured by the health of ecosystems.
2. Personal use by residents who are dependent on the river.
3. Use by irrigators for sustainable crops for domestic use.
4. Use by other sustainable industries for domestic use.
5. Use by export industries.



– Note the export of embedded water is a significant issue, as it results in water being removed from the natural MDB cycle.

➔ Addressing human needs has to be based on the survival of the system, otherwise greater human needs will be sacrificed in the future. It is natural for individuals to make short-term demands but it is the responsibility of government to maintain the optimal balance for all, including future generations. Ultimately, most people expect this even though they will naturally resist it whenever they can.

30 and

31 (c) it is appropriate that impediments to a single, efficient system
32 be set aside until the period of extreme crisis has ended.

Preliminary **Part 1**

Section 5

Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010 3

1 5 Interaction with the Water Act

2 The following provisions of the Water Act apply as if they were
3 part of this Act:

4 (a) section 11 (Reading down provision in relation to the
5 operation of sections 99 and 100 of the Constitution);

6 (b) section 12 (Application to Crown etc.);

7 (c) section 13 (The *Native Title Act 1993* not affected).

8 6 Inconsistent Commonwealth laws

9 (1) Subject to section 5, if a provision of this Act is inconsistent with a
10 provision of any other law of the Commonwealth, the relevant
11 provision of this Act has effect despite the provision of that other
12 law and that provision of the other law is, to the extent of any
13 inconsistency, invalid.

14 (2) A provision of this Act and a provision of any other law of the
15 Commonwealth must not be taken for the purposes of this section
16 to be inconsistent to the extent that they are capable of operating
17 concurrently.

18 7 Interpretation

19 (1) In this Act:

20 **Water Act** means the *Water Act 2007*.

21 **water plan, arrangement or agreement** means any plan,
22 arrangement or agreement provided for or dealt with by the Water
23 Act, and includes the following:

24 (a) the Basin Plan, if any;

25 (b) any interstate sharing agreement;

26 (c) any State or local plans;

27 (d) any arrangement that affects the way that water entitlements
28 and allocations may be traded.

29 (2) Unless the contrary intention appears, any other word or expression
30 that is used in this Act that is also used in the Water Act has the
31 meaning it has in that Act.

Part 1 Preliminary

Section 8

4 Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010

1 8 Regulations



2 The Governor-General may make regulations prescribing matters:
3 (a) required or permitted by this Act to be prescribed; or
4 (b) necessary or convenient to be prescribed for carrying out or
5 giving effect to this Act.

6
7 Declaration of period of extreme crisis **Part 2**

8 Section 9

9 *Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010 5*

1 **Part 2—Declaration of period of extreme crisis**

2

3 **9 Extreme crisis**

➔ Survival of the native ecosystems is the first priority, not water levels *per se*. In particular, ecosystems upstream should not be sacrificed for the sake of a water level downstream that may be naturally cyclical. At times of acute shortage, the overall natural environmental balance is the ultimate guide. However flow to the sea must be ensured at environmentally-appropriate times and the ultimate aim should be to hold the sea back in the vicinity of the mouth by the pressure of the fresh water.

Recommendation: Change “extreme crisis” to “extreme crisis in the salinity balance of the Lower Lakes”.

4 (1) A *period of extreme crisis* exists during any period in which the
5 circumstances in either subsection (1) or (2) exist.

6 (2) A *period of extreme crisis* exists during any period:

7 (a) commencing when the level of water in Lake Alexandrina is
8 continuously less than +0.0m Australian Height Datum

9 (AHD) for more than 3 consecutive months; and

10 (b) ending when the level of water in Lake Alexandrina has

11 returned to a level continuously above +0.4m AHD for 3

12 consecutive months.

➔ These levels only apply if there are barrages to prevent seawater intrusion. The optimal solution is to have a fresh water flow that is strong enough to balance the sea pressure at the mouth.

Recommendation: Change line 6 to ... “exists, where barrages are in place, during any period”...

13 (3) A *period of extreme crisis* exists during any period:

14 (a) commencing when allocations to high security water

15 entitlement holders in any irrigation district have been below

16 20% for more than 2 consecutive years; and

17 (b) ending when allocations to those high security water

18 entitlement holders have returned to a level above 40% in

19 any year.

20 (4) If the criteria in paragraph (2)(a) and paragraph (3)(a) have each

21 been met, the period of extreme crisis does not end until the criteria

22 in paragraphs (2)(b) and (3)(b) have each been met.

23 **10 Chief Executive’s advice**



24 (1) The Chief Executive must advise the Minister, in writing, if:
25 (a) the Authority assesses that the Basin has entered a period of
26 extreme crisis; or
27 (b) the Authority assesses that a period of extreme crisis has
28 ended.

29 (2) Advice under subsection (1) must include advice as to the basis on
30 which the Authority's assessment has been made.

Part 2 Declaration of period of extreme crisis

Section 11

6 Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010

1 (3) The Chief Executive must cause a copy of any advice given under
2 subsection (1) to be published on the Authority's website.

3 11 Advice to the Minister

4 (1) If the Chief Executive advises the Minister that the Basin has
5 entered a period of extreme crisis, the Minister must, within 14
6 days, either:

7 (a) make a declaration under section 12 that the Basin has
8 entered a period of extreme crisis; or

9 (b) both:

10 (i) give reasons why the Minister does not consider it
11 necessary or appropriate to make such a declaration; and
12 (ii) cause a statement of those reasons to be published on
13 the department's website.

- ➔ The Minister must advise Parliament that he/she has been advised of a crisis.
- ➔ Forecasts of impending crises must be published. The models developed by research institutions such as CSIRO need to be greatly improved through greater funding for research and independence from political influence.
- ➔ The full costs of these crises need to be identified and published, together with the full costs of political "fixes" such as unnecessary regulators and desalination plants.

14 (2) If the Chief Executive advises the Minister that a period of extreme
15 crisis has ended, the Minister must either:

16 (a) make a declaration under section 13 that a period of extreme
17 crisis has ended; or

18 (b) both:

19 (i) give reasons why the Minister does not consider it
20 necessary or appropriate to make such a declaration; and
21 (ii) cause a statement of those reasons to be published on
22 the department's website.

- ➔ The Minister must advise Parliament that he/she has been advised that the crisis has ended.

23 (3) Before taking action under subsection (1) or (2), the Minister may
24 seek further information from the Authority.

25 (4) If:

26 (a) the Chief Executive advises the Minister under paragraph
27 10(1)(a) that the Basin has entered a period of extreme crisis;



28 and

29 (b) the Minister does not make a declaration under section 12, in
30 accordance with paragraph (1)(a); and

31 (c) after a period of 6 months from the date of the advice the
32 Chief Executive assesses that a period of extreme crisis
33 continues to exist;

Declaration of period of extreme crisis **Part 2**

Section 12

Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010 7

1 the Chief Executive must again provide advice to the Minister
2 under section 10.

3 **12 Declaration of extreme crisis**

4 The Minister may, by legislative instrument, declare that the Basin
5 has entered a period of extreme crisis.

➔ The Departmental Head should have the unfettered ability to report to Parliament if he/she believes an extreme crisis is occurring and the Minister does not.

6 **13 Declaration of end of crisis**

7 The Minister may, by legislative instrument, declare that a period
8 of extreme crisis has ended, and that a declaration under section 12
9 is no longer in force.

➔ The Departmental Head should have the unfettered ability to report to Parliament if he/she does not believe the extreme crisis has ended when the Minister does.

10

Part 3 Crisis powers

Division 1 Application, objects and effect of Part

Section 14

8 Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010

1 **Part 3—Crisis powers**

2 **Division 1—Application, objects and effect of Part**

3 **14 Application of Part**

4 This Part applies during any period in which a declaration is in
5 force under section 12.

6 **15 Objects of Part**

7 The objects of this Part are:

8 (a) to give the Authority overall control of the water resources in
9 the Basin to address the crisis, including by making the
10 groundwater and surface water allocation decisions
11 necessary:

12 (i) for system maintenance and to maintain river heights at
13 a minimum level; and

14 (ii) for the environment; and

15 (iii) for salinity management; and

16 (iv) for water users and holders of water access entitlements
17 or water access rights; and

18 (b) to empower the Authority to share, manage and allocate
19 Basin water resources and manage all processes that may
20 adversely affect the amount of water likely to flow through



- 21 the Basin, including making allocations to entitlement
- 22 holders and/or allowing the diversion of water from
- 23 flood-affected States or where there is significant rainfall.

- ➔ The Minister must be advised if South Australia's allocation of 1850GL is not maintained. If stored water upstream is not released to compensate, Parliament should declare a State of Emergency.
- ➔ Indigenous management should be given major recognition. Despite the impact of colonisation, there is still Aboriginal expertise in the Basin of a nature that cannot be duplicated by current science. Steps must be taken to respect and utilise this expertise through proper consultation with and guidance from the traditional owners.

24 **16 Effect of Part**

- 25 (1) The powers and functions of the Authority are expanded in
- 26 accordance with Division 2.
- 27 (2) The Water Act and other laws have effect subject to this Part.
- 28 (3) To the extent that a provision of the Water Act or any other law is
- 29 inconsistent with this Part, or with action taken by the Minister or
- 30 the Authority under this Part, that provision is of no effect.

Crisis powers **Part 3**

Crisis powers and functions of Authority **Division 2**

Section 17

Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010 9

- 1 (4) To the extent that a provision of any water plan, arrangement or
- 2 agreement is inconsistent with this Part, or with action taken by the
- 3 Minister or the Authority under this Part, that provision is of no
- 4 effect.

5 **Division 2—Crisis powers and functions of Authority**

6 **17 Authority to manage Basin water resources**

- 7 (1) The Chief Executive may make a direction, in writing, relating to
- 8 the management of any or all of the water resources within, or
- 9 beneath, the Murray-Darling Basin.
- 10 (2) A direction under subsection (1) may deal with any matter capable
- 11 of being dealt with by any water plan, arrangement or agreement,
- 12 including any of the following matters:
 - 13 (a) water sharing arrangements;
 - 14 (b) water allocation arrangements;
 - 15 (c) storage management;
 - 16 (d) water accounting rules;
 - 17 (e) rules for arrangements for sale, purchase or movement of
 - 18 water among Basin States;
 - 19 (f) the allocation of water for essential system maintenance,
 - 20 conveyance and environmental purposes;
 - 21 (g) any other matter necessary to give effect to the objects of this
 - 22 Part.
- 23 (3) A direction under subsection (1) has effect according to its terms.
- 24 (4) A direction under subsection (1) is not a legislative instrument.

25 **18 Authority may suspend or vary agreements etc.**

- 26 (1) The Chief Executive may make a declaration, in writing,



27 suspending, varying or replacing any water plan, arrangement or
28 agreement which might impede the capacity of the Authority to
29 manage the Basin's water resources as a single system.

30 (2) A declaration under subsection (1) must specify:

31 (a) the instrument, or class of instruments, affected;

Part 3 Crisis powers

Division 2 Crisis powers and functions of Authority

Section 19

10 Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010

1 (b) the period during which the instrument, or class of
2 instruments, is to be suspended, varied or replaced (as the
3 case may be), or a method of determining that period.

4 (3) A declaration under subsection (1) has effect according to its
5 terms.

6 (4) A declaration under subsection (1) is not a legislative instrument.

7 **19 Powers of Authority in relation to implementation and** 8 **compliance**

9 (1) The Authority is responsible for implementing any direction or
10 declaration made under this Part.

11 (2) The Authority is responsible for ensuring compliance with any
12 direction or declaration made under this Part.

13 **20 General powers of Authority**

14 The Authority has power to do all things necessary or convenient
15 to be done for or in connection with the performance of its
16 functions under this Act.

17 **21 Matters to which Authority must have regard**

18 In making a direction or declaration under this Part, the Chief
19 Executive must have regard to the following matters:

20 (a) the objects of this Part;

21 (b) the principles set out in the National Water Initiative which
22 have been agreed to by all governments of the

23 Commonwealth of Australia;

24 (c) critical human water needs;

→ Critical human water needs relate to drinking, cooking and personal hygiene only.

25 (d) environmental needs and obligations including international
26 obligations;

27 (e) community needs;

28 (f) the importance of efficient market processes in determining
29 the most appropriate way to use water and to facilitate

30 structural adjustment;

→ Market processes are demonstrably inadequate in determining appropriate uses of water and structural adjustments.

Recommendation: Remove this consideration.

→ Water trading should be restricted to physical water that is available after critical environmental and human needs have been met.



Crisis powers **Part 3**

Crisis powers and functions of Authority **Division 2**

Section 21

Water (Crisis Powers and Floodwater Diversion) Bill 2010 No. , 2010 11

- 1 (g) the importance to the economy and communities of
- 2 maintaining permanent plantings

→ Such economic analyses are notoriously unreliable and usually only perpetuate non-viable practices. Artificial maintenance of presumably non-native plantings is counter-productive and discourages new more-viable developments.

Recommendation: Remove this consideration.

- 4 (i) the possibility that all or some parts of the Basin may be
- 5 experiencing adverse climate change, so that it may not be
- 6 possible to sustain all forms of water use in the Basin, and
- 7 that any adjustment burden must be shared equitably;

→ It is not the aim to sustain all forms of water use in the Basin and any adjustment burden must be addressed in its own right, not in relation to separate issues.

Recommendation: Remove "so that it may not be" and lines 6 and 7.

Darian Hiles, President

29th June 2010