

2019

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Constitution Alteration (Water Resources) 2019

EXPLANATORY MEMORANDUM

and

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Circulated by authority of
Rebekha Sharkie MP

Constitution Alteration (Water Resources) 2019

OUTLINE

The water resources of the Murray-Darling Basin and the Great Artesian Basin are national resources that must be managed on an environmentally sustainable basis in the interests of our nation as a whole.

If passed, this proposed alteration to the *Commonwealth of Australia Constitution Act 1900* (the Constitution) would put before the Australian people the question of whether the Constitution should be amended to give the Commonwealth Parliament the power to make laws to manage Australia's water resources on a nationally consistent basis for the benefit of all Australians while ensuring protection of the environment.

The Murray–Darling Basin (MDB) is the largest and most complex river system in Australia. It runs from Queensland, through New South Wales and the Australian Capital Territory, Victoria and South Australia, spanning 77,000 kilometres of rivers. Some three million people have access to drinking water from the Basin. Agriculture in the MDB is worth \$24 billion annually while its river system supports unique and diverse ecosystems including habitats for some 120 water bird species and 46 native fish species.

The Great Artesian Basin (GAB) is another vital national water resource. It underlies an area of 1.7 million square kilometres, approximately 22 per cent of the Australian continent. It is the only source of reliable water for human activity and water-dependent ecosystems across large parts of the arid and semi-arid inland regions of Queensland, New South Wales, South Australia and the Northern Territory.

The findings of the South Australian Murray-Darling Basin Royal Commission and the Australian Academy of Science's investigation of the causes of mass fish kills in the Menindee region of New South Wales leave little doubt that the management of the water resources of the Murray-Darling Basin is dysfunctional and leading to significant adverse environmental impacts. The MDB is highly likely to face more severe challenges as a consequence of climate change.

Similarly it has long been acknowledged that the Great Artesian Basin is under stress through excessive pumping and waste of bore water with a consequent need for more effective and sustainable management of what is a unique resource. Given the significant overlap of the MDB and GAB, these great natural water resources should be managed on a fully integrated, national basis.

The Commonwealth already plays a central role in management of the Murray Darling Basin river system through the *Water Act 2007* and the implementation of the MDB Plan.

Sections 9 and 9A of the *Water Act* set out the constitutional basis for that legislation and the associated MDB Plan. The *Water Act* variously relies on an array of Commonwealth's legislative powers under paragraphs 51(i), (v), (viii), (xi), (xv), (xx), (xxix) and (xxxix), and section 122, of the Constitution; implied legislative powers of the Commonwealth, and the legislative powers the Commonwealth Parliament has in respect of matters referred to it by state parliaments under paragraph 51(xxxvii) of the Constitution. The constitutionality of the *Water Act* and the MDB Plan have been the subject of argument, but successive Commonwealth governments have declined to release relevant legal advice. Future management of the MDB, including any amendment to the MDB Plan, remains contingent on agreement between the Commonwealth, state and territory governments. Past experience shows that it is very difficult to secure agreement and that parochial interests often trump the national interest.

Management of the water resources of the Great Artesian Basin is currently achieved through consultation and agreement between the Commonwealth, Queensland, New South Wales, South Australian and Northern Territory governments. Again a requirement for interjurisdictional agreement gives parochial interests much influence over management outcomes.

The alteration to the Constitution proposed by this Bill would provide the Commonwealth Parliament with unambiguous authority to make laws relating to water resources that extend beyond the limits of a State. (The Commonwealth already has power to make laws in respect to water resources within the Territories.)

Such an alteration would put beyond doubt the power of the Commonwealth to legislate to manage the MDB river system and the GAB without any reliance on the referral of power from state parliaments, and if necessary override state water management legislation.

The proposed amendment to the Constitution would further ensure that any law of the Commonwealth that relates to water resources must not affect water resources in a way that has an overall detrimental effect on the environment. This requirement would apply to all laws relating to water resources made under the powers conferred on the Commonwealth Parliament by section 51 of the Constitution.

This proposed amendment reflects the Commonwealth Parliament's already stated view, as expressed through the purposes of the Water Act, on the importance of protecting and restoring ecosystems reliant on the Murray-Darling Basin. More broadly it provides constitutional recognition of the vital importance of protecting and preserving Australia's major national water resources.

If passed, this legislation would affirm the Parliament's intention to rely on the new legislative power to create a nationally consistent regulatory framework for the use and management of all or particular water resources that extend beyond the limits of a State. For the avoidance of doubt, the legislation would provide that water resources that extend beyond the limits of a State include the Murray-Darling Basin and the Great Artesian Basin.

This legislation does not propose any amendment or change to section 100 of the Constitution which provides that the Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

This legislation further does not propose any amendment or change to section 99 of the Constitution that provides that the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

Section 128 of the Constitution provides that any proposed law to alter the Constitution must be passed by an absolute majority in both Houses of the Commonwealth Parliament. If passed by both Houses, it is submitted to a referendum at least two months, but less than six months, after it has been passed by Parliament. In certain circumstances, a proposed amendment can be submitted to a referendum if it is passed on two separate occasions by only one House of the Parliament.

At the referendum the proposed alteration must be approved by a 'double majority'; i.e. a national majority of electors in the states and territories, and a majority of electors in a majority of the states (at least four out of six states). Rules governing referendums are contained in the *Referendum (Machinery Provisions) Act 1984*.

FINANCIAL IMPACT

The bill will have no financial impact.

NOTES ON CLAUSES

Clause 1: Short Title

This clause is a formal provision and specifies that the short title of the Act is the Constitution Alteration (Water Resources) 2019.

Clause 2: Commencement

This clause provides for the commencement of the whole of the Act to be on the day the Act receives the Royal Assent.

Clause 3: Schedules

This clause provides that the Constitution is altered as set out in the Schedule.

Clause 4: Object

This clause sets out that the purpose of the Act's proposed alteration to the Constitution is to provide the Commonwealth Parliament with the power to make laws in relation to the use and management of water resources that extend beyond the limits of a State; and to ensure that any law of the Commonwealth that relates to water resources does not affect water resources in a way that has an overall detrimental effect on the environment.

This clause further states that it is the Parliament's intention to rely on the further legislative power provided by the alteration to create a nationally consistent regulatory framework for the use and management of all or particular water resources that extend beyond the limits of a State. For the avoidance of doubt, the clause confirms that water resources that extend beyond the limits of a State include the Murray-Darling Basin and the Great Artesian Basin.

NOTES ON SCHEDULES

Schedule 1: Alteration of the Constitution

Schedule 1 contains the proposed amendments to the Constitution.

Item 1: Power to make laws with respect to water resources

Item 1 inserts after paragraph 51(xxxv) of the Constitution a new paragraph (xxxvA) that would provide the Commonwealth Parliament with the power, subject to the Constitution, to make laws with respect to “the use and management of water resources that extend beyond the limits of a State”.

Item 2: Limitation on laws relating to water resources

Item 2 inserts after section 51 of the Constitution a new section 51A that provides that if a law is made in respect to any matter mentioned in section 51, and the law relates to water resources, the law must not have an effect on water resources that would have an overall detrimental effect on the environment.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Constitution Alteration (Water Resources) 2019

This bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the bill

The purpose of this proposed alteration to the Constitution is to:

- provide the Commonwealth Parliament the power to make laws in relation to the use and management of water resources that extend beyond the limits of a State; and
- ensure that any law of the Commonwealth that relates to water resources does not affect water resources in a way that has an overall detrimental effect on the environment.

The proposed alteration also provides that it is Parliament's intention to rely on the further legislative power provided by the alteration to create a nationally consistent regulatory framework for the use and management of all or particular water resources that extend beyond the limits of a State. Water resources that extend beyond the limits of a State include the Murray-Darling Basin and the Great Artesian Basin.

Human rights implications

This Bill does not engage any of the applicable rights or freedoms as it deals the power of the Commonwealth to make laws in relation to the use and management of water resources that extend beyond the limits of a State.

Conclusion

This Bill is compatible with human rights as it does not raise any human rights issues.

Rebekha Sharkie MP