

THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON CLYDE RIVER WATER MET IN THE MEETING ROOM, CENTRAL HIGHLANDS COUNCIL CHAMBERS, BOTHWELL, ON TUESDAY 10 AUGUST 2004.

Mr JOHN BIGNELL WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED

CHAIR (Mr Hall) - Thank you, John. We have your written evidence, or your written submission, so feel free to make any additional points in support of that submission.

Mr BIGNELL - Thank you very much. I should point out that I was very much an active participant in the group of aggrieved irrigators between ourselves, and therefore I'm only sitting here now to add support to our group submission and highlight a few particular aspects. On that tack, I would perhaps like to start by dealing with a couple of points that have been raised this morning and afternoon as we sat there listening. Starting from left to right, Mrs Smith was concerned about the fact that sleepers in particular weren't contributing to the use of the river and they were sitting on an asset and paying nothing to the community.

It is very important the committee understands that anyone who lived on the river over the last 150 years was levied a surcharge on their rates for the privilege of living on the river to finance the operations of the Clyde River Water Trust, so even those people who lived on the river and did not even develop the irrigation schemes were contributing to the building of the weirs and the management of the trust. The Hallett family from the farm at Sherwood has paid every year for a very long time, apart from the fact they probably went up there and dug rocks out of the canal.

I think that is important. On the matter of money, Mr Fletcher, it concerned you that we were not paying much for the water and you were asking what if it was made \$38 a megalitre or \$50. It is very important in this day and age but it has no bearing on this problem we have now. No matter what the price of the water is it is not going to solve the allocation question unless you make it so expensive that you would invite farmers to nominate how much they would like to buy it for, which would go back to a whole new process. I do not know that that line of questioning is going to solve this problem today but perhaps you can ask me later all about that.

Mr FLETCHER - Okay.

Mr BIGNELL - Mr Edgell made a couple of comments that I wanted to clarify. He was asked whether he was on the trust, he said, 'No', quite correctly but he was a secondee to the trust which I think effectively means he was on the trust for three years and was a key player in the trust's work in this process. Apart from being on committee B he was very much on the trust, as was my brother - he was seconded as well.

The suggestion that his nominated figure for high priority water allocation was 2 000 or 3 000 megalitres based on pre-1976 water usage; that figure is wrong. In the lead-up to

the 1976 decision, the Rivers and Water Commission engineer surveyed and estimated there were 4 400 acres of active irrigation on the Clyde. That equates to 6 600 megalitres being used on and off actively pre-1976; not 2 000 or 3 000. If you add 800 megalitres of sleeper water you get to 7 500, 8 000. You get to roughly what is going to be the annual allocation it would seem from now on.

So 30 years ago the engineer was pretty well spot on in his estimate of how much water was available. I would use that as a lead-up to my submission. I put it in as a personal submission because it highlights the situation on our own farm which is a kilometre up the road.

As I said, in 1972 my father was on the trust because he was on the council - in those days the warden was automatically on the trust. During those years leading up to 1976, we spent a lot of time investing in developing irrigation to the extent that we now have 450 acres fully developed which involves three pumps. We had no gravity pump except for a little bit around the mill I mentioned that was there since the 1830's, but mostly our farm is fully developed with irrigation. We can no higher, there is no more land we can pump any more water to; it is all very expensive to develop with three pumps. I probably have two or three kilometres of delivery lines and it is very expensive to run and in previous years we have used all of this. There is 450 acres and if I use all of that irrigation, as I probably will in the next few years, I need over 600 megalitres. That is my water right at 1.5 megalitres per acre so I should be getting 600 megalitres.

My mother went through the farm records for a few years and we paid for 500 to 600 megalitres regularly during the 1980's. We watered every single drip of the country. As previous speakers have said, with the downturn in the grazing industry we just cut back. The big schemes where we pumped 300 feet up in the air for a couple of kilometres of line were unviable so we shut them down. I would suggest now that probably the good old sheep has come back again and probably prime land is the most profitable enterprise in the district with irrigation, so I would envisage if it stays that way I would want my 600 megalitres again for the next 10 years.

I make the point here, because my father was on the trust at the time I was very familiar with that 1976 policy decision and the lead up to it, not only because he was on the trust but because we were doing all of this development. I was fresh back on the farm in my early twenties and ready to start farming and these big schemes had the potential to turn the river off, basically to stop it flowing, so the trust, very responsibly I would suggest, came up with a compromise, and the 1976 policy is it. It is very well documented, everyone understood it at the time what it meant. You can call them approvals, water rights, agreements, or whatever you like, and you can pay lawyers to argue the meaning of the word 'agreements', but we all knew what it was. I have since discovered, now these legal advices have finally become available, this word has stopped estoppel. It means, I understand, that if an authority leads people to invest money and carry on an occupation on the basis of a set of rules, it's not permitted, it's not appropriate or legal to change the rules. All of a sudden you jeopardise that investment. I think on that simple basis alone, the trust should have upheld the 1976 policy.

No-one has yet addressed the question of these legal opinions which it sought. Basically, I would like to suggest that they were not worth the paper they are written on. No irrigator had much input into the questions that were asked. We have already heard that

it would appear that the legal advisers were given no minutes - three pieces of paper was the best we heard. \$75 000 was paid to these advisers, and they're not worth the paper they're written on. Just as important, much of the work of the consultants, Marsden Jacob, and all the work of Andrew Beattie, who charges \$13 000, was totally worthless because they were operating under a false premise that the 1976 policy had no legal standing.

I had not wasted my money getting a legal opinion on these legal opinions, as such, although some of the irrigators have. I think a bit of basic English comprehension will tell you, even with the very biased briefs they were given and lack of information they had, those legal opinions do not say the 1976 policy is invalid. I firstly put it to you that legal advisers were asked surreptitiously, if that's the word, 'Can we get rid of the 1976 policy?' They weren't asked, 'Can we uphold it?'. The lawyers were asked, 'Do we have to uphold this?' Back came the answer, 'No, you don't have to uphold it, but you can'. My argument is that they damn well should have upheld it. They knew that all those irrigators who put in those big post-1976 schemes knew that that policy existed, and there should be no argument.

I have said in two meetings that I think the grab for that extra water is greedy and dishonest, and I believe morally it is. You can pay as many QCs as you like to argue over the meaning of the word 'agreement', but at the end of the day it's greedy and dishonest. In my initial submission to your group, my son generated this for me based on the data, you will understand what this means.

CHAIR - That was the 1999 application, was it?

Mr BIGNELL - Yes. The purple tower was the amount of irrigation in pre-1976 schemes, and blue towers are what the trust tried to allocate in 2002.

CHAIR - Out of committee C?

Mr BIGNELL - Yes. That's committee C, and you will have all seen the graph of what that does to farm values. Basically, that results in the massive transfer of water from a large number of small operators to just three big ones.

Since then, I have asked him to generate one including a third set of columns, and these are the pale cream ones. That's that water allocation that would have been given had the 1999 legislation slipped through and not been picked up by two farmers. Water allocations for the Clyde River valley would have been based on three-year registry use but ignoring 150 years' history of usage. As you can see, there are some farms down the bottom here - James Hallett, for example - there's not enough water left to even get a colour up. He gets the black line at the top and no more. These three big schemes here control 80 per cent of the river, and that was achieved simply by putting in high water returns. They may well have used them - I will not accuse anyone of putting in dodgy returns, but by using three years of history of use they have achieved that massive transfer of water and I would say well. I have been quoted in the press and I stated in my original submission to you, Greg, that that transfer there, recurrent capital value of my land, I based that on the fact that basically the valuer has put a \$1 000 a megalitre capital value on irrigation rights.

My land out there at Thorpe is worth half a million dollars and I have lost \$240 000 worth of water right if that allocation model is used, the one which was recommended to the minister in 2002. That is pretty significant. The reason that happens, of course, is that without water my land is basically a dry old sheep farm capable of running a bit of wool and wethers. It is like the Murray; you step out of the grapes and the oranges and you step into pure desert. It is a bit like that in the Clyde Valley.

It is not such a question of loss of production, on my farm in most years I would not want the 600 megalitres; the key point is that will devalue my farm by a quarter of a million dollars. I have two sons who want to be farmers. They can't both live on the farm. I will have to buy another one if they wish to go farming. They both seem to want to so I will at least need to mortgage Thorpe to do that and the valuation is going to have to come down.

Hamish Kyle was running around a couple of months ago doing all the revaluations. He told me that he puts \$1 200 a megalitre on them now and he has gone around and done all the farms in the district based on how many acres of irrigation we have each got. I do not know what he put on Sherwood but it is irrelevant, it is not worth the paper it is written on, the valuation, if they do not get a permanent water right. Unless it is a permanent water right it has no capital value, a high priority right.

I think that is all I can say. I will leave it open to questions.

Mr FLETCHER - Mr Bignell, you queried my interest in the commercial value of the water on the property. At this stage I have no opinion. I want to know what you think about that so I can take that into consideration and ask questions of other people as well. The opinion I form will be based on the quality of the evidence you give in relation to that matter. I am seeking evidence, not giving evidence or trying to direct you that I think that water is worth a certain sum of money.

I want to put the proposition and I want to put the argument that if you say to irrigator B, 'How much water do you want?', he will be like Oliver Twist and say, 'I want more'. If you say to farmer B, 'How much water do you want at \$30 a megalitre that is part of the commercial operation that your farm can sustain?' you will get an entirely different answer.

Mr BIGNELL - Yes.

Mr FLETCHER - It is about the judicial use of this water. We have heard allegations made that water has been wasted or flood irrigation of pasture country is no longer acceptable in the twenty-first century; there is a judicious use of water. I am wondering whether the price mechanism is a basis for establishing the discipline there that is obviously needed.

Mr BIGNELL - Not at all because it changes from year to year. I do not grow poppies. Two years ago I would have been outbid 10 to 1 on irrigation water. This year I am probably making more than the poppy boys with fat lambs. It changes so quickly; circumstances change so quickly, someone can die, sons not go farming and the next generation they are needed. Your financial situation at one particular time when the bids were called would be most unfair.

Mr FLETCHER - There has been considerable argument in the Darling/Murray system that because there has been access to very cheap water it has destroyed the ecosystem and it has developed agricultural activities that ought not to be there because of their wasteful use of water. The argument there is the only way to address that is to put a price on the water but you say the same rule should not apply here in the Clyde area.

Mr BIGNELL - You need a mechanism to allocate the water.

Mr FLETCHER - The price is not -

Mr BIGNELL - Do you want to do away with 150 years of allocation to start a whole new process? Why do that?

Mr FLETCHER - You have done away with the way you farmed 150 years ago to find a better way. There needs to be an exploration of the opportunities we have in life and all I am looking to do is explore the opportunities and not be so rooted in the past that you cannot consider those opportunities.

Mr BIGNELL - No, I do not understand that. I do not quite see the logic behind it. We are trying to allocate 7 500 to 10 000 megalitres of water by fairest method. Whether you want to get into a debate as to what is the best economic outcome for Tasmania, that is a different argument. We have a set of criteria to operate under.

Mr FLETCHER - You or someone earlier in the day argued that there has been a considerable amount of water wasted in the last few years as the people have tried to get their water usage history up.

Mr BIGNELL - It has not been wasted. The Clyde River has been recognised as one of the most efficiently run in the whole of Australia as measured by the amount of water released from the lake for the purpose of irrigation and how much ran to waste to the sea.

Mr FLETCHER - So if the water hasn't been wasted over the last few years why shouldn't we accept the history of use as a valid basis for considering the future?

Mr BIGNELL - Because it is 'self-assessed' distribution. You need at least some concrete data to base an allocation on and that stuff has no credibility.

Mr FLETCHER - Haven't you argued to me that water hasn't been wasted, therefore we should assume it has been used wisely. If it has been used wisely for agricultural purposes, why isn't that history of use a valid record?

Mr BIGNELL - Because they are for two different purposes. We are not arguing whether the water was used economically. We are arguing whether the water came out of the lake was used to generate permanent allocation. We are talking about the water being physically used knowing that our allocation is going to be based on the usage of the water, whether it was used to grow grass or whatever. We are arguing that the water was used to run a meter and in so doing it generated a capital value of a water allocation. It is nothing to do with economic return for the water. The reason that there appears to have been more water used than came out of the lake is simple. The fact that it went through

three meters, one after the other. It was not wasted. It just went click, click. You can't allocate the water three times. It was the same bit of water, that is the other problem.

Mr FLETCHER - I am unsure of your argument. But to me you seem to be arguing in support of the validity of the history-of-use argument.

Mr BIGNELL - You cannot morally allocate water from an irrigation scheme that has operated for 180 years on just three years of history of use which creates that inequity. And if you use five years, it creates that inequity.

Mr FLETCHER - I accept that argument.

Mr BIGNELL - It was finally agreed, because I was misled, that allocations be based on a blend of old agreements with a bias of history of use. In the committee B process, when they made the final allocations, they created a list of all the acres that physically existed and then the next line under that said, bias due to history of use. Because they put in the high water usage figure some farms were given up to 300 acres or 600 acres of irrigated land which doesn't exist. It was generated by putting that graph in. But it doesn't exist. But by putting in a massive figure they were able to be given 300 to 600 acres of irrigated land but physically you can't go and find it. It was a mathematical method of biasing the allocation with a touch of history-of-use record.

I want to reiterate that I was coming to these meetings for two or three years and was literally treated like a mushroom. I was lied to; I am quite sure I was lied to as to the basis of those legal opinions. I was told that in the big drought of 2000 they sought a legal opinion, and I was told in the meeting, without seeing it, that the legal opinion was that the 1976 policy has no legal standing and therefore we can allocate the water how we choose. Now that is not true. When you read that legal opinion it does not say that at all. I was told that and I put my hand up and agreed to share my water on that legal opinion. And then two more legal opinions came out, and neither of them says the 1976 policy is irrelevant, but I was told it was. A document containing 16 pages, and two lines were quoted by Mr Mackey, whom you will see tomorrow morning, who told me that the 1976 policy has no legal standing, and that is not true. It does not say that at all when you read it. At the time I couldn't see it. I did not see it. I would have seen it if this process hadn't happened. We were lied to, and we were told that we were not allowed to see this legal opinion. But why not? The trust was told to get a legal opinion to solve the issue and then we weren't allowed to see it and we had to pay for it, so it invalidates the whole two years of processes because we were basically lied to. There are no two ways about it, misled and lied to. I put my hand up and agreed to various things. The consultant came down and charged us \$13 000, and he was operating on the wrong brief. He turned left when he should have turned right, and he went wrong all the way down the track. Someone needs to look at those legal opinions and give a legal opinion on them.

Mrs SMITH - In your submission you said the legal advices obtained in secret by the trust are worthless because of a misleading brief supplied to solicitors.

Mr BIGNELL - That is right.

Mrs SMITH - Have you seen a copy of those briefs now?

Mr BIGNELL - Mr Bowden told me there are no legal briefs. We have asked repeatedly for a written copy of the brief and he said it does not exist.

Mrs SMITH - I thought I read something about someone taking so many hours and charging it out for reading the briefs.

Mr BIGNELL - Stuart observed that. The lawyer might tell us that the brief is the job, isn't it, rather than just -

Mrs SMITH - Yes.

Mr BIGNELL - I don't know.

Mrs SMITH - So you make comments that you haven't seen it, therefore that substantiates your comment that the legal advice was obtained in secret. There is a copy in the concerned irrigators' submission of a letter dated 5 October 2000 from Dobson, Mitchell and Allport to the chairman of the Clyde Water Trust. Is that the letter you are referring to when you say that there are some differences in interpretations?

Mr BIGNELL - Yes. That is the letter I referred to which was used to tell all the irrigators during the heart of the drought that our 1976 priority had no standing, so we basically shared our water, gave our water away, on that basis. I gave my water away that I probably could have had more of. The most important aspect of the Dobson Mitchell Allport advice is that she says:

'my opinion is based on the information I have been provided with' -

and we understand it was three pages.

'However, I will strongly recommend that a thorough investigation of all the literature takes place.'

Now that was never done. Instead, the trust went off and got two more legal opinions. They went up to Sydney to some girl who knew nothing about the river, not a clue, as is demonstrated by what she wrote. She knew nothing about it. She came to Tasmania and asked the locals. She went back to O'Farrell, of course, who was working for Dobson, Mitchell and Allport and helped write the thing in the first place, so it was a nasty little circle going round and round, and the counsel that they supplied was total nonsense. Jenny Mattler is the name of the lawyer in Sydney. She said there were no minutes. She said that every year the Clyde Water Trust met and whacked up the water around the room. You put your hand up as to how much you wanted and you got it. She had no idea there were agreements in force with 150 years of minutes, no idea at all. She made all these outrageous statements, in all innocence, and no effort was made by the trust to correct them. You can run the time-line and see where she faxed down her report. The next day she spent an hour on the phone discussing with various trust members the accuracy - and she uses the word in her invoice - of the advice, and all these inaccuracies were not corrected, and they were very serious inaccuracies, basically that there were no minutes, for one.

It is staggering that Michael O'Farrell said there were no minutes, and yet for quite a few years he was the trust's legal adviser and he wrote the agreement for Stuart in which he used the word 'agreements' and he was going to make him sign a document to say that he had low priority water. He is the same person, I don't understand it.

Mr WILKINSON - Did you see the letter written by the trust requesting the solicitors to supply the advice that they came back with?

Mr BIGNELL - No, I have not seen it.

Mr WILKINSON - And that is what you are saying the trust is saying, there is no letter at all requesting solicitors to carry out that work?

Mr BIGNELL - I don't think there is one. Mr Chairman, I could ask you that, is there one?

We asked, 'Are there no more documents to be sent to the solicitors?' How would they read? The chairman said that to the best of his knowledge that is all that is there, there is no more and there were only a few pages. There were lots and lots of phone calls and emails and faxes that we never saw but there is no written stuff, no references for us to work on; that is our worry.

Mrs SMITH - So if I interpret it correctly, the letter I referred to says:

'We refer to your meeting of 3 October with Mr O'Farrell in which you requested advice.'

You are saying that perhaps terms of reference were given -

Mr BIGNELL - Verbally.

Mrs SMITH - verbally but not in writing and you believe there should be somewhere a written letter with it?

Mr BIGNELL - Well, if the process was to be open and transparent there should have been, that is probably more of a way to get a legal opinion from a lawyer for yourself. The trust was not operating as a public corporation. Their job at the time, they were probably not constitutional. The sole job they were given by the Government was to allocate the water in an open and transparent manner. They weren't a higher authority making a decision; it had to be an agreed decision.

Mrs SMITH - We understand what the appropriate form would be but can you accept that perhaps there was no written advice but verbal advice and therefore there is no hidden agenda of their hiding the brief; it was merely done, perhaps inappropriately, but by word of mouth rather than by the written word?

Mr BIGNELL - I would say it was inappropriate, that's all, yes, and that has called all of this problem. Had all the irrigators sat around here and we agreed to the terms of the brief, it had gone off and we had all seen the answer we would not have been here today. We would not be wasting our time; that's all that had to be done.

Mrs SMITH - I am not a lawyer but the answer to me is confusing too, because it has two bob each way -

Mr BIGNELL - Yes, it does.

Mrs SMITH - and we have a lawyer here so it would be interesting to debate it.

Mr BIGNELL - It is prefaced by the fact, she says, 'Before I can make a proper decision I have to see all the documents', and they have never been produced. No legal adviser has ever seen any of that stuff, basically. Three letters is all we understand exists.

Mrs SMITH - Do you know that for a fact or is that just a presumption?

Mr BIGNELL - The fact that the two -

Mrs SMITH - That no legal lawyer has seen the relevant papers.

Mr BIGNELL - The fact that they made the statement that no minutes exist is indication enough that they never saw anything. That must surely indicate that; they said so. As I say I cannot understand how Michael O'Farrell could make such a claim because he was the trust's solicitor prior to all of this. I don't understand that.

CHAIR - John, have you any final points you would like to make to the committee?

Mr BIGNELL - I will quickly read my dot points at the end of my submission just to refresh. I think the 1976 policy was entirely appropriate and it was regularly enforced, make no mistake. All of those who were around at the time and were interested knew of its existence and therefore didn't object to these new schemes going in because they posed no threat. It was regularly enforced. There were three references in the minutes to being enforced, operators were reminded of its existence. As we know, a great chunk of correspondence has gone missing for some reason. Someone may have an approval without that being mentioned; possibly an oversight or the correspondence is missing or, dare I say it, perhaps people didn't want to mention it, but basically as a general principle it was there all along and well understood and the principle should stand.

I support the committee B process entirely; what they did was very thorough. John was slow to answer but I would say it was a very well balanced committee in that there were pro-1976 irrigators, there was a man with a lot of sleeper water, there was a man with no pre-1976 water, and my brother who was independent. So it was a very well balanced committee just by chance; it was made of people who put their hand up.

As I have already said, I think the legal advice is worthless because they are based on misleading information. We have not seen the other half of it and to suggest three years or even five years of self assessment - and I use the words 'self-assess' again - or even five years of self-assessed - and I use the word 'self-assessed' again - history-of-use records is just invalid. It should not be considered. There is a much more solid, well-founded principle to found allocations on without that assessment. It is so full of holes it shouldn't be even considered.

I would like to say that if the trust had been a more balanced trust and had independent, non-irrigators as it used to be, this would never have happened. So although the words 'pecuniary interests' have been bandied about, I don't know what inference it took but I am sure this wouldn't have happened 10 years ago. And had it been carried out in an open and transparent manner, it wouldn't have happened either. There is no excuse for that. We know that the secretary was very busy with his Derwent Valley thing. That was a big mistake, leaving him in charge of the paperwork. The man wasn't competent, was overworked. That was a very big mistake and if we had all been kept informed it wouldn't have happened. And finally I think to disband the trust based on these last two or three years of problems would be an awful waste of a very sound and well-respected organisation, and it can be put back on a solid footing. Once the model for water allocations is established, the trust is only there for an administrative role anyway. It should be there. We have done a great job in minimising costs, allocating water fairly. There were never any fights over money or water prior to this. I have no confidence whatsoever in the Rivers and Water Supply Commission. Their record on managing the Craighourne is appalling. I think it would be a disaster to allow the Rivers and Water Supply Commission to make the decision on whether the 1976 policy is valid. I think that is a most dreadful outcome. It is your job here today to make that decision or recommend a facility to get that proper decision; I don't think it should be down to a couple of bureaucrats in whom I have no confidence.

CHAIR - Thanks for your evidence.

THE WITNESS WITHDREW.