



THE UNIVERSITY OF  
NEW SOUTH WALES



FACULTY OF  
LAW

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Committee Secretary  
Senate Legal and Constitutional Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary

### **Inquiry into Provisions of the Water Act 2007**

Thank you for the invitation to make a submission to the Committee's inquiry into the provisions of the *Water Act 2007* (Cth). We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

Our submission draws on material published in a recent, peer-reviewed journal article on this topic: Paul Kildea and George Williams, 'The Water Act and the Murray-Darling Basin Plan' (2011) 22 *Public Law Review* 9-14.

### **The *Water Act 2007* (Cth) and the Basin Plan**

In this submission we focus on legal issues concerning the permissible scope of the Murray-Darling Basin Plan, which we see as critical to any consideration of the potential socio-economic impact of the Murray-Darling Basin Authority's *Guide to the Proposed Basin Plan*. The question of whether the Murray-Darling Basin Authority (MDBA), in developing its Guide to the Plan (and later its Draft Plan and final Plan), must give environmental considerations precedence over social and economic factors has emerged as a contentious issue in recent public debate. How this question is answered has obvious ramifications for both the final shape of the Plan and its impact on regional communities and the environment.

In our view, the MDBA and the Minister are obliged to take into account social and economic factors when preparing the Plan, but in doing so they must give environmental considerations precedence. This view is supported by an examination of both the *Water Act 2007* (Cth) and the underlying constitutional basis of its provisions, upon which we elaborate in the following paragraphs.

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## **Social and economic factors and the Basin Plan**

Section 21 of the *Water Act* sets out the basis on which the Basin Plan is to be developed. The MDBA and the Minister must take into account social and economic factors. However, s 21(1) of the *Water Act* states that environmental concerns as reflected in key international conventions have primacy in the making of the Plan:

The Basin Plan... must be prepared so as to provide for giving effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources).

The term ‘relevant international agreement’ is defined in section 4(1) and includes several environmental treaties, including the Ramsar Convention on wetlands and the Convention on Biological Diversity. Some of the specific obligations arising under these treaties, such as the conservation of declared Ramsar wetlands in the Basin, are detailed in sections 21(2) and (3).

The primacy of the international agreements is further reflected in the objects of the Act, as set out in section 3:

The objects of this Act are:

- (a) to enable the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources in the national interest; and
- (b) to give effect to relevant international agreements...; and
- (c) in giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes...

The broad purposes of the Basin Plan as set out in the Act are expressed in similar terms.<sup>1</sup>

Section 21(4) confirms the relevance of social and economic factors to the Plan, but its opening words (‘subject to subsections (1), (2) and (3)’) clarify that these factors must be read against the overarching obligation to give effect to international agreements. The provision states:

Subject to subsections (1), (2) and (3), the Authority and the Minister must, in exercising their powers and performing their functions under this Division:

- (a) take into account the principles of ecologically sustainable development; and
- (b) act on the basis of the best available scientific knowledge and socio-economic analysis; and
- (c) have regard to the following:
  - (i) the National Water Initiative;
  - (ii) the consumptive and other economic uses of Basin water resources;
  - ...
  - (v) social, cultural, Indigenous and other public benefit issues...

Section 22 sets out in more detail some of the matters that must be included in the Basin Plan, including the long-term average sustainable diversion limits for the Basin water resources. The 2008 amendments to the Act also introduced a new requirement

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<sup>1</sup> *Water Act 2007* (Cth), s 20.

in section 86A that, ‘without limiting section 21,’ the Basin Plan must be prepared having regard to ‘critical human water needs’.

### **Constitutional basis of the *Water Act***

The *Water Act* thus affirms the relevance of social and economic considerations while also making clear that they are secondary to the MDBA’s and Minister’s obligation to give effect to the relevant international agreements. This reflects the primary constitutional basis of the Act: that is, the federal Parliament’s power to enact laws with respect to ‘external affairs’ in section 51(xxix) of the *Constitution*, and in particular the aspect of the power that enables the federal parliament to pass laws to implement obligations assumed by the federal executive under international treaties and conventions.<sup>2</sup> As the High Court has made clear on a number of occasions, a law based upon the external affairs power must be ‘reasonably capable of being considered appropriate and adapted to implementing the treaty’.<sup>3</sup> If a law does not pass this test, it will be struck down by the Court as being unconstitutional.<sup>4</sup>

Advice to Water Minister Tony Burke, prepared by the Australian Government Solicitor in October 2010, was consistent with this construction of the *Water Act*. It provided that ‘[t]he overarching objective of the Act and the Plan is to give effect to relevant international agreements’.<sup>5</sup> In addition, it found that the terms of the key treaties provide an indirect avenue for the Commonwealth to take into account social and economic factors. This arises from the fact that both the Convention on Biological Diversity and the Ramsar Convention on wetlands appear to frame their environmental obligations in ways which permit consideration of social and economic factors.

For example, the Convention on Biological Diversity commits members to, as far as possible and as appropriate, ‘regulate or manage biological resources important for the conservation of biological diversity... with a view to ensuring their conservation and sustainable use’.<sup>6</sup> The term ‘sustainable use’ is defined in the Convention to mean ‘the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, *thereby maintaining its potential to meet the needs and aspirations of present and future generations*’.<sup>7</sup> As the AGS advice stated, both Conventions ‘establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allow consideration of social and economic factors’.<sup>8</sup>

In summary, the *Water Act*, both as to its own terms and when read in light of its constitutional underpinnings, recognises that a Basin Plan must be prepared to give effect to the relevant international conventions. In doing so, social and economic factors must also be taken into account. However, these latter factors cannot be given

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<sup>2</sup> See *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1.

<sup>3</sup> *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 486.

<sup>4</sup> See, for example, *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 in regard to s 170de(1) and s 170de(2) of the Industrial Relations Reform Act 1993 (Cth).

<sup>5</sup> Australian Government Solicitor, *The Role of Social and Economic Factors in the Basin Plan*, 25 October 2010, para 2 (summary) and para 9 (discussion), <http://www.environment.gov.au/minister/burke/2010/pubs/social-economic-advice-ags.doc> viewed 4 January 2011.

<sup>6</sup> Convention on Biological Diversity, Article 8(c).

<sup>7</sup> Convention on Biological Diversity, Article 2 (emphasis added).

<sup>8</sup> AGS, n 5, para 23 (discussion).

such weight as would prejudice the faithful implementation of the international environmental conventions upon which the validity of the Act depends.

**Looking ahead: Constructing the Basin Plan**

This suggests a clear legal path for the construction of a Basin Plan. First, the Plan must be prepared to implement the relevant international conventions. Second, in doing this, some social and economic factors can be taken into account in the meeting of the core environmental objectives. Third, once the threshold of compliance with the international conventions has been met, social and economic factors may generally be taken into account to the maximum remaining extent possible.

Yours sincerely,

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