



Australian Government Solicitor

THE ROLE OF SOCIAL AND ECONOMIC FACTORS IN THE BASIN PLAN

Summary

1. In summary, the general purposes of the *Water Act 2007* (Water Act) and the Basin Plan are:
 - to give effect to relevant **international agreements**,
 - to provide for the establishment of **environmentally sustainable limits** on the quantities of water that may be taken from Basin water resources,
 - to provide for the use of the Basin water resources in a way that optimises **economic, social and environmental outcomes**,
 - improved **water security** for all uses, and
 - subject to the environmentally sustainable limits, to maximize the **net economic returns** to the Australian community.
2. The overarching objective of the Act and the Plan is to give effect to relevant international agreements, and this reflects the fact that the provisions of the Act relating to the Basin Plan are, to a large extent, supported by the treaty implementation aspect of the external affairs power in the Commonwealth Constitution. The agreements are international environmental agreements including the Convention on Biological Diversity and the Ramsar Convention relating to wetlands.
3. The international agreements themselves recognise economic and social factors, and their relevance to decision making.
4. The Water Act further makes clear that in giving effect to those agreements the Plan needs to optimise economic, social and environmental outcomes. Therefore, where a discretionary choice must be made between a number of options the decision-maker should, having considered the economic, social and environmental impacts, choose the option which optimises those outcomes.
5. The nature of the decision-making in relation to the Plan involves the application of broad concepts and there is therefore scope for the consideration of how economic, social and environmental outcomes should be optimised.

Discussion

1. This paper examines the ways in which the Murray Darling Basin Authority (MDBA) and the Minister are required to take into account social and economic factors in developing and making the Basin Plan, and the relationship between socio-economic factors and the implementation of international environmental agreements.

The general framework for decision-making: objects, purposes and specific requirements

2. The Water Act frames the requirements relating to the Basin Plan, both at:
 - a general level in terms of the objects and purposes of the Act and Plan, and
 - at a detailed level setting out the specific requirements that must be included in the Plan.

In making decisions in relation to the Basin Plan the MDBA and the Minister are required to comply with both the detailed statutory provisions relating to the matter under consideration, and to the extent they are relevant, the general objects of the Act and the purpose and the basis of the Plan. The role of socio-economic considerations in decision-making in relation to the Plan must be considered in the context of this framework.

3. At the detailed level, the Act identifies the matters that must be included in the Plan and includes specific statutory requirements for each of these items.¹ The matters that the Plan must deal with include, in particular:
 - the long-term average sustainable diversion limits for the Basin water resources,²
 - temporary diversion provision,³
 - an environmental watering plan,⁴
 - a water quality and salinity management plan,⁵
 - water trading rules,⁶ and
 - the requirements for accreditation of State water resource plans.⁷

¹ The table in s 22(1) of the Water Act which includes 13 items specifies the mandatory content of the Basin Plan.

² Water Act, items 6 and 8 of s 22(1), and s 23.

³ Water Act, items 7 and 8 of s 22(1), and s 24.

⁴ Water Act, item 9 of s 22(1), and ss 28-32.

⁵ Water Act, item 10 of s 22(1), and s 25.

⁶ Water Act, item 12 of s 22(1), and s 26.

⁷ Water Act, item 11 of s 22(1), and s 22(3).

4. At the general level, the Act defines the broad purpose of the Plan: 'to provide for integrated management of the Basin water resources in a way that promotes the objects of the Act'.⁸ This general purpose is elaborated by reference to particular ways in which the Plan should provide for the purpose. These 'sub-purposes' include:
- a) giving effect to relevant **international agreements**, including among others, the Convention on Biological Diversity,⁹ the Ramsar Convention¹⁰ which deals with wetlands of international importance and the Bonn Convention on migratory species;¹¹
 - b) the establishment of **environmentally sustainable limits** on the quantities of surface and ground water that may be taken from Basin water resources;¹²
 - c) Basin wide **environmental objectives** for water-dependent ecosystems and water quality and salinity objectives;¹³
 - d) the use and management of the Basin water resources in a way that optimises **economic, social and environmental outcomes**;¹⁴ and
 - e) improved **water security** for all uses of Basin water resources.¹⁵
5. These 'sub-purposes' of the Plan to a large extent parallel provisions in the objects of the Act relating to:
- a) giving effect to relevant **international agreements**;¹⁶
 - b) in giving effect to those agreements, promoting the use and management of the Basin water resources in a way that optimises **economic, social and environmental outcomes**;¹⁷
 - c) ensuring a return to **environmentally sustainable levels** of extraction for overallocated or overused water resources; and protecting, restoring, and providing for the ecological values and ecosystem services of the Murray-

⁸ Water Act, s 20.

⁹ Rio de Janeiro, 5 June 1992, [1993] ATS 32.

¹⁰ Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, Iran, 2 February 1971, [1975] ATS 48.

¹¹ Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, [1991] ATS 32. Section 4(1) of the Water Act defines 'relevant international agreement'.

¹² Water Act, s 20(b).

¹³ Water Act, s 20(c).

¹⁴ Water Act, s 20(d).

¹⁵ Water Act, s 20(g).

¹⁶ Water Act, s 3(b).

¹⁷ Water Act, s 3(c).

Darling Basin. This object does not limit the previous two objects relating to implementation of international agreements and optimising outcomes;¹⁸

- d) maximizing the **net economic returns** to the Australian community from the use and management of the Basin water resources. This object is subject to the previous provisions relating to environmentally sustainable levels of extraction for overallocated and overused resources and protecting, restoring and providing for ecological values and ecosystem services,¹⁹ and
 - e) improving **water security** for all uses of Basin water resources.²⁰
6. Additional provisions elaborate on the requirement that the Plan give effect to relevant international agreements generally, and in particular to the Convention on Biological Diversity and the Ramsar Convention²¹ (developing the concepts in paras 4(a) and 5(a) above, discussed further below).
7. Section 21(4) sets out further matters relevant to the development of the Basin Plan, each of which is subject to the requirements regarding the implementation of the relevant international agreements, in particular the Convention on Biological Diversity and the Ramsar Convention. The MDBA and the Minister must take into account the principles of ecologically sustainable development (linking to the concepts in paras 4(b) and (c) and 5(c) above).²² These are defined in s 4(2) as including the principle that 'decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations'. The MDBA and the Minister are subject to a requirement to act on the basis of the best available scientific knowledge and socio-economic analysis.²³ In addition there are a large number of other matters that the MDBA and the Minister must have regard to, including the consumptive and economic uses of Basin water resources, and social, cultural, Indigenous and other public benefit issues (linking to the concepts in paras 4(d) and 5(b) above).²⁴

Giving effect to international agreements and social and economic considerations

8. The Plan has multiple objects and purposes and must deal with a wide variety of environmental, economic and social considerations. It is clear from this general examination of the provisions relating to the Plan that environmental, economic and social considerations are of relevance to decision-making in relation to Plan. To understand the role of socio-economic considerations in decision-making on the

¹⁸ Water Act, s 3(d)(i) and (ii).

¹⁹ Water Act, s 3(d)(iii).

²⁰ Water Act, s 3(e).

²¹ Water Act, s 21(1) to (3).

²² Water Act, s 21(4)(a).

²³ Water Act, s 21(4)(b).

²⁴ Water Act, s 21(4)(c)(ii) and (v).

Plan it is necessary to consider the relationship between socio-economic considerations and the obligation to give effect to the relevant international agreements.

9. An overarching objective of the Act and the Plan is to give effect to relevant international agreements.²⁵ This reflects the fact that the provisions of the Act relating to the Basin Plan are, to a large extent, supported by the treaty implementation aspect of the external affairs power in the Commonwealth Constitution.²⁶
10. The two key provisions of the objects relating to implementation of international agreements provide that the Act:
 - gives effect to relevant international agreements (to the extent that the agreements are relevant to the use and management of the Basin water resources) and in particular provides for special measures to address the threats to the Basin water resources (para 5(a) above);²⁷ and
 - in giving effect to those agreements, promotes the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes (para 5(b) above).²⁸
11. As noted above these objects are incorporated into the purpose of the Plan. Thus the purpose of the Plan is to give effect to relevant international agreements (para 4(a) above). However, in meeting the objects of the Act it is necessary to consider the economic, social and environmental impact of proposed courses of action (para 4(d) above).
12. Therefore, where in applying the particular provisions of the Act that give effect to the agreements a discretionary choice must be made between a number of options the decision-maker must, having considered the economic, social and environmental impacts, choose the option which optimises the economic, social and environmental outcomes. As discussed below the nature of the decision-making in relation to the Plan involves the application of broad concepts and there is therefore substantial scope for the consideration of how economic, social and environmental outcomes should be optimised. This consideration should be informed by the best available scientific knowledge and socio-economic analysis in accordance with s 21(4)(b).

²⁵ Water Act, ss 3(b), 20(a), and 21(1) to (3).

²⁶ The external affairs power in s 51(xxix) of the Constitution supports laws that are 'capable of being reasonably considered to be appropriate and adapted' to fulfilling Australia's obligations under international agreements: *Commonwealth v Tasmania* (Franklin Dam case) (1983) 158 CLR 1, 259. Part 2 of the Water Act which deals with most aspects of the making of the Basin Plan is not supported by the referral of powers by the Basin States and relies solely on the Commonwealth's own constitutional powers.

²⁷ Water Act, s 3(b).

²⁸ Water Act, s 3(c).

13. The objects of the Water Act and purpose of the Plan also pivotally involve the establishment of 'environmentally sustainable limits', or levels, on the quantities of surface and ground water that may be taken from Basin water resources (paras 4(b) and 5(c) above).²⁹ This term is not defined, but the related term of the 'principles of ecologically sustainable development' is,³⁰ and this sets out the first principle as that decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.
14. The objects of the Act also include to maximise the net economic returns to the Australian community, subject to ensuring returns to environmentally sustainable levels of extraction for water resources that are overallocated or overused, and protecting, restoring and providing for the ecological values and ecosystem services of the Basin (see para 5(d) above).³¹ This can be seen as a particular application of the general objects relating to implementation of the international agreements and optimisation of economic, social and environmental outcomes. The effect of the object is that economic objects can only be pursued to the extent that they are consistent with addressing overallocation and overuse. A corollary is that consideration should be given to ways in which economic returns can be maximized consistent with the requirement to address overallocation and overuse and environmental degradation.
15. It is necessary to turn to the key agreements, the Convention on Biological Diversity and the Ramsar Convention and the provisions in the Act specifically relating to the agreements to consider in more detail what scope there is for decision-making in relation to the Plan to take into account social and economic factors.

Convention on Biological Diversity

16. The Convention on Biological Diversity requires, amongst other things, that State Parties, as far as possible and as appropriate:
 - integrate the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies;³²
 - identify and monitor the components of biological biodiversity important for its conservation and sustainable use; monitor the components of biological diversity so identified and identify processes and activities which have or are likely to have a significant adverse impact on the conservation and sustainable use of biological diversity;³³
 - establish areas where special measures need to be taken to conserve biological diversity; promote the protection of ecosystems, natural habitats, and the

²⁹ Water Act, ss 3(d)(i) and (ii) and 20(b).

³⁰ Water Act, s 4(2).

³¹ Water Act, s 3(d).

³² Convention on Biological Diversity (CBD), Art 6(b).

³³ CBD, Art 7(a),(b),(c).

maintenance of viable populations of species in natural surroundings; rehabilitate and restore degraded ecosystems and promote the recovery of threatened species through the development of plans or other management strategies.³⁴

17. Section 21(2) of the Water Act which reflects these obligations provides that the Plan must:
 - be prepared having regard to ‘the fact that the use of the Basin water resources has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity’ and that as a result special measures are required to manage the use of the Basin water resources to conserve biodiversity; and
 - promote the sustainable use of the Basin water resources to protect and restore the ecosystems, natural habitats and species that are reliant on Basin water resources to conserve biodiversity.
18. In addition to these general provisions many of the provisions dealing with the detailed requirements of the Plan give effect to the obligations under the Convention: for example those concerning long-term average sustainable diversion limits, the environmental watering plan, and the water quality and salinity management plan.
19. It is fundamental that the obligations in the Convention concern the preservation of biological diversity. However, the Convention does not exclude social and environmental considerations. Rather, the Convention seeks to balance the requirements to conserve and maintain biodiversity with its sustainable use and other considerations such as the social and economic development of the Parties. The balancing of these requirements is evident in the definition of the concept of ‘sustainable use’. ‘Sustainable use’ is defined by 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’.³⁵

Ramsar Convention

20. The obligations under the Ramsar Convention relate to the conservation of wetlands included in the List of Wetlands of International Importance³⁶ (Ramsar wetlands) and, as far as possible, to the ‘wise use’ of wetlands in a State’s territory. There are 16 Ramsar wetlands in the Murray-Darling Basin but the relevant obligations under the Ramsar Convention are not confined to the Ramsar wetlands. For the purposes of the Convention ‘wetland’ is defined to mean ‘areas of marsh, fen, peatland or

³⁴ CBD, Art 8.

³⁵ CBD, Art 2.

³⁶ Article 2 of the Ramsar Convention establishes the List of Wetlands of International Importance.

water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh or brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.³⁷ 'Wetland' has the same meaning in the Act as in the Convention.³⁸ The definition of 'water resource' in s 4(1) includes, among others, surface water, watercourses, lakes and wetlands. According to these definitions, much, if not all, of the Basin's surface water resources are likely to be wetlands.

21. Section 21(3) which reflects obligations in the Ramsar Convention provides that the Basin Plan must promote the wise use of all the Basin water resources, the conservation of declared Ramsar wetlands, and take account of the ecological character description of all declared Ramsar wetlands and other key environmental sites within the Basin.
22. The key concept of 'wise use' is not defined by the Convention. The most recent definition of 'wise use' by the Parties to the Convention, however, provides guidance as to its meaning: 'the maintenance of ... [the] ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development'.³⁹ For the purposes of the definition 'ecological character' means the 'the combination of ecosystem components, processes, and benefits/services that characterise the wetland at a given point in time.'⁴⁰ The phrase 'in the context of sustainable development' is intended to recognise that whilst some wetland development is inevitable and that many developments have important benefits for society, developments can be facilitated in sustainable ways by approaches elaborated in the Convention.⁴¹

The Conventions permit consideration of economic and social considerations

23. Neither the Convention on Biological Diversity nor the Ramsar Convention require that the Parties disregard economic and social considerations in giving effect to the environmental obligations. Both Conventions establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allows consideration of social and economic factors. In short it would be an over-simplification to regard implementation of the agreements as being concerned with 'purely' environmental objectives as opposed to social and economic considerations.
24. Further, the general and high level nature of the obligations under the Conventions and the provisions in the Act relating to the Conventions allow significant room for

³⁷ Article 1(1) of the Ramsar Convention.

³⁸ Water Act, s (4)(1).

³⁹ Ninth Meeting of the Conference of Parties to the Ramsar Convention (2005), Res IX.1 Annex A, *A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character*, para 22.

⁴⁰ Ibid, para 15 .

⁴¹ Ibid, para 22, footnote 3.

judgment as to the application of key provisions concerning sustainable use, wise use and overallocation. These discretionary judgments should, in accordance with the objects of the Act and purpose of the Plan, optimise economic, social and environmental outcomes.

Sustainable Diversion Limits

25. As noted above in making decisions in relation to the Basin Plan the MDBA and the Minister are required to comply with both the specific statutory provisions relating to the matter under consideration and to the extent they are relevant the objects of the Act and to the purpose of the Plan. The interaction of the general provisions and the specific provisions relating to the content of the Plan is necessarily complex and needs to be considered in each case.
26. As an example we consider briefly the interaction of the different provisions in relation to the setting of long-term average sustainable diversion limits where a number of objectives are applicable. In particular, s 23(1) and the definition of 'environmentally sustainable level of take' in s 4(1) operate together to require long-term average sustainable diversion limits to be set so as to not compromise 'key environmental assets'. The Water Act does not specifically provide guidance on which environmental assets are 'key'. In identifying which environmental assets are key for the purposes of the proposed Basin Plan it will be necessary for the MDBA and the Minister to:
 - comply with the specific requirements of the Water Act, interpreted in light of the objects; and
 - act in accordance with the purpose of the Plan in s 20 (including promoting the objects in s 3).
27. There are a number of specific requirements in the Water Act with which the MDBA and the Minister will need to comply when identifying which environmental assets are key. For example, the Basin Plan is required to promote sustainable use of the Basin water resources to protect and restore the ecosystems, natural habitats and species that are reliant on the Basin water resources and conserve biodiversity (see s 21(2)(b)). They are also required to promote the conservation of declared Ramsar wetlands (s 21(3)(b)). In interpreting the meaning of 'conserve biodiversity' in s 21(2)(b) and 'conservation of declared Ramsar wetlands' in s 21(3)(b), a court would look to the relevant international agreements for guidance, as these requirements are drawn from these agreements.
28. However, the MDBA and the Minister are also required to give effect to the other objects, where possible, within the specific requirements of the Water Act, and where relevant to the provision at hand. Another object relevant to determining which environmental assets are key is the object of optimising economic, social and environmental outcomes while giving effect to the relevant international agreements (s 3(c)). While the specific obligations such as those under s 21 still apply, this objective affects the scope of what the MDBA and the Minister could identify as key

environmental assets. For example, the MDBA and the Minister could not identify an environmental asset as key if this was not necessary to achieve the specific requirements of the Water Act (such as those under s 21) and would have significant negative social and economic effects.

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