

Joint Statement on the *Water Act 2007* (Cth)

Submission to the Senate Inquiry into the provisions of the *Water Act 2007*

March 2011

This joint statement is submitted to the Legal and Constitutional Affairs Committee for consideration in its inquiry into the provisions of the *Water Act 2007* (Cth). It provides a general statement on the interpretation of key provisions of the Act as they relate to the development of the Basin Plan and the terms of reference for the inquiry.

The statement is supported by water law academics from around Australia listed below. The group would welcome the opportunity to appear before the Committee, represented by a nominated spokesperson.

- **Professor Douglas Fisher**, School of Law, Queensland University of Technology
- **Assoc. Professor Alex Gardner**, Faculty of Law, University of Western Australia
- **Professor Lee Godden**, Director, Centre for Resources, Energy and Environmental Law, Faculty of Law, University of Melbourne
- **Janice Gray**, Senior Lecturer, Faculty of Law, University of New South Wales
- **Professor Jan McDonald**, Faculty of Law, University of Tasmania
- **Dr Chris McGrath**, Senior Lecturer, School of Geography, Planning and Environmental Management, University of Queensland
- **Assoc. Professor Poh-Ling Tan**, Faculty of Law, Griffith University

For further information on the statement, please contact:

Dr. Anita Foerster,
Research Fellow,
Centre for Resources, Energy and Environmental Law,
Faculty of Law, University of Melbourne.
Email. anitacf@unimelb.edu.au

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1. The Water Act contains a number of provisions directed to the preparation of the Basin Plan. From the level of overarching statutory objectives¹ to the more specific provisions guiding the planning process,² the Act exhibits an integrated treatment of economic, social and environmental factors pertinent to decision-making about the use and management of Basin water resources. (*Terms of Ref. 1a*)
2. For example, the overarching objectives of the Act include: to enable the Commonwealth, in conjunction with the states, to manage Basin water resources in the national interest;³ to give effect to relevant international agreements;⁴ and, in so doing, to promote the use and management of Basin water resources in a way that optimises economic, social and environmental outcomes.⁵ Within the context of these objectives, the Act commits specifically to return extraction in the Basin to environmentally sustainable levels;⁶ and to protect, restore and provide for the ecological values and ecosystem services of the Basin;⁷ and, subject to the above, to maximise net economic returns from the use and management of water resources.⁸ These objectives address economic, social and environmental issues simultaneously. There is, however, an underlying recognition that long term economic and social values associated with Basin water resources depend on maintaining environmental values and achieving environmentally sustainable levels of water extraction.⁹ (*Terms of Ref. 1a*)
3. In relation to the Basin Plan, the Act provides a specific purpose, the general basis upon which it is to be developed, and a list of mandatory content.¹⁰ These provisions establish a framework within which to address economic, social and environmental issues in the preparation of the plan. This effectively integrates the consideration of these issues and sets clear guidelines for their resolution. For example, the Plan is to contain important

¹ *Water Act 2007* (Cth), s 3.

² *Water Act 2007* (Cth), s 20, 21, 22.

³ *Water Act 2007* (Cth), s 3(a).

⁴ *Water Act 2007* (Cth), s 3(b).

⁵ *Water Act 2007* (Cth), s 3(c).

⁶ *Water Act 2007* (Cth), s 3(d)(i).

⁷ *Water Act 2007* (Cth), s 3(d)(ii).

⁸ *Water Act 2007* (Cth), s 3(e).

⁹ Gardner, Alex, "Water Reform and the Federal System" (Paper to be delivered Friday 25 March, *Federalism Research Roundtable*, 24-25 March 2011, University of NSW, Sydney)

Gardner refers to the objective in s 3(d)(i) - to return extraction in the Basin to environmentally sustainable levels - as "a short - medium term objective to deal with the problem of over-allocation and over use... The Water Act prioritizes provision of water to the environment for the short-medium term objective of returning to environmentally sustainable levels of extraction. The clear statutory purpose is to repair a perceived long-term historical imbalance in favour of economic uses of the Basin water resources." In contrast, the optimisation of economic, social and environmental values is characterised as a longer term objective.

¹⁰ *Water Act 2007* (Cth), s 20, 21, 22.

environmental measures such as the long term average sustainable diversion limits for Basin water resources¹¹ and an environmental watering plan.¹² It must also include a water quality and salinity management plan¹³ and rules for the trading or transfer of water rights.¹⁴ These latter measures safeguard ongoing human use of Basin water resources. The Plan is to be prepared so as to give effect to relevant International Agreements.¹⁵ The planning process is, however, also governed by an extensive list of considerations and directions.¹⁶ This includes a direction that the planning process is to be based on the best available science *and* socio-economic analysis.¹⁷ While a key purpose for the Plan is the establishment and enforcement of environmentally sustainable limits on water extraction,¹⁸ this is only one of the list of purposes which includes providing not only for the use and management of water resources in a way that optimises economic, social and environmental outcomes,¹⁹ but also providing for improved security for all uses of Basin water resources.²⁰ (*Terms of Ref. 1a*)

4. One of the key elements of the Basin Plan is the establishment of environmentally sustainable limits on water extraction (sustainable diversion limits - SDLs). The object to ensure the return to environmentally sustainable levels of extraction,²¹ together with the mandatory purpose and content of the plan directed at SDLs,²² may amount to a *duty* or *threshold responsibility* in the Act to ensure the return of water extraction to environmentally sustainable levels.²³
5. This potential duty is accompanied by an environmental standard for the setting of SDLs. The Act provides that SDLs must reflect an *environmentally sustainable level of take*.²⁴ This is defined as the level at which water can be taken from a water resource which, if exceeded, would compromise key environmental assets of the water resource; key

¹¹ *Water Act 2007* (Cth), s 22(1) Item 6.

¹² *Water Act 2007* (Cth), s 22(1) Item 9.

¹³ *Water Act 2007* (Cth), s 22(1) Item 10.

¹⁴ *Water Act 2007* (Cth), s 22(1) Item 12.

¹⁵ *Water Act 2007* (Cth), s 21(1).

¹⁶ *Water Act 2007* (Cth), s 21(4).

¹⁷ *Water Act 2007* (Cth), s 21(4)(b).

¹⁸ *Water Act 2007* (Cth), s 20(b).

¹⁹ *Water Act 2007* (Cth), s 20(d).

²⁰ *Water Act 2007* (Cth), s 20(g).

²¹ *Water Act 2007* (Cth), s 3(d)(i).

²² *Water Act 2007* (Cth), ss 20 (b), 22(1) – item 4(c) and 6.

²³ See discussion in,

Fisher, Douglas 'A sustainable Murray-Darling Basin: the legal challenges' in Daniel Connell and Quentin Grafton (eds) *Basin Futures: Water reform in the Murray-Darling Basin*. (2011) ANU EPress, Canberra (forthcoming).

See also, Gardner, above n 9. This interpretation is consistent with Gardner's characterization of short-medium term and long term objectives. The commitment to return extraction to environmentally sustainable levels is treated as a short-medium term objective.

²⁴ *Water Act 2007* (Cth), s 23(1).

ecosystem functions of the water resource; the productive base of the water resource; or key environmental outcomes of the water resource.²⁵

6. This is a strong environmental standard. However, it is not concerned solely with environmental values, but is consistent with the recognition that long term human use of water depends on maintaining environmental values. Thus, for instance the definition is clearly addressed not only to the *productive base of the water resource*, but also to *key environmental outcomes*. The latter includes a reference to water quality and water resource health, for example, mitigating pollution and limiting noxious algal blooms,²⁶ factors which are critical to ongoing human use. (*Terms of Ref. 1a*)
7. Importantly, this duty and its accompanying standard are situated in the context of the explicit statement of the objects of the planning purposes. These include the optimisation of economic, social and environmental outcomes.²⁷ The Act thus contains a number of process provisions which allow for SDLs to be established and enforced in a way that minimises any negative social and economic impacts. For example, it provides for extensive lead in time for implementation of SDLs through transitional water resource plans.²⁸ In addition, in order to minimise adverse social and economic impacts associated with the implementation of SDLs, an additional five years may be granted before full implementation of the SDL is required.²⁹ (*Terms of Ref. 1a*)
8. It is important to view the provisions of the Water Act in relation to the Basin Plan in light of previous efforts to achieve sustainable levels of water extraction in the Basin.³⁰ In the context of prolonged drought in recent years, unsustainable levels of water extraction became increasingly apparent, severely affecting not just environmental values but also the security of water entitlements for consumptive users. The passing of the Act represented widespread consensus that this issue should be prioritised and addressed through a central statutory planning process, which provides clear guidance on this matter. In the words of the

²⁵ *Water Act 2007* (Cth), s 4.

²⁶ *Water Act 2007* (Cth), s 4.

²⁷ *Water Act 2007* (Cth), s 20(d).

²⁸ Under the Act existing state water resource plans are characterised as transitional water resource plans and accredited without alteration under the Basin Plan until they expire or come up for review under relevant state legislation. In Victoria for example, this ensures that the level of consumptive entitlement authorised under existing planning instruments is preserved until 2019. See, *Water Act 2007* (Cth), ss 63-72, 241, 243, 245 and Schedule 4 to the Act which provides the scheduled date of transition.

²⁹ *Water Act 2007* (Cth), s 24.

³⁰ See, for example, a recent assessment of progress implementing measures to address over-allocation and over-use under the National Water Initiative, National Water Commission, *Australian Water Reform, 2009 – Second Biennial Assessment of Progress in Implementation of the National Water Initiative* (2009), viii-ix.

For a discussion of the inefficacy of limits on water extraction achieved under the Murray-Darling Basin Cap, which was introduced in 1995, see, Whittington, John et al, *Ecological Sustainability of the Rivers of the Murray-Darling Basin. Companion Paper no. 1, Review of the Operation of the Cap: Overview Report of the Murray-Darling Basin Commission* (2000).

Commonwealth Minister for Environment and Water Resources in the second reading speech for the Water Bill 2007, “The Water Bill and the national plan [for water security announced by the Prime Minister on 25 January 2007] build on the 2004 National Water Initiative agreement, signed by all governments. The key objectives of the National Water Initiative are to improve the efficiency of water use and *establish clear pathways to return all water sources to environmentally sustainable levels of extraction*. These are the objectives of the Water Bill ... [emphasis added]”³¹

9. The Commonwealth has relied on a number of constitutional heads of power to enact the Water Act.³² The Inquiry’s terms of reference highlight the use of the external affairs power,³³ under which the Commonwealth can legislate to give effect to International Agreements to which Australia is a party, to the extent that the relevant legislation is reasonably capable of being considered appropriate and adapted to implementing the purpose of the agreement.³⁴ Thus, it is open to the Commonwealth to legislate for the management of water resources in Australia under the external affairs power to give effect to Australia’s international obligations under “relevant international agreement[s]”: defined in Water Act s 4. The use of the external affairs power among other indirect heads of power to support Commonwealth legislation is a model that has operated within the cooperative federalism paradigm for many years now, not only in the areas of natural resource and environmental management. The law is well settled around the adoption of this model of federal powers.³⁵ (*Terms of Ref. 1c and d*)

10. As demonstrated above, the Act presents a clear methodology for addressing the range of relevant economic, social and environmental issues. It provides a sound statutory basis for the preparation of a Basin Plan to achieve the objectives of the Act and, for this purpose, does not require amendment. It is important to distinguish between the legal integrity of the Act and the way in which the substantive outcomes of its implementation through the Basin Plan will be viewed by different stakeholder groups. Different stakeholder groups will not always concur on such outcomes. This is not a reflection on the Act itself. (*Terms of Ref. 1e*)

³¹ The Hon Malcolm Turnbull, Commonwealth Minister for Environment and Water, 2nd reading speech for the Water Bill 2007, *Hansard*, House of Representatives, Wednesday 8 August 2007, at 5.
³² *Water Act 2007* (Cth), ss 9 and 9A.

³³ *Commonwealth of Australia Constitution Act*, s 51(xxix)

³⁴ *Victoria v the Commonwealth of Australia (The Industrial Relations Case)* (1996) 187 CLR 416 at 487-8, following the *Tasmanian Dams* case (1983) 158 CLR 1, and applied in *R v Tang* (2009) 237 CLR 1.

³⁵ For example the High Court has confirmed the broad, but not unlimited, scope of the external affairs power in enabling Commonwealth environmental regulation based on obligations under international agreements on a number of occasions, including:

Tasmania v Commonwealth (1983) 158 CLR 1 (*The Tasmanian Dam Case*)

Richardson v Forestry Commission (1988) 164 CLR 261;

Queensland v Commonwealth (1989) 167 CLR 232;

Victoria v the Commonwealth of Australia (The Industrial Relations Case) (1996) 187 CLR 416;

R v Tang (2009) 237 CLR 1; and

Pape v Commissioner of Taxation of the Commonwealth of Australia (2009) 238 CLR 1, Hayne & Keifel JJ at [368] – [374] and Heydon J at [475] – [485].

