

24 May 2011

## By email

Dear Mr Griffiths,

## Response to Questions on Notice from Water Act Inquiry

Please find below our response to two questions we took on notice at the above Senate inquiry on 18 May 2011.

### QUESTION:

**Senator HANSON-YOUNG:** *So you agree with the Government Solicitor's advice?*

**Ms Rivers:** *Yes, we do. I think there has been a number of varied interpretations of that advice, and so I guess commentary on that advice has differed, but when we look at it from our legal perspective, yes, we think that is sound advice.*

**Senator HANSON-YOUNG:** *There was a question around points made in that advice about limits to the authority—limits on the authority, in certain aspects, to implement all of the things that the act is requiring. Are those limits obvious to you?*

**Ms Rivers:** *I am not exactly sure what you were referring to from that advice. I can go back and have a look at it and take the question on notice if you'd like.*

**Senator HANSON-YOUNG:** *Could you? The Government Solicitor's advice specifically points to limits on the authority. If you could take that on board and get back to us on notice, as to your interpretation of that—*

**Mr Sydes:** *Is it specifically in terms of those paragraphs of the advice that you are referring to?*

**Senator HANSON-YOUNG:** *Yes. Paragraph 25 and 26, I think, from memory.*

The advice by the Australian Government Solicitor (AGS) dated 25 October 2010 discusses the requirements that the Act places on the Murray Darling Basin Authority (MDBA) in developing the Murray Darling Basin Plan (the Plan). There are a number of requirements in the Act that guide and in some cases limit the MDBA's discretion in making the Plan. As noted by the AGS the MDBA must comply with the specific statutory provisions in the Act, as well as the more general objects of the Act and purpose of the Plan where relevant. In most cases the specific statutory provisions set requirements or limits, but give some discretion in determining how to meet those requirements.

For example the MDBA is required to set a sustainable diversion limit (SDL) that reflects an environmentally sustainable level of take that will not compromise four areas – key environmental assets, key ecosystem functions, the productive base, and key environmental outcomes.<sup>1</sup> Environmental assets and environmental outcomes are further defined. The Act does not say how the MDBA must determine what the key assets,

<sup>1</sup>As included in the definition of an environmentally sustainable level of take in s 4.

functions, productive base and outcomes are, and therefore the MDBA may use its discretion to determine this, provided it complies with the provisions mentioned above and is consistent with the more general objects and purposes of the Plan and Act. Other 'limits' on the MDBA's discretion are found in the Act such as the MDBA must act on the basis of best available scientific knowledge and socio-economic analysis. Thus the MDBA must comply with the specific provisions in the Act which provide some limits to its discretion, and must also act in accordance with the more general provisions of the Act that are relevant to the exercise of that specific power.

**QUESTION:**

**Senator XENOPHON:** *do you see any part of the act that would give scope or weight to early adopters other than the general discretion that Ms Rivers has referred to?*

The Water Act provides that the MDBA determine the long term average quantity of water that can be taken on a sustainable basis from the Basin as a whole and each water resource plan area or part of a plan area.<sup>2</sup> That determination must reflect the level of water that can be taken without compromising key environmental assets, key ecosystem functions, the productive base and key environmental outcomes. The determination must also be made in such a way that it complies with the more general provisions of the Act such as optimising economic, social and environmental outcomes.

Whether the Basin Plan could recognise 'early adopters' of water efficiency measures would therefore largely depend on the condition of the resource, whether the water efficiency measures had improved the condition of the resource, and whether the needs of the local area could be met in part by water from elsewhere in the Basin.

For example, where water users have adopted water efficiency measures which have allowed water to be returned to the system to improve the condition of the system, it could be taken into account in setting SDLs. However where water savings generated by water efficiency measures have been retained by water users to allow greater production, but unsustainable levels of extraction remain, there would still be a requirement to ensure enough water was returned to the system to achieve sustainable water use.

Yours sincerely,

Nicola Rivers  
**Law Reform Director**

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<sup>2</sup> s 22 item 6