

**THE SENATE**  
**STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

**Submission to the Inquiry into the provisions of the *Water Act* 2007**  
**March 2011**

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

I thank the Senate Committee for the opportunity to make a submission to the above Inquiry. This submission addresses each of the Terms of Reference 1 (a) to (e) and then makes some general points under 1(f). The submission draws on my legal expertise, (as denoted under Terms of Reference (2)), as an academic at the Melbourne Law School, The University of Melbourne, who teaches and researches in the field of water law. However, the views expressed herein are in my capacity as an individual researcher and do not reflect the position of the Melbourne Law School.

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**1. Legal Interpretation and Ambiguity: Terms of Reference 1 (a),(b)**

The Inquiry directs attention to (1) The provisions of the *Water Act* 2007 (the Act), with particular reference to the direction it provides for the development of a Basin Plan and to issues of ambiguity and constraints and different legal interpretations.

General Considerations: At the outset it is necessary to note that the provisions of a complex piece of natural resource management legislation such as the *Water Act* may fulfil a number of legal and constitutional functions; that there is case law that amplifies the interpretation of provisions; and technical conventions of legal interpretation that need to be taken into account when determining the meaning of various legislative provisions and the direction that they provide for the Basin Plan. Typically, this may mean that there may be some variation in emphasis in legal interpretation (Terms of Reference 1(b)) as with deriving the meaning of all language, but that it remains possible still to determine substantive legal requirements.

The substantive legal provisions for the development of the Basin Plan in section 21 of the *Water Act* 2007 require that such a Plan give effect to relevant international agreements (such as those related to biodiversity conservation and wetland site protection) in a manner which recognises that the use of Basin Water Resources, 'has had or is likely to have significant adverse impacts on the conservation and sustainable

use of biodiversity'. The provision recognises that historic levels of water extraction from the Basin water resources have been unsustainable, that biodiversity such as native fish species have been 'significantly impacted' and that accordingly 'special measures' are required to conserve biodiversity.

This is not a generic 'trade-off' between environmental and socio-economic factors which can be remedied by 'balancing', as popular debate has suggested. Indeed, sustainability is commonly interpreted under relevant international agreements (and Australian laws) to comprise a range of biodiversity conservation and socio-economic components. However, in this instance, the legal provision points to the complex task of integrated decision-making giving effect to special measures (i.e. such as determining long-term average sustainable diversion limits under the Basin Plan) for biodiversity protection, while ensuring that the overall sustainability of the resource is retained to support ecosystems within the basin. The viability of underpinning ecosystems is necessary to support both environmental values such as biodiversity protection and productive uses of water. For example, high salinity levels and algal blooms due to low water levels in a river affect both biodiversity AND irrigation uses.

**Clearly then, in implementing international agreements, the Basin Plan must be prepared to achieve conservation outcomes at first instance, with regard to sustainable uses (which can comprise socio-economic factors) and other considerations, such as critical human water needs, to ensure the basic ecosystem viability is maintained.**

It is also necessary to recognise that interpretation of a statute alone cannot pre-empt all the subtleties of the implementation of complex legal requirements in a dynamic natural resource context such as water. This is not necessarily a reflection on the overarching legal integrity of the statute and its constitutional basis, but rather it may reflect operational 'ambiguities and constraints' as an Act is implemented. The *Water Act*, as with most natural resource and environmental law regimes, creates a legal framework that must iterate with existing operational and institutional structures for managing water. These contextual matters thus have particular bearing on the question of whether there are, 'any ambiguities or constraints in the Act' (Terms of Reference, 1 (a)). Moreover, the concept of equally-weighted consideration of economic, social and environmental factors (often touted as triple bottom line sustainability) suffers from a high degree of generality and it is not at all clear exactly what such a consideration would entail in a specific, operational context. Typically, the triple bottom line sustainability concept is seen as an aspiration, rather than a substantive procedure. By contrast, the *Water Act* 2007 does mandate a particular process and basis for the development of the Basin Plan and directs attention to how Commonwealth authority powers should be exercised (see below).

Returning to the legal interpretation of the Act, the general approach where any ambiguity of statutory language is found, is to give effect to the objects for which legislation is enacted (a purposive approach). In this instance, there is a spectrum of objectives, which is typical of many modern statutes designed to set up statutory authority and natural resource management responsibilities. The overall objectives of the *Water Act* are set out in s 3, which revolves around the initial goal of enabling the

Commonwealth, 'in conjunction with the Basin States, to manage the Basin water resources in the national interest'.<sup>1</sup>

The Act, as noted, also seeks to give effect to certain international agreements and, in doing so, to provide for 'special measures' to address the threats to the Murray-Darling Basin's water resources.<sup>2</sup> In giving effect to these agreements, the Act is also intended to 'promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes.'<sup>3</sup> While the Act seeks 'to maximise the net economic returns' from the use of the Basin water resources to the Australian community,<sup>4</sup> significantly this goal is subject to the return of over-allocated water resources to 'environmentally sustainable levels of extraction',<sup>5</sup> and the protection of the Basin's 'ecological values and ecosystem services'.<sup>6</sup> Other objects include the improvement of water security for all Basin water users,<sup>7</sup> a 'big-picture' management approach to the Basin's water resources,<sup>8</sup> the achievement of efficient and cost-effective water administration<sup>9</sup> and improved data and information about Australia's water resources, management and use.<sup>10</sup>

The objectives are outlined in full here to underline the diversity of objectives that frame the context for the development of the Basin Plan. Secondly, it needs to be highlighted that there is a requirement to 'promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes,' where the Act seeks to give effect to International agreements. Thus, while there is no explicit wording in the objectives that states that the Basin Plan is to be developed on, 'an equally-weighted consideration of economic, social and environmental factors' the diversity of objectives in section 3 and specific directions to consider optimisation of outcomes, would suggest that consideration should be given to a range of these objectives when developing the Basin Plan; notwithstanding that these considerations are raised with reference to the important primary purpose of the Basin Plan in giving effect to International agreements (Terms of Reference I (d)).

## 2. Constitutional Basis: Terms of Reference 1(c)

The *Australian Constitution* does not confer on the Commonwealth Government any 'direct' express power to make laws with respect to water among the heads of legislative power in s 51 of the Constitution.<sup>11</sup> Case law has established that the Commonwealth can rely on a number of 'indirect' powers under s 51 in order to pass legislation in relevant areas, such as environmental protection.<sup>12</sup> Where the Commonwealth legislates, as in this instance, for the regulation of water resources, then

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<sup>1</sup> *Water Act* s 3(a).

<sup>2</sup> *Ibid* s 3(b).

<sup>3</sup> *Ibid* s 3(c).

<sup>4</sup> *Ibid* s 3(d)(iii).

<sup>5</sup> *Ibid* s 3(d)(i).

<sup>6</sup> *Ibid* s 3(d)(ii).

<sup>7</sup> *Ibid* s 3(e).

<sup>8</sup> *Ibid* s 3(f).

<sup>9</sup> *Ibid* s 3(g).

<sup>10</sup> *Ibid* s 3(h).

<sup>11</sup> Alex Gardner, Richard Bartlett and Janice Gray, *Water Resources Law* (LexisNexis Butterworths, 2009) 106.

<sup>12</sup> See for example, EPBC Act 1999.

there must be a 'sufficient connection' with the 'indirect' legislative powers. The *Water Act* relies on powers enumerated in s 9 which includes inter alia, interstate and overseas trade or commerce,<sup>13</sup> postal, telegraphic and other like services,<sup>14</sup> weights and measures,<sup>15</sup> corporations,<sup>16</sup> external affairs<sup>17</sup> and matters incidental to the execution of any power vested in the Commonwealth by the Constitution.<sup>18</sup>

Other bases for federal legislation lie in s 122 of the Constitution, (government of territories),<sup>19</sup> and in s 61, (an implied 'nationhood' power).<sup>20</sup> Lastly – and this is the constitutional basis for Parts 1A, 2A, 4, 4A, 10A and 11A of the *Water Act* – the Commonwealth may draw on those legislative powers that relate to matters which have been referred to it by the state governments under s 51(xxxvii) of the Constitution.<sup>21</sup> This was an important foundation for the 2008 amendments to the *Water Act* which extended Commonwealth regulation for example in areas such as the water market trade rules.

The external affairs power in s 51(xxix) has proven to be an important source of 'indirect' legislative power for the Commonwealth over environmental matters – especially since its scope was established in *Commonwealth v Tasmania*<sup>22</sup> in 1983. While not directly dealing with the subject matter of water, this head of legislative power can be used to give effect to an obligation contained in an international treaty that is entered into in good faith by the Australian government<sup>23</sup> – and as long as the ensuing statute is reasonably appropriate and adapted to carrying out the treaty (international law) obligations.<sup>24</sup> The international agreements (treaties and conventions) to which the *Water Act* seeks to give effect<sup>25</sup> relate to long-standing treaty obligations on the part of the Australian nation. Discussion as to whether the Act is 'reasonably appropriate and adapted' is outlined below.

### 3. International Agreements and the Basin Plan: Terms of Reference 1(d)

As noted above, the basis on which the Basin Plan is to be developed is set out in s 21, which requires a Basin Plan to give 'effect to relevant international agreements'<sup>26</sup> and 'promote sustainable use of the Basin water resources to protect and restore [its] ecosystems, natural habitats and species'.<sup>27</sup> The Basin Plan is to be prepared by the

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<sup>13</sup> *Commonwealth Constitution* s 51(i).

<sup>14</sup> *Ibid* s 51(v).

<sup>15</sup> *Ibid* s 51(xv).

<sup>16</sup> *Ibid* s 51(xx).

<sup>17</sup> *Ibid* s 51(xxix).

<sup>18</sup> *Ibid* s 51(xxxix).

<sup>19</sup> *Ibid* s 122; *Water Act 2007* (Cth) s 9(a) ('*Water Act*').

<sup>20</sup> *Water Act* s 9(b); *Commonwealth Constitution* s 61.

<sup>21</sup> *Water Act* s 9A.

<sup>22</sup> (1983) 46 ALR 625.

<sup>23</sup> Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2006) 62-3; Gardner, Bartlett and Gray, above n 1, 94-5.

<sup>24</sup> *Commonwealth v Tasmania* (1983) 46 ALR 625; Gardner, Bartlett and Gray, above n 1, 94-5.

<sup>25</sup> The relevant international agreements are the Biodiversity Convention, the Ramsar wetland convention, the Desertification convention, migratory species conventions, the UNFCCC 'climate change' convention and any other prescribed agreement (none prescribed).

<sup>26</sup> *Ibid* s 21(1).

<sup>27</sup> *Ibid* s 21(2)(b).

Murray-Darling Basin Authority, with discretion over its adoption resting with the Commonwealth Water Minister.<sup>28</sup> In exercising these powers, s 21 states that the Authority and the Minister must take into account the principles of ecologically sustainable development, as well as act on the basis of the 'best available scientific knowledge and socio-economic analysis',<sup>29</sup> and have regard to a number of other considerations, including the economic uses of the Basin's water resources.<sup>30</sup> Overall this integration suggests a 'reasonably appropriate and adapted' statute designed to give effect to the relevant international agreements while considering, inter alia, socio-economic matters. Moreover, the reference to ecologically sustainable development (ESD), which, at law, comprises a number of sub-principles, resonates with the key guiding objectives for many of the designated treaties.

Sustainable development has an established foundation at international law, as well as within Australian law and intergovernmental policy (e.g. *The Intergovernmental Agreement on the Environment* 1992). The establishment of sustainability recognised that the use and development of natural resources could no longer be considered in isolation from the need to protect the environment.<sup>31</sup> This principle was initially developed as a frame for discussions at the Stockholm Conference in 1972, and later formulated more concretely at the Rio Earth Summit of 1992. The core principles are set out in the 1992 Rio Declaration on Environment and Development, which remains the most comprehensive international statement. The legal formulation includes the principles of intergenerational equity,<sup>32</sup> and the precautionary principle<sup>33</sup> – as well as a principle of intragenerational equity. The view that ESD requires a simple 'trade off/balance' between environment and consumptive use misunderstands the integrated nature of ESD, and the need to protect the fundamental eco-systemic basis that can secure both productive uses and environmental values for water resources. Pertinently, the 'wise use' of these resources and the 'conservation of declared Ramsar wetlands' are also to be promoted in the development of any Basin Plan,<sup>34</sup> which must not result in a net reduction in the protection of planned environmental water from the levels of protection afforded under state government law immediately before the Basin Plan first takes effect.<sup>35</sup>

More generally, the contents of the Basin Plan must also satisfy a number of other requirements set out in the *Water Act*. First, s 22 requires the overall Basin Plan to incorporate a range of mandatory content including a sustainable diversion limit (SDL), a temporary diversion provision, an environmental watering plan, and a water quality and salinity management plan.<sup>36</sup> More specific aims and requirements apply to each of these mandatory aspects of the Plan.<sup>37</sup> In particular, any SDL set out in the Basin Plan must reflect 'an environmentally sustainable level of take',<sup>38</sup> which s 4 defines as a

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<sup>28</sup> Ibid ss 19(3), 41, 44.

<sup>29</sup> Ibid s 21(4)(b).

<sup>30</sup> Ibid s 21(4).

<sup>31</sup> Principle 4, Rio Declaration 1992.

<sup>32</sup> Principle 3, Rio Declaration.

<sup>33</sup> Principle 15, Rio Declaration.

<sup>34</sup> Ibid s 21(3).

<sup>35</sup> Ibid s 21(5).

<sup>36</sup> Ibid s 22.

<sup>37</sup> Ibid ss 23-26, 28.

<sup>38</sup> Ibid s 23(1).



water extraction level that, if exceeded, would compromise either the Basin's key environmental assets, its key ecosystems functions, its productive base or its key environmental outcomes.<sup>39</sup>

Clearly then the important mechanism that the *Water Act* uses to institute key ESD objectives is the Basin Plan as an instrument that sets a long-term average sustainable diversion limit ('SDL')<sup>40</sup> on the quantity of water that may be taken from the Basin water resources as a whole, and from the water resources of each water resource plan area. The Basin Plan is to achieve the 'integrated management of the Basin water resources' in a way that promotes the aims outlined above. The specific purposes are outlined in s 20, and include giving effect to the relevant international agreements, as well as establishing and enforcing 'environmentally sustainable limits on the quantities of surface water and ground water that may be taken from the Basin water resources (including by interception activities)'. They also include the setting of Basin-wide environmental, water quality and salinity objectives, as well as the development of 'an efficient water trading regime across the Murray Darling Basin'. The Basin Plan must also provide for 'improved water security' and the achievement of any requirements that must be met by a water resource plan. In s 20, reference is once again made to 'the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes.'

#### **4. Amendments to the Water Act: Terms of Reference 1(e)**

Pursuant to a series of Inter-governmental Memoranda of Understanding over several decades of water law and policy reform, it has been agreed that the Commonwealth should have a stronger role in water law and management in the Murray-Darling Basin, particularly in view of the substantial financial resources that the Commonwealth can bring to bear. To this end, the *Water Act* 2007 puts into effect a range of Commonwealth 'national' responsibilities related to water resources that are not necessarily tied to the development of the Basin Plan per se. If the Commonwealth's powers under the *Water Act* are weakened by subsequent amendments in order to give effect to the proposed equal-weighting requirement for the Basin Plan, this may impede the capacity of the Commonwealth to support an overarching framework and sound financial basis for water resource management more widely in Australia. Sound water resource planning and management are vital to Australia's future and accordingly, caution should be exercised before any statutory amendments are contemplated.

#### **6. Any other related matter: Terms of Reference 1(f)**

Not all stakeholders agree on the exact scope of more substantial Commonwealth responsibilities for water management, the adoption of the National Water Initiative, and the nature of a progressive implementation or augmentation of strategic water resource planning in the Murray-Darling Basin. Yet, it is argued here, that these developments represent an important step in setting national standards for water management where more local reforms have lagged and in redressing inter-jurisdictional conflict over the 'sharing' of water resources in a federal system.

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<sup>39</sup> Ibid s 4.

Some have expressed disquiet about the ‘interaction’ between the Commonwealth and State governments on important issues such as processes to recover environmental water, and the need for closer community consultation. For example, the process of consultation with stakeholders around the draft Guide to the Basin Plan released in 2010, was not as extensive as ‘best practice’ might warrant, even given that the time frames for the plan development were acutely short. Clearly, there is scope to better incorporate the long-term water resource management experience that has been gained in jurisdictions across the basin over many years.

It is also evident that the equity implications of the socio-economic structural changes that are taking place in the Murray-Darling Basin need greater attention and better support for those affected. The renewed policy emphasis on regional Australia is useful, but significant national concerns remain around one of Australia’s most productive ‘assets’ and an area which holds social and cultural significance for many people. Australia needs much better understanding about the processes and practices around the institution of long term water governance and social change. The pressures on the Murray-Darling Basin and its users need to be addressed by a raft of approaches including other legislative and policy initiatives. It is unrealistic to expect that a natural resource management statutory framework can achieve all these complex outcomes.

Further, how best to achieve intergovernmental cooperation on matters related to water resources has occupied much public policy debate over many years. Such issues of intergovernmental relations may be addressed more productively in other forums than through the vagaries of legislative amendment around a problematic construct of ‘equal-weighting’. More generally, it is worth noting that there has been a very long trajectory from Federation debates to the successive forms of Murray-Darling agreements and state water legislation reforms to arrive at the *Water Act* 2007. The Act has the objectives and legal mechanisms to institute long term strategic water resources planning and to address shorter term critical water allocation problems, especially given that water is so vital to supporting the ecosystems on which the human productive uses and the environmental values of the Murray-Darling Basin depend.

Melbourne, March 2011