

CHAPTER 3

Key issues

Introduction

3.1 A range of key issues were raised during the inquiry. While most witnesses and submitters raised issues regarding terms of reference (a)-(e), a number of broader water management and environmental issues were also raised, implicitly or explicitly, under term of reference (f) ('any other matter related'). Witnesses and submitters to the inquiry can be broadly divided into:

- those who support amendment or replacement of the Water Act to facilitate the equally weighted consideration of environmental, social and economic factors in the development of the Basin Plan;
- those who consider that there is currently adequate scope in the Water Act for consideration of environmental, social and economic factors in the development of the Basin Plan; and
- those who consider that the Water Act appropriately gives primacy to environment factors over social and economic factors in the Water Act, and in the development of the Basin Plan.

3.2 These issues are discussed further below.

Environmental, social and economic factors in Basin Plan

3.3 The majority of evidence during the inquiry focused on how environmental, social and economic factors are reflected in the provisions of the Water Act and the development of the Basin Plan.

Interpretation of the Basin Plan provisions

3.4 A number of submissions outlined their interpretations of the provisions of the Water Act relating to the consideration of environmental, social and economic factors in the development of the Basin Plan. These interpretations focused on a wide range of sections and definitions in the Water Act including:

- the objects section (section 3);
- the definition of 'environmentally sustainable level of take' (section 4);
- section 20 which sets out the purpose of the Basin Plan;
- section 21 which sets out the general basis on which the Basin Plan is to be developed;
- section 22 which outlines the mandatory content of the Basin Plan; and

- the meaning and effect of 'long-term average sustainable diversion limits' (subsection 22(6) and section 23).

Objects section

3.5 Section 3 sets out the objects of the Water Act. Evidence to the committee's inquiry focused on paragraphs 3(a)-(d), namely:

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 (to the extent to which those agreements are relevant to the use and management of the Basin water resources) and, in particular, to provide for special measures, in accordance with those agreements, to address the threats to the Basin water resources; 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; and

(d) without limiting paragraph (b) or (c):

(i) to ensure the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused; and

(ii) to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin (taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity); and

(iii) subject to subparagraphs (i) and (ii)—to maximise the net economic returns to the Australian community from the use and management of the Basin water resources

3.6 A number of submissions argued that the objects section of the Water Act indicate that social and economic factors would not be given equally weighted consideration in the development of the Basin Plan.¹ For example the Victorian Farmers Federation asserted that the objects section of the Water Act does not indicate that there would be adequate consideration of the socio-economic impacts in developing the Basin Plan:

[Paragraph 3] (c) speaks of promoting the use of water resources in a way that optimises outcomes; but this is based in relation to giving effect to the international agreements and not as a basis for balancing the optimal outcomes for the economic, social and environmental factors.

1 For example, National Irrigators' Council, *Submission 19*, p. 7; NSW Irrigators' Council, *Submission 12*, p. 7; Southern Riverina Irrigators, *Submission 52*, p. 3.

[Paragraph 3] (d) (iii) places the net economic returns to the Australian community as subservient to the environmental needs, and not balanced against the environmental needs.²

3.7 Cotton Australia also highlighted the wording of subparagraph 3(d)(iii):

...section 3 D (iii) by using the words subject to paragraphs and (ii) clearly shows that maximising net economic gains to the Australian community can only be considered after the Sustainable Diversion Limit (SDL) has been set at a level to fully protect and restore the environmental assets.

To put it in layman terms, first of all the Act requires the plan to identify how much water is required by the environment to protect and restore it, and then and only then, can the [Basin] Plan contemplate how that SDL [sustainable diversion limit] can be supplied at the least social and economic cost to the Australian community.³

3.8 However, others argued there is sufficient scope within the objects section for consideration of social and economic factors. For example, Professor Lee Godden noted that '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)'. He commented:

...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" that diversity of objectives in section 3 [of the Water Act] and the 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...⁴

Environmentally sustainable level of take

3.9 Subsection 22(1) of the Water Act sets out the mandatory content for the Basin Plan. In particular, this mandatory content must include specific limits on the quantity of water that may be taken, on a sustainable basis from Basin water resources. Section 23 provides that these 'long-term average sustainable diversion limits' must reflect an 'environmentally sustainable level of take', which is defined in section 4 as follows:

environmentally sustainable level of take for a water resource means the level at which water can be taken from that water resource which, if exceeded, would compromise:

2 Submission 55, pp 3-4.

3 Submission 43, p. 6.

4 Submission 83, p. 3.

- (a) key environmental assets of the water resource; or
- (b) key ecosystem functions of the water resource; or
- (c) the productive base of the water resource; or
- (d) key environmental outcomes for the water resource.

3.10 A number of different views were expressed on the meaning of this definition and its effect on the development of the Basin Plan. For example, the National Irrigators' Council stated that the requirement that sustainable diversion limits must reflect an environmentally sustainable level of take 'does not suggest any consideration need be given to what might be sustainable for communities, particularly irrigation-dependent communities'.⁵ Others took more expansive views of the definition of 'environmentally sustainable level of take'. For example, Ms Nicola Rivers from the Australian Network of Environmental Defender's Offices (ANEDO) argued:

The definition around the environmentally sustainable level of take specifically talks about the productive base of the water resource, which encompasses things like mitigating pollution, reducing the risk of algal blooms and removing salinity from the basin, which are all factors that are very important for continued productive human use of the basin—agriculture and tourism, and those kinds of things. So, with the premise of the [A]ct and those considerations, it is actually difficult to separate what we would consider environmental considerations or maintaining ecosystems from other environmental services which maintain a productive base for human use as well.⁶

3.11 In his evidence, Mr Rob Freeman, from the MDBA, also commented on the meaning of 'productive base of the water resource' in the definition of 'environmentally sustainable level of take':

[T]he authority actually took legal advice on the definition of productive base, because it is a term that could be interpreted in multiple ways. It is actually issues such as water quality that underpin both the economic and environmental basis of the water resource. What this is requiring us to do here is determine the environmentally sustainable level of take and, with regard to productive base, it would be water quality et cetera, which is essential not only for the environment but also for economic use of water...The legal advice that we have is very clear that the productive base is not the economic base of that water resource but actually the broader productive base in both an economic and environmental sense.⁷

3.12 Mrs Josephine Kelly's position was that, when determining the amount of water for the environment, the MDBA 'cannot take into account the impact that a

5 *Submission 19*, p. 7.

6 *Committee Hansard*, 18 May 2011, p. 20.

7 *Committee Hansard*, 18 May 2011, p. 60.

reduction of water for agriculture, for example, will have on...rural communities'.⁸ She argued that it was clear from the AGS legal advice on the role of social and economic factors in the Basin Plan that social and economic outcomes are not relevant to identifying key environmental assets or determining water allocation for those assets under the Water Act. She argued:

[T]he Act does not give specific guidance as to which environmental assets are key...The AGS advice does not consider whether, once key environmental assets have been identified, the objective of optimizing economic, social and environmental outcomes, is relevant to deciding the sustainable diversion limit. Clearly, that objective is not a relevant consideration because the only question to decide is what is the level of water that can be taken without compromising the key assets?

[E]conomic and social outcomes are not relevant to the identification of key environmental assets or to the determination of water allocation for those assets...Water for human use is what is left after the "environmentally sustainable limits" have been determined.⁹

3.13 An alternative view of the requirements of the Water Act was outlined in the joint submission from Professor Douglas Fisher, Associate Professor Alex Gardner, Professor Lee Godden, Ms Janice Gray, Professor Jan McDonald, Dr Chris McGrath and Associate Professor Poh-Ling Tan. They highlighted that a 'strong environmental standard' is created by the requirement in the Water Act that sustainable diversion limits must reflect an 'environmentally sustainable level of take'. However, they also noted:

[This requirement in the Water Act] 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 [of environmentally sustainable level of take] 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, factors which are critical to ongoing human use. Importantly, this duty and its accompanying standard are situated in the context of the explicit statement of the objects of the planning process. These include the optimisation of economic, social and environmental outcomes.¹⁰

3.14 The Victorian Farmers Federation was concerned that the definition of 'environmentally sustainable level of take' in the Water Act emphasises environmental outcomes and lacks clarity. Further, it considered that the definition of 'sustainable' 'does not allow consideration that the Basin waterways are now in the main working

8 Committee Hansard, 18 May 2011, p. 43.

9 Submission 54, pp 2-3.

10 Submission 75, p. 4. See also, Dr Anita Foerster, Committee Hansard, 18 May 2011, p. 36.

waterways servicing a range of purposes...[and] the definition fails to balance the reality of uses'.¹¹

Purpose of the Basin Plan

3.15 Section 20 outlines that the purpose of the Basin Plan is to 'provide for the integrated management of the Basin water resources in a way that promotes the objects of this Act'. It lists eight purposes which the Basin Plan is particularly to provide for, including: 'giving effect to relevant international agreements'; 'the establishment and enforcement of environmentally sustainable limits on the quantities of surface water and ground water that may be taken from the Basin water resources'; and 'the use and management of Basin water resources in a way that optimises economic, social and environmental outcomes'.¹²

3.16 The Rural Issues Committee of the Law Society of NSW observed that, of the eight purposes of the Basin Plan listed in section 20 of the Water Act, 'only one purpose mentions social/economic outcomes, whilst there are three references to environmental factors'. It concluded that '[t]his tends to suggest the focus is on environmental factors, not on achieving a balance between the environment and social needs'.¹³

3.17 Other submissions took a broader approach to the purpose of the Water Act and the Basin Plan. ANEDO emphasised that the 'key purpose of the Water Act is to return extraction in the Basin to long term sustainable levels to support both the ecosystems that depend on the Basin and continued productive use of the Basin'. It argued this purpose could be seen through the objects of the Act, the provisions of the Act, and the purpose and basis of the Basin Plan.¹⁴

General basis for development of the Basin Plan

3.18 A number of submissions and witnesses pointed to section 21, which outlines the general basis for the development of the Basin Plan, as prioritising environmental considerations in the development of the Basin Plan. For example, Mr Danny O'Brien from the National Irrigators' Council noted:

Subsections (1), (2) and (3) [of section 21] all talk about the environment and the international agreements, Ramsar wetlands, key environmental sites et cetera. Subsection (4), subject to subsections (1), (2) and (3), is the first subsection that actually mentions economic or consumptive uses or the

11 *Submission 55*, p. 4.

12 Water Act, paragraphs 20(a), (b) & (d).

13 *Submission 51*, p. 2.

14 *Submission 16*, p. 3.

National Water Initiative, all of which are subject to the above requirements.¹⁵

3.19 Similarly, Mrs Vicki Dunne MLA, from the ACT Legislative Assembly, highlighted the differences in the emphasis on the various factors in section 21 of the Water Act (which outlines the general basis on which the Basin Plan is to be developed) and section 3 (which outlines the objects of the Water Act). She considered that it is clear that section 21 'does not create a balance between environmental, economic and social factors'.¹⁶ In her view, a contradiction exists 'which must be addressed especially because the operative clauses [in legislation] have more weight than an object[s] clause'.¹⁷

3.20 The Gilbert + Tobin Centre of Public Law submitted that '[t]he MDBA and the Minister must take into account social and economic factors...[H]owever 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'.¹⁸ In its 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'.¹⁹ Further, the Water Act provides 'a clear legal path for the construction of a Basin Plan' in the following way:

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.²⁰

3.21 Other submissions suggested that there continues to be sufficient scope in the provisions of the Water Act for appropriate consideration of social and economic factors. In the view of the Australian Network of Environmental Defender's Offices (ANEDO), the argument that the Water Act 'focuses solely on "environmental considerations" with social and economic considerations sidelined is incorrect' because:

[T]he [Water] Act requires decisions about the preferred long term extraction levels to be based on a scientific understanding of what is sustainable for the Basin in the long term...The requirement to set SDLs [sustainable diversion limits] therefore does not prioritise 'environmental'

15 *Committee Hansard*, 18 May 2011, p. 8.

16 *Committee Hansard*, 18 May 2011, p. 50.

17 *Submission 96*, p. 5.

18 *Submission 15*, p. 2.

19 *Submission 15*, p. 1.

20 *Submission 15*, p. 4.

considerations, it prioritises a scientific assessment of what is sustainable extraction.²¹

3.22 ANEDO continued:

The key purpose of the Water Act is to return extraction in the Basin to long term sustainable levels to support both the ecosystems that depend on the Basin and continued productive use of the Basin. It does this by requiring the development and implementation of a Basin Plan that gives effect to relevant international agreements, sets sustainable extraction levels based on best available science, and optimises social economic and environmental outcomes.²²

3.23 Similarly, the Australian Conservation Foundation stated:

The intention of the Act is to achieve a sustainable balance in the Basin, and this purpose and intention inherently involve consideration of environmental, social and economic matters. The Act can achieve a sustainable outcome in the Basin without amendment and the Act quite clearly does not give the environment primacy over all else.²³

3.24 However, other submissions argued that the provisions of the Water Act appropriately prioritise environmental considerations. For example, the Clarence Environmental Centre noted that the Water Act was drafted after a period of drought and deteriorating environmental conditions, and its legal basis is the implementation of international agreements protecting the environment. Accordingly, it argued that the Water Act is an 'environmental [A]ct':

While the "economic, social and environmental outcomes" is mentioned in clause (d) in Section 20, when we look at Section 21, General basis on which Basin Plan is to be developed, only "critical human water needs" are mentioned in the first three subsections. All the other subsections are subject to these first three subsections.²⁴

3.25 Similarly, Fair Water Use argued that the Water Act is 'clearly intended to prioritise the environment' for the 'very sound reason' that '[i]t is only by ensuring the environmental health of the Murray-Darling river system that the social and economic fabric of the Basin will be maintained for generations to come'.²⁵

3.26 The Conservation Council of South Australia considered that environmental factors warrant priority in the Water Act because the environment is the resource base which underpins irrigated agriculture and is a pre-requisite for much of the social and

21 *Submission 16*, p. 5.

22 *Submission 16*, p. 3.

23 *Submission 73*, p. 1.

24 *Submission 34*, p. 3.

25 *Submission 18*, p. 1.

economic activity in the Basin.²⁶ Therefore, if the Water Act was 'changed to lock in equal weighting to balance economic, social and environmental outcomes, then the Act will fail to deliver a reliable and sustainable management of the Basin water resources'.²⁷

Policy-maker discretion

3.27 The Water Act outlines a process for the development of the Basin Plan whereby the MDBA submits a Basin Plan to the relevant Minister for approval before it is introduced into the parliament. The discretion of the MDBA and the relevant Minister, and the role of scientific evidence in the development of the Basin Plan, were raised as issues relating to the equally weighted consideration of economic, social and environmental factors. In particular, evidence highlighted the issue of whether the provisions of the Water Act gives policy-makers the capacity to decide to prioritise social and economic factors over environmental factors.

3.28 Some viewed the lack of certainty in the provisions of the Water Act as providing significant discretion to policy-makers in the development of the Basin Plan. For example, the Rural Issues Committee of the Law Society of NSW asserted:

[T]he present drafting of the Act provides no clear direction on whether environmental, social and economic factors are to be given equal consideration with respect to the decision making process and indeed, is ambiguous in exactly what factors are to be given consideration. This may result in a very discretionary process.²⁸

3.29 Several other submissions and witnesses noted that the wording of the definition of 'environmental sustainable level of take' allows policy-makers a level of discretion in setting sustainable diversion limits in the Basin Plan. For example, Ms Anita Foerster stated

[T]he [A]ct...builds in discretion for the decision-maker around determining the sustainable diversion limit according to this definition and talks about the level of water use that, which if exceeded, would compromise key assets, key functions et cetera. Around the words 'compromise' and 'key', there is a fair bit of discretion built into the decision-making framework for the Murray-Darling Basin Authority to work with...²⁹

3.30 Mr Rob Freeman, from the MDBA, noted the ways in which the MDBA had used its discretion in relation to social and economic factors in preparing the Guide to the Basin Plan:

26 *Submission 3*, p. 4.

27 *Submission 3*, p. 5.

28 *Submission 51*, p. 2.

29 *Committee Hansard*, 18 May 2011, p. 40.

The identification of assets, functions and the productive base tends to be science driven. The assessment of how much water you need includes a range. As the [MDBA] said in the guide, if the Water Act was purely about the environment, the amount of water that we believe needs to be returned to the river system to make it healthy from an environmental perspective would be 7,600 gigalitres. But the [A]ct does not stop there. The [A]ct allows you to take into account economic and social considerations, and hence the range that was put out in the guide was 3,000 gigalitres to 4,000 gigalitres...

While it might be optimum to have water out on the flood plain every second year, for instance, the [MDBA] has had to look at what the impact on those environmental assets and functions would be if that occurred only every third year in order to reduce the economic and social impacts. The questioning tends to be about where we meet them or not. The [MDBA] has to meet them at a level of risk that it believes will not compromise them. But there are clearly decisions that can be taken in there.³⁰

3.31 However, others did not perceive the provisions of the Water Act as providing significant discretion to policy-makers in the development of the Basin Plan. For example, Professor John Briscoe described the Water Act as 'extraordinarily specific in what is to be given primary importance, how science is to be deployed and how the [A]ct is to be translated into action'.³¹ He argued that the legislation is based on the logic that 'science will determine what the environment needs and that the task for government (including the MDBA), is then to just "do what the science tells it to do"'.³² Professor Briscoe noted that 'if the science were certain, this would essentially take away from a parliament and a government what has always seemed to me to be the ultimate responsibility of elected officials to make trade-offs'.³³

3.32 In relation to identification of key environmental assets, Professor Briscoe stated:

[D]espite this very prescriptive science, the reality is that scientists have to necessarily in that process make a whole series of judgments about how many, how much, how much reliability, and in my view that should not be the role of scientists to make those judgments. The scientists should be telling you about those response curves—and those judgments should be judgments that are made by policy makers in the public domain, taking into account environmental outcomes and, ideally, other outcomes as well.³⁴

3.33 Subsection 21(4) of the Water Act provides that the MDBA and the Minister must, in exercising their powers and performing their functions, '(a) take into account

30 *Committee Hansard*, 18 May 2011, pp 60-61.

31 *Committee Hansard*, 18 May 2011, p. 2.

32 *Submission 2*, p. 4.

33 *Committee Hansard*, 18 May 2011, p. 2.

34 *Committee Hansard*, 18 May 2011, p. 5.

the principles of ecologically sustainable development'. This term is defined in subsection 4(2). The Murray Group of Concerned Communities highlighted the 'principles of ecologically sustainable development' as limiting the discretion of the MDBA and the Minister. It noted that these principles, as outlined in the Water Act (paragraph 4(2)(d)) provide that 'the conservation of biodiversity and ecological integrity should be a fundamental consideration in decision-making'.³⁵

3.34 After discussing the provisions of the Water Act, the NSW Irrigators' Council concluded that a 'final Basin Plan that equally treats social, economic and environmental factors *may* be possible within the confines of the Act', however it noted that 'it is not a *requirement* of the Act'.³⁶ The NSW Irrigators' Council believed that the MDBA is bound by the Water Act and thus the Basin Plan cannot be developed on equal weighting of social, economic and environmental factors. In its view, equal weighting can only occur as a result of Ministerial direction subsequent to the development of the draft Basin Plan.³⁷ Further:

If the Minister cannot contravene the Act or must "implement faithfully" the full provisions of international treaties and conventions, then a balanced outcome, in the submission of NSWIC is, in fact, simply not realisable.³⁸

Different legal interpretations

3.35 In its submission, Murrumbidgee Irrigation provided a useful list of the range of legal interpretations which have been expressed by various organisations and individuals about the Water Act. This list includes the Australian Government Solicitor, the Murray-Darling Basin Authority, the Productivity Commission, the High-Level Review Panel for the Murray Darling Basin Plan (as noted in Professor John Briscoe's submission³⁹) and Professor George Williams (also expressed in the Gilbert + Tobin Centre of Public Law submission⁴⁰):

1. The Australian Government Solicitor

The Act does allow the MBDA to consider the triple-bottom-line approach.

"The Water Act makes clear that in giving effect to those [international] 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 these outcomes."

35 *Submission 27*, p. 3. Emphasis in original.

36 *Submission 12*, p. 9.

37 *Submission 12*, p. 9.

38 *Submission 12*, p. 10.

39 *Submission 2*, p.4.

40 *Submission 15*.

2. The Murray-Darling Basin Authority

The Act is about determining the environmental water requirements (a range) first and then considering the social and economic impacts within that range.

"Mr Taylor noted that, balancing the requirements of the Water Act 2007 against the potential social and economic impact on communities will be a significant challenge. The Guide was developed with full regard to the requirements of the Water Act, and in close consultation with the Australian Government Solicitor. However, the [MDBA] has sought, and obtained, further confirmation that it cannot compromise the minimum level of water required to restore the system's environment on social or economic grounds."

3. The Productivity Commission

The Act requires the MDBA to determine environmental water needs without explicitly taking into account economic and social costs. They also recommend the Act be amended if the MDBA is unable to set sustainable diversion limits (SDLs) in a way that balances environmental, social and economic tradeoffs.

"The Commission's interpretation of the Water Act 2007 (Cwlth) is that it requires the Murray-Darling Basin Authority to determine environmental water needs based on scientific information, but precludes consideration of economic and social costs in deciding the extent to which these needs should be met. This means that the overall proportion of water allocated to the environment is to be determined without explicitly taking into account the Australian community's environmental preferences, the opportunity cost of foregone irrigation or the role of other inputs such as land management. There is a risk that this approach will impose unnecessarily high social and economic costs"

4. High-Level Review Panel for the Murray-Darling Basin Plan

Whilst this group's views have not been publicly released by the MDBA, Professor John Briscoe in his submission to this inquiry states that it is the environment first and socio-economic factors second.

"Similarly, the High-Level Review Panel for the Murray Darling Basin Plan (of which I was a member) stated that *'The driving value of the Act is that a triple-bottom-line approach (environment, economic and social) is replaced by one in which environment becomes the overriding objective, with the social and economic spheres required to "do the best they can" with whatever is left once environmental needs are addressed'*."

5. Professor [George] Williams, University of NSW

Environmental matters take precedence.

"Clearly, any suggestion that the authority need not take into account the socio-economic interests of farmers, irrigators and other locals is false. If it did so, the authority would breach its own act.

The sting for local communities lies in the fact that these interests follow after the environmental matters set out in the international conventions.

Section 21 is clear in stating that these environmental considerations take precedence and that local economic and other concerns must be taken into account "subject" to them."

3.36 Murrumbidgee Irrigation consequently argued that, due to the broad range of possible legal interpretations of the Water Act, a High Court challenge over its constitutional validity is 'a distinct possibility'. It noted that such an outcome would result in delays in the implementation of the Basin Plan until the matter is resolved, causing ongoing social and economic uncertainty for Basin communities.⁴¹

3.37 The NSW Irrigators' Council (NSWIC) acknowledged that Minister Burke had received legal advice from AGS 'noting that social and economic considerations can be taken into account in certain circumstances'. However, it submitted that the phrase 'certain circumstances' 'does not equate to equivalent treatment', therefore concluding that 'the environment takes primacy'.⁴² At the public hearing, Mr Andrew Gregson, from the NSWIC, asserted as follows:

[I]nterpretation of the [A]ct is like an enormous game of a pea under a coconut: it depends which coconut you pick up as to what definition you get from which section of the [A]ct...[I]n our submission that results in a very convoluted piece of legislation that does not give any long-term certainty that the outcome that we all agreed and sought, equivalent treatment, is to be delivered at each iteration of the Basin Plan.⁴³

3.38 The NSWIC also called for the AGS legal advice received by the MDBA to be publicly released:

Aside from exacerbating the stakeholder relations problems at the [MDBA], the withholding of this advice has not assisted a wider understanding of the short fallings of the Act.⁴⁴

3.39 Similarly, the Ricegrowers' Association of Australia called for the legal advice to the MDBA to be disclosed, to determine 'whether it in fact clarifies the ambiguities raised...or itself simply reflects the ambiguity apparent in the Act and the conflicting interpretations agricultural industries and local communities have been left to suffer under'.⁴⁵

3.40 However, the Australian Network of Environmental Defender's Offices (ANEDO) considered that differences in the legal interpretations of the Water Act had been 'greatly exaggerated' and demonstrated 'a misunderstanding of the legal issues'.

41 *Submission 39*, p. 8. See also Murray Group of Concerned Communities, *Submission 27*, p. 3.

42 *Submission 12*, p. 6.

43 *Committee Hansard*, 18 May 2011, p. 9.

44 *Submission 12*, p. 6. See also, Murrumbidgee Irrigation, *Submission 39*, p. 8; Murray Group of Concerned Communities, *Submission 27*, p. 2.

45 *Submission 49*, p. 2.

While ANEDO had not been privy to the AGS advice to the MDBA, it believed it to be consistent with the advice provided to the Minister:

All credible legal interpretations that we have read have been consistent with each other and with our own interpretation...Any difference in legal interpretation lies in the language used in those interpretations, and the fact that the understanding of the Act has evolved over the past 18 months.⁴⁶

3.41 Similarly, the joint submission from Professor Douglas Fisher, Associate Professor Alex Gardner, Professor Lee Godden, Ms Janice Gray, Professor Jan McDonald, Dr Chris McGrath and Associate Professor Poh-Ling Tan stated:

[T]he Act presents a clear methodology for addressing the range of relevant economic, social and environmental issues. 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.⁴⁷

3.42 A number of submissions highlighted the potential problems which could be created, particularly for those living and working in the Basin, if the validity of the Water Act, or the Basin Plan, faces a legal challenge.⁴⁸ For example, the National Farmers' Federation noted that any successful High Court challenge to the Basin Plan 'will likely result in the MDBA and the Commonwealth re-doing the Basin Plan, i.e. the High Court will not draft the Basin Plan itself'.⁴⁹

3.43 Another key risk identified was the creation of uncertainty in affected communities.⁵⁰ In this regard, the Griffith Business Chamber considered that ambiguity regarding the ability of the Water Act to deliver a balanced approach continues to exist, and these 'different interpretations will continue to threaten Basin communities'.⁵¹ Similarly, Border Rivers Food and Fibre argued:

[W]e believe that with the Act being interpreted so differently by the Australian Government Solicitor on different occasions, that such uncertainty as currently exists will only continue and that a challenge of the Act in the High Court of Australia is inevitable. The risk of such a challenge, from either side of the debate, only perpetuates the current uncertainty surrounding the Act and the Basin Plan process, and further

46 *Submission 16*, p. 10. See also Inland Rivers Network, *Submission 46*, p. 5.

47 *Submission 75*, p. 5.

48 See, for example, NSW Farmers Association, *Submission 55*, p. 8; Ian and Robyn Cush, *Submission 89*, p. 2.

49 *Submission 38*, p. 7.

50 For example, Gwydir Valley Irrigator Association, *Submission 42*, p. 4.

51 *Submission 77*, p. 1.

undermines confidence in the government being able to deliver an acceptable outcome to all parties.⁵²

3.44 The Peel Valley Water Users Association also expressed concern that there continues to be a robust debate on the Water Act even though 'the release of the Draft Basin Plan is imminent'. They considered the 'foundation on which the Plan has been constructed should not still be the subject of debate at this late stage'. In particular:

Our very grave fear is that once the Draft Basin Plan is released, a legal challenge is then mounted to the Water Act 2007, causing the Draft Basin Plan to be reviewed and amended. If that eventuates, it would only add more uncertainty, more delays and more frustration for all of the stakeholders involved. It is inconceivable that stakeholders should then have to go through the process of negotiations over the Draft Basin Plan again if the Water Act was amended after the Draft Basin Plan was released.⁵³

Constitutional issues and international agreements

3.45 While many submissions noted that the Water Act relies on a number of constitutional heads of power, most discussion focused on the 'external affairs' power in section 51(xxix) of the Constitution. The issue of the Commonwealth's power to legislate in the area of water was frequently linked to the influence of international agreements for the protections of the environment on the Water Act and Basin Plan. The significance of the 'external affairs' power to the constitutional validity of the Water Act is evident in the AGS legal advice which provides that '[t]he overarching objective of the Act and the [Basin] Plan is to give effect to relevant international agreements'.⁵⁴ These relevant international agreements include the Ramsar Convention (dealing with protection of wetlands), the Convention on Biological Diversity, the Bonn Convention (protection of migratory species) and 'any other international convention that is...relevant to the use and management of Basin water resources' (as defined in section 4 of the Water Act).⁵⁵

3.46 Differing views were expressed regarding the possible implications of the use of the external affairs power as the primary constitutional basis of the enactment of the Water Act. While some highlighted the previous utilisation of the 'external affairs' power in regulating the environment, others emphasised that its use imposes restrictions on the development of the Basin Plan.

52 *Submission 44*, p. 3.

53 *Submission 95*, p. 1

54 Australian Government Solicitor, *The Role of Social and Economic Factors in the Basin Plan*, 25 October 2010, p. 1.

55 Convention on Biological Diversity [1993] ATS 32; Convention on Wetlands of International Importance especially Waterfowl Habitat [1975] ATS 48; Convention on the Conservation of Migratory Species of Wild Animals [1991] ATS 32.

3.47 For example, the joint submission from Professor Douglas Fisher, Associate Professor Alex Gardner, Professor Lee Godden, Ms Janice Gray, Professor Jan McDonald, Dr Chris McGrath and Associate Professor Poh-Ling Tan commented that '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'.⁵⁶

3.48 In contrast, the Gilbert + Tobin Centre of Public Law highlighted that use of the 'external affairs' power as the primary constitutional basis for the Water Act means that 'a Basin Plan must be prepared to give effect to the relevant international conventions'. While social and economic factors must also be taken into account, these 'factors cannot be given such weight as would prejudice the faithful implementation of the international environmental conventions upon which the validity of the Act depends'.⁵⁷ It noted further:

...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'. If a law does not pass this test, it will be struck down by the Court as being unconstitutional.⁵⁸

Development of the Water Act

3.49 Several submissions to the inquiry subscribed to two different narratives regarding the influence of constitutional issues and international agreements on development of the Water Act, which broadly reflects their respective interpretations of its provisions.

First narrative

3.50 The first narrative was highlighted by the NSW Irrigators' Council (NSWIC).⁵⁹ NSWIC emphasised that the National Water Initiative (NWI) agreed in 2004 by all Basin States 'was intended by all States as the platform for reform that provided the guiding principles'. It contended that the NWI clearly laid out that a 'triple bottom-line outcome was to be sought as part of the objectives' and that this would be achieved by weighing those competing objectives equally.⁶⁰

56 *Submission 75*, p. 5.

57 *Submission 15*, pp 3-4.

58 *Submission 15*, p. 3, citing *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 486.

59 *Submission 12*, pp 3-4. Also see, Victorian Farmers Federation, *Submission 55*, p. 3; Southern Riverina Irrigators, *Submission 53*, p. 2; Murrumbidgee Irrigation, *Submission 39*, p. 8.

60 *Submission 12*, p. 3.

3.51 NSWIC considered that the Water Act has strayed from this 'triple bottom line outcome' approach which balances competing environmental, social and economic factors. It argued that, following the breakdown of negotiations between the Commonwealth and the states regarding the referral of powers over water, the focus of the proposed text of the Water Bill 2007 changed due 'to the need for the Act to assume Constitutional validity through reliance on the External Affairs power'. This meant that 'the very fundamental of the Basin Plan process [was] hijacked by the necessity to find legal capacity [for the Water Act] under the Constitution', resulting in 'a massive shift to environmental precedence'. To illustrate this point, NSWIC highlighted the differences between 'version 61' of the draft Water Bill 2007 which was circulated to industry groups and the final version of the Water Act:

NSWIC submits that even by simple comparison of sections 3 and 4 of the Act as against the Bill, the very concept that had driven water reform at the outset has been hopelessly lost. The Bill aimed to achieve balance – the political necessity of the Commonwealth to proceed with the Act meant that such balance could not be achieved and, instead, primacy is given to environmental measures.⁶¹

3.52 In NSWIC's view, the Water Act is completely reliant on international agreements in respect of the Basin Plan. The NSWIC described these international agreements as 'entirely environmental in nature', meaning the Basin Plan cannot be developed in a 'balanced manner'.⁶²

3.53 Professor John Briscoe also provided an explanation as to the basis on which the Water Act was developed:

A major challenge was how to deal with the matter of the Constitution, which had given the states powers over water management, and which underpinned the inter-state consensual processes which had been the institutional bedrock of the [Murray-Darling Basin] Commission...Because constitutional amendments are, not simple, and definitely cannot be done over a weekend before an election, the authors of the *Water Act 2007* had to find legal cover for usurping state powers. An alert and enterprising environmental lawyer found the fig-leaf, which was the Ramsar Convention, which the Commonwealth Government had signed, committing itself to protecting wetlands which are critical for migratory birds...To avoid a constitutional crisis, the Commonwealth had to build the Water Act around this figleaf. So the Act became an environmental [A]ct, which was all it really could be, since it was in the name of the commonwealth's obligations to an obscure international environmental convention that it was taking powers from the states.⁶³

61 *Submission 12*, pp 3-4 and p. 5.

62 *Submission 12*, p. 11.

63 *Submission 2*, p. 3.

Second narrative

3.54 The second narrative regarding the development of the Water Act was outlined by the Australian Network of Environmental Defender's Offices (ANEDO).⁶⁴ In contrast to the NSWIC, it considered the Water Act to be consistent with the approach of the National Water Initiative:

A clear objective of the National Water Initiative is to 'complete the return of all currently over-allocated or overused systems to environmentally-sustainable levels of extraction'...The NWI does not treat economic, social and environmental factors 'equally', it sets out requirements that must be met for each. There is no requirement in the NWI that the three factors be equally balanced or equally weighted.⁶⁵

3.55 ANEDO acknowledged that the final Water Act was altered from the version of the Bill 'produced at a time when the Commonwealth believed that it would secure a referral of powers from the States'. However, it argued that, while the 'current Act gives greater prominence to implementation of international agreements it is largely the same Act, and has the same intent'. Further, it observed that a Senate inquiry into the Water Bill (before it was passed) found that, despite some reservations from stakeholders about various aspects of the Bill, there was 'broad support for the Bill'.⁶⁶

3.56 ANEDO noted that the Water Act 'recognises and attempts to operationalise [Australia's] already existing obligations under international law'.⁶⁷ ANEDO commented that, as the Constitution does not provide the Commonwealth with direct powers in relation to water management, federal legislation relies on valid referral of powers by the states or the use of another indirect power in the Constitution:

It is important that the Act retain its Constitutional foundations, otherwise it may put the Federal Government on tenuous ground should a State decide to remove its referral of powers or challenge the Act...If the Constitutional basis of the Act is weakened it may threaten the ability of the Commonwealth to establish an overarching framework for water management in Australia. This would leave the Murray-Darling Basin in its current position of ineffective, inconsistent State regulation which has been repeatedly recognised by all parties as no longer tenable.⁶⁸

3.57 Differing views were expressed in relation to whether the use of the external affairs powers and the particular international agreements listed in the Water Act

64 See also Ms Kerri Muller, *Submission 30*, p. 2; Environment Victoria, *Submission 32*, pp 1-2; Inland River Network, *Submission 46*, pp 3-4.

65 *Submission 16*, p. 8.

66 *Submission 16*, p. 9. Senate Environment, Communications, Information Technology and Arts Committee, *Inquiry into Water Bill and Water (Consequential Amendments) Bill 2007*, August 2007.

67 *Submission 16*, p. 12.

68 *Submission 16*, p. 11.

influence the consideration of social and economic factors. The Gilbert + Tobin Centre of Public Law considered that 'the terms of the key treaties provide an indirect avenue for the Commonwealth to take into account social and economic factors'. In particular, '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'.⁶⁹

3.58 In contrast, the Rural Issues Committee of the Law Society of NSW argued that while some of the international agreements do not exclude social or economic considerations, 'they establish a framework where environmental objectives have primacy'. Specifically:

[I]f the overarching objective of the Act is to give effect to relevant international agreements, and those international agreements do not consider the three factors equally, then it is difficult for the Act to achieve this.⁷⁰

3.59 NSWIC also pointed to section 100 of the Constitution which provides:

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

3.60 NSWIC submitted that section 100 may have a bearing on matters relevant to the Basin Plan by creating an implied right to water by referring to the right of both a State and its residents to 'reasonable use'.⁷¹ However, the Rural Issues Committee of the Law Society of NSW noted that the restriction in section 100 'has been read down somewhat in other contexts to apply only to laws made under the [trade and commerce power] in section 51(i) of the Constitution'.⁷²

Amendment of the Water Act

3.61 A broad range of views were expressed regarding the possible amendment of the Water Act to allow equally weighted consideration of economic, social and environmental factors in the development of the Basin Plan.

69 *Submission 15*, p. 3.

70 *Submission 51*, p. 3.

71 *Submission 12*, p. 12. See also Murray Group of Concerned Communities, *Submission 27*, p. 4.

72 *Submission 51*, p. 4, citing *Morgan v The Commonwealth* (1947) 74 CLR 421.

Support for status quo

3.62 A number of submissions from individuals indicated support for the current approach in the Water Act.⁷³ These submissions opposed any amendments which might 'water down' the environmental protection aspects of the Water Act. The following extract from Mr James Moore was mirrored in many of these submissions:

The Water Act 2007 gets the balance right and does not need to be amended.

The Water Act 2007 importantly recognises the need to return extraction to long-term sustainable levels and this must remain the focus.

The Water Act 2007 correctly prioritises the need to reduce water extraction and return water to the environment in order to support both the ecosystems and the communities that depend on them.

The Water Act 2007 correctly acknowledges the need to base decisions about sustainable water extraction levels on the best available science. Any call to base decisions on a different 'balance' of social, environmental and environmental considerations will rely on the politics of the day and not scientific understanding.⁷⁴

3.63 These sentiments were echoed in submissions from a number of environmental and conservation organisations.⁷⁵ For example, the Friends of the Earth argued that the Water Act should not be amended because it strikes a fair balance

73 For example see Mrs Robyn O'Bryan, *Submission 4*, p. 1; Ms Faye Shepherd, *Submission 5*, p.1; Mr Glenn Osboldstone, *Submission 6*, p. 1; Mr Gary Hughes, *Submission 7*, p. 1; Mr Rob Kane, *Submission 8*, p. 1; Mr Bill Hampel, *Submission 9*, pp 1-2; Mr Alan Carpenter, *Submission 10*, p. 1; Dr AK Lethlean, *Submission 13*, p. 1; Ms Maria Riedl, *Submission 14*, p. 7; Ms Jane Judd, *Submission 21*, p. 1; Ms Kim Wheatley, *Submission 37*, p. 1; Ms Judith Turley, *Submission 40*, p. 1; Ms Kate McLaren, *Submission 41*, p. 1; Ms Betty Nyman, *Submission 56*, p. 1; Ms Meg Stewart, *Submission 64*, p. 1; Ms Alanna Moore, *Submission 65*, p. 1; Mr Peter Cowman, *Submission 66*, p. 1; Mr James Moore, *Submission 67*, p. 1; Name Withheld, *Submission 68*, p. 1; Ms Shirley Drake, *Submission 69*, p. 1; Ms Beth Williams, *Submission 70*, p. 1; Name Withheld, *Submission 71*, p. 1; Mr Ron Webster, *Submission 72*, p. 1; Ms Alzana Brown, *Submission 85*, p. 1; L Wray, *Submission 87*, p. 1; Mr John Bentley, *Submission 88*, p. 1; Ms Elizabeth Brasseur, *Submission 90*, p. 1; Mr and Mrs Richard and Helena Roberts, *Submission 92*, p. 1. Also see form letter 1 received from 8 individuals.

74 *Submission 67*, p. 1.

75 See, for example, Clarence Valley Conservation Coalition, *Submission 17*, p. 1; Australian Water Campaigners, *Submission 25*, pp 1-2; Nature Conservation Council of NSW, *Submission 26*, p. 1; Ryde-Hunter's Hill Flora and Fauna Preservation Society, *Submission 28*, p. 1; River, Lakes and Coorong Action Group, *Submission 31*, p. 2; Clarence Environment Centre, *Submission 34*, p. 3; Inland Rivers Network, *Submission 46*, pp 2-3; Blue Mountains Conservation Society, *Submission 48*, pp 2-3; Manduka Cooperative, *Submission 53*, p. 1; Southern Sydney Branch of the National Parks Association of NSW, *Submission 62*, p. 1; Mudgee District Environmental Group, *Submission 63*, pp 1-4; National Parks Association of NSW, *Submission 78*, pp 1-2.

'between delivering water for the environment and delivering water for irrigation'.⁷⁶ In particular:

Any amendment to the Act which sought to achieve a different 'balance' between environmental and socio-economic concerns would undermine the scientific and objective process underpinning the Basin planning process, and would instead leave the future of the Murray-Darling Basin open to arbitrary and politically motivated decisions.⁷⁷

3.64 The South Australian Government noted its continuing support for the objects of the Water Act, and the purpose and basis of the Basin Plan. While it acknowledged that reform under the Water Act would have social and economic impacts, it believed that these consequences could 'be minimised through strategic investment programs to assist communities to transition to a future with less water'. In addition:

It is imperative that this significant reform is progressed without further delay. Continued deliberation and debate about the intent of the provisions of the Act is likely to contribute to further uncertainty for those potentially affected by the Basin Plan. This would not be in the best interest of the environment or the communities that depend on the resources of the Basin for their livelihoods.⁷⁸

3.65 The Australian Network of Environmental Defender's Offices (ANEDO) considered that the Water Act 'provides direction on what economic, social and environmental outcomes should be achieved, while setting out a path to return extraction in the Basin to sustainable levels'. It stated that amendments to the Water Act 'will not assist to achieve that purpose'. In particular, its view was that a requirement in legislation that a decision-maker 'give equal weighting' to environmental, social and economic considerations' would mean little in an operational sense:

It will not assist the MDBA and the Government in achieving the purpose of the Act which is to achieve long term sustainable extraction levels in the Basin. Although that formulation has superficial appeal, it is problematic and counterproductive in practice.⁷⁹

Despite calls for its inclusion in the Act there is in fact no understanding at all about what a 'triple bottom line' or an 'equal balancing' process would mean in this context. Is it a process requirement, where all three factors must be considered equally in developing the Plan? Is it a substantive requirement where the outcome of the Plan must be to equally balance all the social, economic and environmental factors that are relevant in the Basin? How could a decision-maker give equal weighting to

76 *Submission 45*, p. 1.

77 *Submission 45*, p. 1.

78 *Submission 86*, pp 1-2.

79 *Submission 16*, pp 2-3.

incommensurable factors? Any attempt to equally balance will always in fact be a value judgement by the decision-maker.⁸⁰

3.66 The Environmental Farmers Network also perceived a risk that '[l]egislation to change the Water Act 2007 would create further uncertainty in the irrigation industry and almost certainly move the MDBA into caretaker mode bringing to a halt all work on the Basin Plan'.⁸¹ In contrast, Cotton Australia considered that the potential risks of opening the Water Act for amendment could be mitigated if the major parties take a bi-partisan approach 'and limit changes to only those that will help deliver the balanced and holistic Basin Plan [they]...both...profess to want to achieve'.⁸²

3.67 Professor Lee Godden warned that caution should be exercised before any statutory amendments are contemplated. He argued that '[i]f 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 in Australia'.⁸³

Possible amendments

3.68 In general, submissions supporting the amendment of the Water Act proposed approaches to facilitate an equal weighting of environmental, social and economic consideration in the Water Act and/or the Basin Plan, also referred to as a 'triple bottom-line outcome'.⁸⁴ For example, Mr Paul McCormack stated:

The Water Act 2007 must be rewritten in order to give equal weighting to social, economic and environmental concerns relating to the Murray Darling Basin. Currently, the environment is given primacy according to the Act, and too much emphasis is placed upon international agreements and treaties.⁸⁵

3.69 The National Irrigators' Council (NIC) argued that the Water Act should be amended 'in order to deliver on the triple-bottom-line promise of COAG and the NWI [National Water Initiative] and deliver a balanced Basin Plan'. It noted:

While the Government has made clear its intention to deliver a triple-bottom-line outcome, we remain concerned that any resulting Plan could

80 *Submission 16*, pp 6-7.

81 *Submission 59*, p. 1.

82 *Submission 43*, p. 5.

83 *Submission 83*, p. 6.

84 For example, see Murrumbidgee Valley Food and Fibre Association, *Submission 11*, p. 1; NSW Irrigators' Council, *Submission 12*, p. 16; National Irrigators' Council, *Submission 19*, p. 10; Mr Patrick Byrne, Mr Ken Trewin and Mr Neil Eagle, *Submission 60*, p. 2.

85 *Submission 1*, p. 1

then be subject to legal challenge on the basis that it is not consistent with the Act as it currently stands.⁸⁶

3.70 NSWIC considered the crux of the Basin Plan to be the term 'long-term average sustainable diversion limit'. It proposed altering the definition of long-term average sustainable diversion limit within section 4 of the Water Act to include 'noting that at all times "sustainable" is to equally include environmental, social and economic aspects such that tradeoffs occur to balance all three'.⁸⁷

3.71 Similarly, Mrs Josephine Kelly proposed amending the definition in section 4 of the 'environmentally sustainable level of take' to include the 'object of optimising economic, social and environmental outcomes must be taken into account...'. She also proposed amending Item 4 of section 22 (which outlines the objectives and outcomes to be achieved by the Basin Plan) to include: *The objectives and outcomes must address (a) environmental, social and economic outcomes*.⁸⁸

3.72 Some submissions referred to the findings of the Productivity Commission in 2010 which recommended that the MDBA should set sustainable diversion limits in a way that balances environmental, social and economic tradeoffs. In its report, the Productivity Commission noted that this appears to be consistent with the objects of the Water Act but may not be consistent with the specific provisions defining how sustainable diversion limits are to be set. If the Water Act is inconsistent, the Productivity Commission recommended that it should be amended.⁸⁹

3.73 The Rural Issues Committee of the Law Society of NSW outlined a number of possible amendments and approaches to the Water Act. For example:

- amending section 3 (the objects section of the Water Act) to remove limitations on paragraph 3(c) and subparagraph 3(d)(iii); and
- including in section 20 (the section outlining the purpose of the Basin Plan) a requirement to minimise social dislocation or to maximise Australia's agricultural output in an environmentally sustainable manner.⁹⁰

86 Submission 19, p. 5.

87 Submission 12, p. 12.

88 Submission 54, p. 7. Italics in original.

89 Productivity Commission, *Market Mechanisms for Recovering Water in the Murray-Darling Basin*, Research Report, March 2010, p. 114. For example, Professor John Briscoe, Submission 2, p. 4; National Irrigators' Council, Submission 19, p. 9; Victorian Farmers Federation, Submission 55, p. 6.

90 Submission 51, p. 6.

Other approaches

3.74 Other more comprehensive reforms to the Water Act were also suggested in submissions. For example, Professor Briscoe's 'stark' conclusion was that the Water Act was founded on 'a political deception' and that Australia 'cannot find its way in water management if this Act is the guide'. He urged the government to 'start again, to re-define principles, to engage all who have a stake in this vital issue, and to produce, as rapidly as possible, a new Act which can serve Australia for generations to come'.⁹¹

3.75 The Rural Issues Committee of the Law Society of NSW also suggested that, in order to give economic and social considerations equal weight to environmental considerations, the Australian Government could renegotiate a referral of powers from the states to remove the reliance on the external affairs power. Alternatively the Australian Government could 'consider whether there are other international agreements that might provide balance in the Act'.⁹² Similarly, Murray Irrigation considered an optimal outcome would be for the Australian Government and states to negotiate a new cooperative agreement that allows for the introduction of uniform laws in each jurisdiction, 'enabling a triple-bottom-line Basin Plan to be developed while actual legislative control of Basin waterways is maintained by the States'.⁹³

3.76 These possibilities were also highlighted in other submissions. For example, Southern Riverina Irrigators concluded:

It is clear that the Act, as presently drafted, does not allow for equal consideration of social, economic and environmental factors. Further, it is clear that the Constitution does not grant the Commonwealth the power to rectify this on its own. SRI believe the best solution is for the Commonwealth to return to the negotiating table with the States to develop a new Inter-Governmental Agreement for uniform State laws or for a referral of powers to enable the development of an evenly balanced Basin Plan that addresses equally social, economic and environmental concerns.⁹⁴

Other related matters

3.77 A number of other matters were raised in evidence, primarily in relation to national water management issues.

3.78 For example, the National Irrigators' Council (NIC) was concerned that the Water Act and the Basin reform process were too focused on 'water and flow alone as a solution to the environmental problems of the river system'. It noted that the Water Act specifically precludes the Basin Plan from dealing with 'land-use or planning, management of natural resources other than water and control of

91 *Submission 2*, p. 6.

92 *Submission 51*, p. 4.

93 *Submission 23*, p. 3.

94 *Submission 52*, p. 4.

pollution'.⁹⁵ In NIC's view, this was 'a repudiation of some 30 years of integrated catchment management in [Australia] that has acknowledged that management must extend to matters such as land use, riparian vegetation, noxious weeds, invasive species and foreign fish species such as European carp. NIC submitted that the Water Act should be amended to require the MDBA to consider non-water related solutions to particular problems.'⁹⁶

3.79 Environmental issues were also frequently raised in submissions: in particular, the view that many problems have been created by the over-allocation and overuse of water in the Murray-Darling Basin. The Conservation Council of South Australia argued that the 'environmental health of the Murray Darling river system is the pre-requisite for social and economic wellbeing in the region'. In particular:

Let us not forget why the Water Act 2007 was created in the first place. Any river needs a minimum volume of water to function. Economic activity that relies on a healthy river will not be viable if the river does not have enough water to function. Communities that are built around economic activity throughout the Basin will also not be viable and attain wellbeing if the river does not have enough water to function.⁹⁷

3.80 The importance of water resources to the viability of communities and industries of the Murray-Darling Basin was a subject which was repeatedly raised.⁹⁸ Similarly, the importance of the Basin to Australian agriculture and food production was frequently emphasised.⁹⁹

3.81 A joint submission from Mr Patrick Byrne, Mr Ken Trewin and Mr Neil Eagle argued that reference to international agreements should be removed from the Water Act as 'they fail to describe the nature of the Murray-Darling Basin's climate and ecology'. They considered that '[a]ny references to biodiversity in the Basin must be qualified in the Act by recognising that native species experience major fluctuations across the Basin because of the extremes of natural climate variation',¹⁰⁰ and recommended as follows:

The Act needs to be amended so as to recognise that water availability in the Basin is highly variable, that the Basin's climate is not "static" but subject to long dry and long wet periods caused by natural, cyclical, inter-

95 Section 23 of the Water Act.

96 *Submission 19*, p. 10. Also see Cotton Australia, *Submission 43*, p. 3.

97 *Submission 3*, p. 3.

98 See, for example, Ms Helen Leach, *Submission 22*, p. 1; NSW Farmers' Association, *Submission 58*, pp 4-5; Ms Brigitte Bode, *Submission 82*, pp 1-2.

99 See, for example, Riverina and Murray Regional Organisation of Councils, *Submission 36*, p. 3; National Aglime Association, *Submission 47*, p. 1; NSW Farmers Association, *Submission 58*, p. 5; Mr Anthony Firth, *Submission 76*, p. 1; Mr Clinton Pagden, *Submission 79*, p. 1; Mr David Lindsay, *Submission 81*, *Supplementary submission*, p. 1.

100 *Submission 60*, p. 2.

decadal climate variations, which naturally cause major fluctuations in species numbers and biodiversity.¹⁰¹

3.82 Other submissions focused on specific water management issues, including:

- the Northern Victoria Irrigation Renewal Project;¹⁰²
- the diversion of Snowy River water to the Murray-Darling Basin (subsection 21(6) requires the Basin Plan to not be inconsistent with the provisions of the Snowy River Water Licence);¹⁰³
- duplication in the Water Act in state arrangements regarding water quality and salinity;¹⁰⁴
- the balance of accountability in the Water Act between the Commonwealth and the states;¹⁰⁵
- amendment of the Water Act to avoid conflicts of interest in the functions and powers of the MDBA;¹⁰⁶ and
- the administrative burden of water regulation on irrigators.¹⁰⁷

3.83 Mrs Vicki Dunne MLA, a member of the ACT Legislative Assembly, argued that the Water Act fails 'to acknowledge the special nature of the Australian Capital Territory as the home of the nation's capital and the federal parliament'.¹⁰⁸ She highlighted the importance of the ACT as the largest urban community in the Basin holding 17 per cent of the Basin's population and providing a variety of services to the surrounding region. Mrs Dunne argued that the distinctive characteristics and needs of the ACT have not been taken into account by the MDBA.

3.84 Mrs Dunne had commissioned a legal opinion on the legislative background of the ACT and its access to water 'which canvasses...the complex interrelationship between these pieces of legislation'. Based on this opinion, Mrs Dunne concluded that this matter was overlooked in the drafting of the Water Act and the compilation of the Guide to the Basin Plan.¹⁰⁹ She recommended that the Water Act should 'be amended

101 *Submission 60*, p. 2.

102 Mr Peter Murray, *Submission 74*, p. 1.

103 Snowy River Alliance, *Submission 35*, p. 6.

104 United Dairy Farmers of Victoria District Council 3, *Submission 29*, pp 7-8.

105 United Dairy Farmers of Victoria District Council 3, *Submission 29*, pp 8-9.

106 United Dairy Farmers of Victoria District Council 3, *Submission 29*, p 9.

107 Murrumbidgee Irrigation, *Submission 39*, p. 9.

108 *Committee Hansard*, 18 May 2011, p. 47.

109 *Submission 96*, p. 4.

to make it clear that the critical water needs of the Australian Capital Territory are protected in the same way that they were envisaged in 1909'.¹¹⁰

3.85 Community consultation issues were also raised in several submissions. These issues relate to events prior to the enactment of the Water Act and the development of the Guide to the Basin Plan. For example, Ms Caren Martin from Omega Orchards commented:

The Water Act 2007 goes to great lengths to appoint the Basin Community Committee and the Basin Officials Committee as the only needed avenue for consultation and advice. This creates a bottleneck of information to and from the community. The people on these committees are untouchable and don't adequately reflect the voice of the Basin Community. To take advice limited to one group stifles information flow and innovation to and from those who are most directly [a]ffected by policy decisions.¹¹¹

3.86 Similarly, the Murrumbidgee Valley Food and Fibre Association (MVFFA) argued that the lack of consultation has been problematic:

This whole process has claimed "wide consultation" and much "peer review". MVFFA does not believe that this has been the case. The Water Act 2007 should demand consultation with the people who know the practicalities of managing water and know the true condition and the true history of the [Murray-Darling Basin]. These people live and work in the [Murray-Darling Basin]. Some of these people are 3rd and 4th generation producers and have vast practical experience and vast knowledge of the system. We would also add that the definition of "consultation" is not just touring around and giving a power point presentation and then taking questions which are left unanswered.¹¹²

3.87 Finally, issues of equity were raised during the inquiry in relation to whether the early investment in water efficiency by farmers and irrigators (particularly in South Australia) is being adequately acknowledged in the Basin Plan. This includes the capacity of these 'early adopters' to access the government programs to increase water use efficiency in rural Australia. The Rural Issues Committee of the Law Society of NSW noted that this was 'a particularly difficult issue for policy makers':

There is no doubt that some water resource areas have already invested heavily in water efficiency measures using their own financial resources. Furthermore, individual irrigators within water resource areas have themselves invested substantial sums in water efficiency measures. The approach taken to date in water resource planning has generally been an across the board cut to meet diversion limits or targets. The question of how to deal with the farmer or group of farmers who are already using their

110 *Committee Hansard*, 18 May 2011, p. 47.

111 *Submission 98*, p. 4

112 *Submission 11*, p. 2.

water for the highest value use, using the most efficient technology available is difficult.¹¹³

3.88 The Rural Issues Committee stated that the socio-economic impact on different water users (those who have invested in water efficiency and those who have not) could be taken into account in the planning under the Water Act after a sustainable diversion limit is set. However, the fact that 'all or the majority of the irrigators in that area are as efficient as technology will allow' could not be taken into account in setting the sustainable diversion limit.¹¹⁴

3.89 The ANEDO argued that the consideration of efficient water use by early adopters would largely depend on the condition of the water 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:

[W]here 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 [sustainable diversion limits]. 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.¹¹⁵

3.90 Dr Anita Foerster and Associate Professor Alex Gardner listed a number of sections of the Water Act where water use efficiency could be relevant:

Water use efficiency is a factor that may be considered relevant to the objects of the Act, as a factor relevant to economic outcomes of water management and efficient and cost effective water management: s.3(c), (d)(iii) and (g). Water use efficiency is relevant to the purposes of the Basin Plan; it is relevant to optimising economic outcomes (s.20(d)), to applying the principles of ecologically sustainable development (ss.4(2) & 21(4)(a), to having regard to the consumptive and other economic uses of Basin water resources (s.21(4)(c)(ii)). Water use efficiency is, arguably, also relevant to the Plan content through the above provisions and through the requirements that the Basin Plan identify risks to the condition or continued availability of Basin water resources (s.22(1) item 3) and the strategies to manage those risks (s.22(1) item 5).¹¹⁶

3.91 They concluded that water use efficiency may be a relevant consideration but it is not a mandatory rule to apply in determining sustainable diversion limits under the Plan:

113 Response to question on notice provided 30 May 2011, p. 2.

114 Response to question on notice provided 30 May 2011, p. 2.

115 Response to question on notice provided 26 May 2011, p. 2.

116 Response to question on notice provided 30 May 2011, p. 2.

[W]hile water use efficiency may potentially be relevant to the initial consideration by the Authority of the social and economic impacts of proposed SDLs [sustainable diversion limits], and how to ensure economic and social outcomes are also optimised in a catchment, the treatment of certain groups of irrigators is more a matter for the subsequent planning process at the State level, through which the distribution of water available for use under the SDLs [sustainable diversion limits] among various entitlement holders can theoretically be revisited.¹¹⁷

3.92 The National Farmers' Federation noted that self-funded early adopters of water efficiency have retained all of their water entitlements, whereas those participating in government infrastructure or efficiency programs are required to give up some water entitlements in return for government investment. It noted that early adopters could be found across the Basin and that 'all irrigators have a choice about whether or not to participate in government programs – so this is [a] voluntary decision with consideration of all the positive and negative impacts to the farm business'.¹¹⁸

117 Response to question on notice provided 30 May 2011, p. 3.

118 Response to question on notice provided 2 June 2011, pp 1-2.

