

CHAPTER 4

Committee view and recommendations

4.1 The committee considers that the Water Act, as currently drafted, is uncertain and ambiguous, requiring amendment as a matter of priority to provide clarity for all concerned. Such uncertainty and ambiguity is exacerbated by the Australian Government's failure to release all relevant legal advice pertaining to possible interpretations of the Water Act. The committee is of the strong view that much of the potential for ambiguity seems to be generated by the Water Act's reliance on the external affairs power under section 51(xxix) of the Constitution. Left unresolved, this ambiguity risks increasing uncertainty for all who will be impacted by the development of the current Basin Plan, especially through the threat of High Court challenges and, indeed, could continue through the further planning processes required by the Water Act.

Amendment of the Water Act

4.2 Evidence to the committee outlined several different perspectives on how the provisions of the Water Act will address social, economic and environmental factors in the development of the Basin Plan. However, in the view of the committee, the current drafting of the Water Act does not provide adequate certainty regarding how water resources should be managed under the Basin Plan. This degree of uncertainty is not compatible with the stable and sustainable management of water resources in the Murray-Darling Basin. For example, it is not clear to the committee to what extent the term 'the productive base of the water resource', in the definition of 'environmentally sustainable level of take' in section 4 of the Water Act, will allow for the consideration of social and economic factors in the development of the Basin Plan.

4.3 The committee notes the statements by the Minister for Sustainability, Environment, Water, Population and Communities, Hon Tony Burke MP, that 'it is completely open to the Murray-Darling Basin Authority to go down a pathway which optimises all three – optimises environment, social and economic impacts'¹ and that 'there are a series of discretionary points where we can do exactly what the Act says is one of its objectives, and that's to optimise the environmental, social and economic outcomes'.² The committee also notes similar statements made by the chair of the MDBA, Mr Craig Knowles, that he is 'very comfortable that the scope of the legislation, the objectives of the legislation talk about optimising the economic, social

1 Hon Tony Burke MP, ABC1, *Lateline Transcript*, 26 October 2010, <http://www.abc.net.au/lateline/content/2010/s3049060.htm>, accessed 9 June 2011.

2 Hon Tony Burke MP, Press Conference Transcript, 9 February 2011, <http://www.environment.gov.au/minister/burke/2011/tr20110209.html>, accessed 9 June 2011.

and environmental outcomes as plain as day'³ and that he has 'enough scope in this Act to work on a balanced approach'.⁴

4.4 The committee is pleased with the assurances of the Minister and the MDBA that they are working towards a 'balanced approach' and urges them to strive to deliver such a Basin Plan without delay, as has been the stated intent of all governments since the passage of the Water Act. However, we are strongly concerned that, given the wide range of interpretations applied to the Act in the evidence provided to this inquiry, any plan delivered, whether balanced or not, will be subject to arguments that it may not comply with the requirements of the Act and may therefore be the subject of potential legal challenge. Such continued uncertainty and delay would be the worst of all outcomes for the environment, communities and economies of the Murray-Darling Basin.

4.5 In the committee's view, this level of uncertainty midway through the process to develop a Basin Plan threatens its community wide acceptance and hence its potential to be a long-term solution. A plan that is not based on robust evidence and informed by community-wide values about tradeoffs between economic, social and environmental factors will struggle to gain widespread acceptance. Meanwhile, a plan which fails to adhere to the requirements of the Act is at risk of legal challenge. Such ongoing uncertainty would be a disastrous outcome for all with an interest in the Basin. The environment will not be put on a sustainable footing and the communities in the Basin will struggle to attract and retain economic investment.

4.6 The argument has been made that there is sufficient scope for consideration of social and economic factors in provisions of the Water Act and the international agreements which the Water Act implements. However, it seems more likely to the committee that the use of the external affairs power, in conjunction with international agreements for the protection of the environment, has created a legislative framework in the Water Act for the development of the Basin Plan where environmental considerations can be, and are, given substantially more 'weight' than social and economic considerations.

4.7 Where there is a trade off between economic, social and environmental issues, environmental factors are paramount under the Water Act, however even those environmental factors are often ambiguous and open to wide interpretation. Economic and social considerations can be considered but only after an environmentally sustainable level of take is determined. There would appear to be no scope for the MDBA to reduce cuts to water use below an environmentally sustainable level of take

3 Mr Craig Knowles, ABC Radio, *PM Program Transcript*, 28 January 2011, [http://www.abc.net.au/pm/content/2011/s3124477.htm?site=ruralµsite=murraydarling§ion=audio&date=\(none\)](http://www.abc.net.au/pm/content/2011/s3124477.htm?site=ruralµsite=murraydarling§ion=audio&date=(none)), accessed 9 June 2011.

4 Mr Craig Knowles, 'Water plan shake-up', *Weekly Times*, 13 February 2011, http://www.weeklytimesnow.com.au/article/2011/02/13/292781_print_friendly_article.html, accessed 9 June 2011.

based on social, economic or other considerations. In the committee's view, this finding is consistent with the legal advice of the AGS and the approach taken by the MDBA in the Guide. Indeed, after the release of the Guide, the MDBA stated that regardless of the economic and social impacts, the Water Act did not let them choose cuts to water use below the minimum required for the environment – that is, below 3,000 GL as determined in the Guide.

4.8 For example, section 21 of the Water Act (General basis on which Basin Plan to be developed) gives precedence to the environmental considerations listed in subsections 21(1), 21(2) and 21(3) – including giving effect to environmental international agreements. Subsection 21(4) mentions some economic and social factors but these are 'Subject to subsections 21(1), 21(2) and 21(3)'. Therefore, it would appear that the Authority can not deviate from the requirements of sections 21(1), 21(2) and 21(3) when addressing matters in section 21(4).

4.9 The need for a balance between environmental, social and economic considerations was reflected in the recent House of Representatives Standing Committee on Regional Australia report on the impact of the Guide to the Murray-Darling Basin Plan. That committee expressed the view that a Basin Plan that balances the needs of the community and the economy with the needs of the environment can be achieved. In particular, it noted that '[n]o society can wantonly destroy the essential balance between social, environmental and economic outcomes'.⁵

4.10 The committee is also concerned that the current provisions of the Water Act do not appear to allow policy-makers, in the development of the Basin Plan, to find trade-offs between social, economic and environmental considerations. In particular, the provisions of the Water Act do not appear to allow for the MDBA or the Minister to give appropriate weight to economic, social and environmental considerations in order to balance these interests against each other. The committee's strong view is that this discretion should be clearly articulated in the Water Act, and that this does not necessarily detract from the overall broad purpose of the Water Act to return water to the environment.

Constitutional validity

4.11 The committee agrees that the ambiguities in the provisions of the Water Act, in relation to the development of the Basin Plan, have largely resulted from the absence of a clear constitutional power for the Commonwealth over water regulation in Australia. In the committee's view, the basis upon which the Water Act is established is unsound: there are clear question marks over the adequacy of the constitutional heads of power (namely, the external affairs power), as well as the limited state referral powers, upon which the Act relies.

5 House of Representatives Committee on Regional Australia House of Representatives Standing Committee on Regional Australia, *Of drought and flooding rains: Inquiry into the impact of the Guide to the Murray-Darling Basin Plan*, 2 June 2011, p. 22
<http://www.aph.gov.au/house/committee/ra/murraydarling/index.htm>, accessed 3 June 2011.

4.12 The amendment of the Water Act to provide that the Basin Plan is developed on an equally weighted consideration of social, economic and environmental factors may not, on its own, be sufficient to provide certainty for communities in the Basin. Any Commonwealth legislation for the overall regulation of water, which is primarily dependent on the external affairs power and international agreements for the protection of the environment for constitutional validity, risks a potential legal challenge in the High Court.

4.13 While no legislation will be completely immune from potential legal challenges, the Australian Government must take measures to strengthen its legal position in relation to the constitutional validity to the Water Act. These measures will assist in providing certainty to those with interests in the Murray-Darling Basin. A number of proposals were suggested during the inquiry which would enable this to occur. These include: referral of necessary authority under section 51 (xxxvii) of the Constitution from the Basin states; securing the passage of complimentary legislation in each jurisdiction; and the amendment of the Water Act to explicitly recognise that additional international agreements, in addition to those for the protection of the environment, are being implemented through the Water Act. The committee considers that genuine cooperation between the federal, state and territory governments on the approach to the regulation of water is the best solution to this issue.

Legal advice

4.14 The committee believes that the various reports of what legal advice has been provided to the Minister and the MDBA have not been conducive to the consultation process for the development of Basin Plan. In the view of the committee, residents of the Basin are entitled to be concerned when the MBDA and the Minister seemingly have different interpretations of the Water Act, based on legal advice from the same organisation – the Australian Government Solicitor.

4.15 The committee notes the position of the Attorney-General's Department that the release of relevant legal advice may be prejudicial to the interests of the Commonwealth. However, the initial view of the MDBA was that the release of this legal advice would be in the public interest and would assist public understanding of the provisions of the Water Act relating to the development of the Basin Plan. It is only the intervention of the Attorney-General's Department, presumably following consultation with the Attorney-General, which prevented this information from being released.

4.16 Minister Burke has already tabled advice from the Australian Government Solicitor on the role of social and economic factors in the Basin Plan. It has been suggested that the other relevant legal advice provided by the Australian Government Solicitor to the MDBA is consistent with the advice tabled by the Minister in Parliament. If this is the case, then the view of the committee is that the public interest weighs towards the advice being in the public domain. The committee calls on the Australian Government to publicly release the legal advice provided to the MDBA on 26 and 30 November 2010, and any other relevant legal advice, as a matter of priority.

Recommendation 1

4.17 The committee recommends that the Australian Government publicly release the legal advice on the *Water Act 2007* provided by the Australian Government Solicitor to the Murray-Darling Basin Authority on 26 November 2010 and 30 November 2010, and any other relevant legal advice, as a matter of urgency.

Recommendation 2

4.18 The committee recommends that the Australian Government appoint as a matter of urgency an independent panel of legal experts to review all relevant legal advice relating to the *Water Act 2007* for the purpose of recommending specific amendments to the Act to ensure:

- the Basin Plan has the security of sound legal underpinnings and certainty for all involved and affected;
- the Basin Plan balances the optimisation of environmental, social and economic considerations; and
- the Murray-Darling Basin Authority and the Minister are granted the discretion to give appropriate weight to economic, social and environmental considerations in order to balance these interests against each other.

Recommendation 3

4.19 Subject to Recommendation 2 and following the report of the independent panel of legal experts, the committee recommends that the Australian Government amend the *Water Act 2007* as a matter of urgency.

Recommendation 4

4.20 The committee recommends that the Australian Government take whatever measures are necessary to strengthen the constitutional validity of the *Water Act 2007*.

Senator Guy Barnett
Chair

