

DISSENTING REPORT BY GOVERNMENT SENATORS

1.1 Government Senators do not agree with the conclusions of the committee majority or the recommendations of the majority report.

Constitutional basis of the Water Act

1.2 Government Senators are concerned that the apprehensions expressed during the inquiry, regarding a possible constitutional legal challenge to the Water Act or the Basin Plan may be the result of misinformation on this issue. Section 9 provides that the Water Act relies on a number of constitutional heads of power as well as 'any implied legislative powers of the Commonwealth'. The 'external affairs' power, together with the other powers granted to the Commonwealth under the Australian Constitution, has been successfully utilised as the constitutional basis of a number of pieces of Commonwealth legislation.

1.3 This position was reflected in the joint submission to the inquiry from a number of academics with particular legal expertise in the area of water. In their joint submission, 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:

[I]t is open to the Commonwealth to legislate for the management of water resources in Australia under the external affairs power to give effect to Australia's international obligations under "relevant international agreement[s]": defined in Water Act s 4. The use of the external affairs power among other indirect heads of power to support Commonwealth legislation is a model that has operated within the cooperative federalism paradigm for many years now, not only in the areas of natural resource and environmental management. The law is well settled around the adoption of this model of federal powers.¹

1.4 The consensus framework established under the Water Act, as well as the continued opportunities for consultation and community input, mean also that it is in the best interests of all stakeholders to avoid litigation.

Legal advice

1.5 As noted in the correspondence from the Attorney-General's Department (AGD) to the Murray-Darling Basin Authority (MDBA) on 3 December 2010, under the Legal Services Directions 2005 made by the Attorney-General, constitutional and international law advice may only be provided to the Australian Government by the Solicitor-General, AGD and the Australian Government Solicitor (AGS). Further,

1 *Submission 75*, p. 5.

Government agencies must notify AGD of all significant legal matters and requests for constitutional advice.

1.6 These arrangements are designed so that the Australian Government can properly co-ordinate its engagement with constitutional issues. This is critically important, as an adverse decision of the High Court in relation to a particular governmental action, or Commonwealth legislative scheme, has the potential to remove altogether the Commonwealth's capacity to legislate in that area. Constitutional legal advice can reflect the Australian Government's view about its capacity to implement policy, not only in one particular case, but also in similar cases. This means that the release of constitutional legal advice can have significance beyond the particular legal issue under consideration.

1.7 Accordingly, Government Senators consider that the legal advice provided by AGS to the MDBA is advice which should not be publicly released. The release of this advice could prejudice the interests of the current Australian Government, as well as the interests of future governments. The release of advice that explores legal matters in detail would go against long established convention and practice. There are important public interest grounds, long recognised by successive governments, for keeping such material confidential.

1.8 While the Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, has released specific advice on the role of social and economic factors and the Basin Plan, this can be distinguished from the legal advice provided to the MDBA which should not be in the public domain. When requesting legal advice from AGS, Minister Burke made it clear that he intended to release that advice publicly. AGS was therefore able to prepare the material in such a way that informed the community, while protecting the Commonwealth's legal position. Minister Burke made clear that whatever the advice said, he would table it the same day that it was received. Government Senators note that this occurred.

1.9 Government Senators also note that AGS has confirmed to the Secretary of the Department of Sustainability, Environment, Water, Population and Communities that no variation of the summary advice of 25 October 2010 is required in light of further advice provided to the MDBA.

Possible amendment of the Water Act

1.10 Government Senators recognise the concerns expressed by communities in the Murray-Darling Basin following the release of the Guide to the proposed Basin Plan (Guide) by the MDBA. Following the release of the Guide by the MDBA, Minister Burke took steps to publicly clarify that the Guide was produced independently by the MDBA, ahead of the statutory consultation required by the Water Act, and does not represent government policy.

1.11 Government Senators believe that at the present time amendments to the Water Act are neither necessary nor desirable. The Government is clear in its direction for reform in the Murray Darling Basin. Minister Burke has said:

The key challenge before the Parliament is for this to be the term in which action is taken across the Basin to restore the system to health. We need to do this in a way which delivers three core outcomes:

- healthy rivers
- strong communities and
- food production.

These priorities do not need to be in competition with each other. Sensible reform will find a way to provide all three.²

1.12 Submissions and witnesses before the committee have largely agreed that these three priorities are both an appropriate and a desirable outcome of the reform.

1.13 On 25 October 2010, Minister Burke tabled in parliament summary legal advice on the extent to which the Water Act enabled the consideration of social and economic factors in determining Sustainable Diversion Limits in the Murray Darling Basin Plan. That advice shows that decision-making in the development of the Basin Plan involves the application of broad concepts and that there is considerable scope to consider how economic, social and environmental outcomes should be optimised. The Minister noted in his statement, '[i]t is clear from this advice that environmental, economic and social considerations are central to the Water Act and that the Basin Plan can appropriately take these into account'.³ Government Senators consider that the statement by the Minister, based on the tabled advice from AGS, continues to be an accurate description of the provisions of the Water Act.

1.14 As addressed in the Summary Advice released by Minister Burke, the overarching objective of the Water Act and the Basin Plan is to give effect to relevant international agreements, and the provisions of the Act relating to the Basin Plan are, to a large extent, supported by the treaty implementation aspect of the external affairs power in the Constitution. These agreements are international environmental agreements, including the Convention on Biological Diversity and the Ramsar Convention relating to wetlands. The Water Act makes clear that in giving effect to those agreements the Plan needs to optimise economic, social and environmental outcomes.

1.15 As the advice of 25 October 2010 outlined:

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- 2 Minister for Sustainability, Environment, Water, Population and Communities, Hon Tony Burke MP, 'Ministerial statement: Murray Darling Basin Reform – Interpretation of the *Water Act 2007*', 25 October 2010, p. 1.
 - 3 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'Ministerial statement – Murray-Darling Basin Reform – Interpretation of the *Water Act 2007*', *Media Release*, 25 October 2010, p. 4, <http://www.environment.gov.au/minister/burke/2010/pubs/sp20101025.pdf>, accessed 31 May 2011.

[T]he general and high level nature of the obligations under the Conventions and the provisions in the Act relating to the Conventions allow significant room for judgment as to the application of key provisions concerning sustainable use, wise use and overallocation. These discretionary judgments should, in accordance with the objects of the Act and purpose of the Plan, optimise economic, social and environmental outcomes.⁴

1.16 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 those outcomes. Such discretionary choices can include the determination of key environmental assets. The legal advice tabled by Minister Burke makes clear that the Water Act does not provide specific advice on which assets are 'key'. In determining these assets, the decision makers considerations can include the object of optimising social, economic and environmental outcomes.

1.17 Much discussion has surrounded whether or not the MDBA can propose a diversion limit which is higher than the environmentally sustainable level of take. This debate overlooks a critical factor: that by this point in the process the MDBA has already included socio-economic factors in determining the environmentally sustainable level of take.

1.18 Mr Rob Freeman from the MDBA was clear on this point in his evidence:

In determining what the environmental water requirements are, the authority takes into account economic and social factors.⁵

1.19 Having lived with years of drought and uncertainty, communities in the Murray-Darling Basin deserve a clear vision and plan for the future of the Murray Darling Basin. In the view of Government Senators, a re-examination of legislation which was passed with the support of both sides of parliament and which is critical to the development of the Plan is a distraction to the main business of water reform.

1.20 Government Senators also note the views expressed by the former Minister for Environment and Water Resources, the Hon Malcolm Turnbull MP, on this issue:

[C]laims that the Act prevent the MDBA from taking into account socio-economic issues in setting the SDLs [sustainable diversion limits] are contradicted by the [Water] Act and the Guide to the Basin Plan itself. The need to balance the claims of the environment against the needs of agriculture and other consumptive uses is quite explicitly set out in the Act. An amendment to make what is already explicit more explicit would not change one fact on the ground nor would it make any easier the difficult

4 AGS, 'The Role of Social and Economic Factors in the Basin Plan', 25 October 2010, pp 8-9.

5 *Committee Hansard*, 18 May 2011, p. 52.

task of balancing the claims of the environment and the claims of agriculture.

Because all this talk about the [Water] Act is really just a smoke screen obscuring the real issue which is (a) how many environmental assets are significant, how many of them do you want to preserve, and (b) how much water will need to be acquired to do that? You are weighing up red gum forests versus fields of grass for dairy cows to eat versus rice, wheat and vines. All of those questions are contentious and that is where the debate should be focussed not on the arid, uninformed debate about the interpretation of the Act.⁶

1.21 Critically, opening up the Water Act to amendment will create further confusion and uncertainty in communities. Amendments to complex legislative schemes, such as the Water Act, can take significant time to develop. Should parliament indicate its intention to amend the Water Act, it is very likely that the work of the MDBA would need to stop due to a lack of clarity around the legislative instrument under which they are operating. The development of the Basin Plan would certainly be delayed and such an action could delay water reform indefinitely.

1.22 In that context, Mr Matt Linnegar from the National Farmers' Federation indicated:

From our perspective, we are interested in the outcomes at the end of the day. If those outcomes provide the balance we are seeking, we all move along merrily. If they do not, then changes will be required.⁷

1.23 Government Senators agree that communities would be best served if the efforts of parliament were focused on constructive involvement in a process which delivers healthy rivers, strong communities and sustainable food production.

1.24 The MDBA has commissioned a detailed study into the likely social and economic impacts of the proposed Basin Plan on local communities.⁸ The MDBA has also stated it will consider the findings of the House of Representatives Standing Committee on Regional Australia inquiry into the Impact of the Murray-Darling Basin

6 Hon Malcolm Turnbull MP, 'The Water Act and the Basin Plan', 9 December 2010, <http://www.malcolmturnbull.com.au/blogs/the-water-act-and-the-basin-plan>, accessed 9 June 2011.

7 *Committee Hansard*, 18 May 2011, p. 27.

8 Murray-Darling Basin Authority, 'MDBA to commission further socio-economic study of the Basin', Media Release, 17 October 2010, http://www.mdba.gov.au/media_centre/media_releases/mdba-to-commission-further-socio-economic-study-of-the-basin, accessed 31 May 2011.

Plan in Regional Australia which was tabled on 2 June 2011.⁹ The MDBA has indicated it will take these new sources of information, together with the community feedback following the release of the Guide, into account in the proposed Basin Plan which is anticipated to be publicly available in the coming months.

1.25 The new Chair of the MDBA, Mr Craig Knowles, has made it clear that the MDBA intends to take a different approach to the development of the proposed Basin Plan. In particular, Mr Knowles has stated:

The Plan we put out in the next couple of months will of course comply with the Act and it will contain our best estimates of the sustainable diversion limits and the environmentally sustainable level of take. But the big thing that will be different to the Guide is that these numbers will not be an end point they will be the start of a process, a process to turn my plan into our plan. Where the Guide gave the image of a big cut all happening on one day our process will talk about how much we've already done and what's left to do.¹⁰

1.26 In the view of Government Senators, this approach to the Basin Plan should be given an opportunity to succeed before any amendments to the Water Act are contemplated.

Senator Trish Crossin
Deputy Chair

Senator Mark Furner

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- 9 Murray-Darling Basin Authority, 'Authority says findings will be considered', Media Release, 23 May 2011, http://www.mdba.gov.au/media_centre/media_releases/authority-says-findings-will-be-considered, accessed 31 May 2011; 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, <http://www.aph.gov.au/house/committee/ra/murraydarling/index.htm>, accessed 3 June 2011.
- 10 Murray-Darling Basin Authority, 'MDBA Chair Mr Craig Knowles' speech to the Sustaining Rural Communities Conference (Narrabri)', Media Release, 6 April 2011, http://www.mdba.gov.au/media_centre/media_releases/MDBA-chair-craig-knowles-speech, accessed 31 May 2011.