

The Senate

Legal and Constitutional Affairs
References Committee

A Balancing Act: provisions of the *Water Act 2007*

June 2011

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ABBREVIATIONS

ACT	Australian Capital Territory
AGD	Attorney General's Department
AGS	Australian Government Solicitor
ANEDO	Australian Network of Environmental Defender's Offices
Basin	Murray-Darling Basin
Basin Commission	Murray-Darling Basin Commission
COAG	Council of Australian Governments
GL	Gigalitre
Guide	Guide to the Proposed Basin Plan
MDBA	Murray-Darling Basin Authority
MOU	Memorandum of Understanding
NSW	New South Wales
NSWIC	New South Wales Irrigators' Council
NWI	National Water Initiative
Qld	Queensland
Ramsar Convention	Convention on Wetlands of International Importance, especially as Waterfowl Habitat
SA	South Australia
SDL	Sustainable Diversion Limit
Water Act	<i>Water Act 2007</i>
Waters Agreement	River Murray Waters Agreement
Vic	Victoria

RECOMMENDATIONS

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*.

CHAPTER 1

Introduction

1.1 On 9 February 2011, the Senate referred the provisions of the *Water Act 2007* (Cth) (Water Act) to the Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 11 May 2011. On 11 May 2011, the committee received an extension from the Senate for this inquiry to 6 June 2011 to enable a public hearing to be held in Canberra on 18 May 2011. On 6 June 2011, the committee tabled an interim report. The interim report stated that the committee required additional time to ensure that the issues raised during the inquiry were thoroughly considered and appropriately addressed, and that the committee intended to present its final report by 10 June 2011.

1.2 The terms of reference are as follows:

- (1) The provisions of the *Water Act 2007* (Act), with particular reference to the direction it provides for the development of a Basin Plan, including:
 - (a) any ambiguities or constraints in the Act which would prevent a Basin Plan from being developed on an equally weighted consideration of economic, social and environmental factors;
 - (b) the differences in legal interpretations of the Act;
 - (c) the constitutional power of the Commonwealth to legislate in the area of water;
 - (d) the role of relevant international agreements and the effect of those on the parts of the Act which direct the Basin Plan to give effect to those agreements and their effect on the Act more generally;
 - (e) any amendments that would be required to ensure that economic, social and environmental factors are given equally weighted consideration in developing the Basin Plan; and
 - (f) any other related matter.
- (2) That in conducting its inquiry, the committee should consult those with particular legal expertise in the area of water.

Scope of this report

1.3 The structure of this report is as follows:

- Chapter 2 outlines the background to the inquiry;
- Chapter 3 discusses the issues raised during the inquiry; and
- Chapter 4 provides the committee's view and recommendations.

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper and wrote to over 54 organisations and individuals, inviting submissions by 18 March 2011. Details of the inquiry were placed on the committee's website.

1.5 The committee received 100 submissions from various individuals and organisations, and these are listed at Appendix 1. Public submissions were placed on the committee's website.

1.6 A public hearing was held in Canberra on 18 May 2011. A list of the witnesses who appeared at the hearings is at Appendix 2, and copies of the *Hansard* transcript are available through the Internet at <http://www.aph.gov.au/hansard>.

Acknowledgement

1.7 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Note on references

1.8 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to proof *Hansard*: page numbers may vary between the proof and the official *Hansard* transcript.

CHAPTER 2

Background to the inquiry

Murray-Darling Basin

2.1 The Murray-Darling Basin (Basin) consists of 23 major river valleys, defined by the catchment areas of the Murray and Darling Rivers and their tributaries. It extends over one million square kilometres, covering the Australian Capital Territory (ACT), three-quarters of New South Wales (NSW), more than half of Victoria, and significant parts of Queensland and South Australia (SA).¹

2.2 More than 2.1 million people live in the Basin and a further 1.3 million people outside the Basin are dependent on its water.² Thirty-nine per cent of Australia's total agricultural production occurs in the Basin, known as 'Australia's food bowl', producing \$15 billion of produce each year (including grains, horticulture, fruit and nuts, grapes and other vegetables, crops, cotton, legumes and canola, pasture, cattle and other livestock). The Basin also contains about 65 per cent of Australia's irrigated land area, and around 40 per cent of Australia's farms.³

2.3 As well as contributing to Australia's economy, the Basin has environmental significance. It contains sensitive and ecologically important wetlands, which provide habitat for migratory birds, and other plants, animals and ecosystems that are nationally and/or internationally significant.⁴ According to the Murray-Darling Basin Authority (MDBA), the Sustainable Rivers Audit ecosystem health assessments for 2004-2007 found that 20 of the 23 major river valleys of the Basin were in poor to very poor ecological condition. However, in 2010 the Basin experienced its wettest spring on record after ten years of extreme drought.⁵

Historical regulation of the Murray-Darling Basin

2.4 Water management has long been an issue of national significance. Prior to federation, the colonies of NSW, Victoria and SA recognised the importance of managing water in the Murray River for use in farming and irrigation, and as a major

1 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 13, available from http://download.mdba.gov.au/Guide_to_the_Basin_Plan_Volume_1_web.pdf, accessed 27 May 2011.

2 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 15.

3 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 13.

4 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, pp 17-19.

5 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 18; Department of Sustainability, Environment, Water, Populations and Communities, 'Commonwealth Environmental Water Holder', <http://www.environment.gov.au/water/policy-programs/cewh/index.html>, accessed 27 May 2011.

transport route.⁶ The issue was also of concern during the Constitutional Convention Debates.⁷ Water management has largely been carried out cooperatively by the Australian Government, and the states and territories. The following section of this chapter sets out the history of regulation of the Basin before the creation of the Water Act.

River Murray Waters Agreement (1914)

2.5 The first agreement to regulate the use of Basin waters was the River Murray Waters Agreement (Waters Agreement). The Waters Agreement was signed by the Commonwealth, NSW, Victoria and SA in 1914, and took effect in 1915. In 1917, the River Murray Commission was established.⁸ The River Murray Commission's role was to regulate the main stream of the Murray River to ensure each of the three party states received their agreed water allocation.⁹

Expansion of the River Murray Commission's powers (1920s-1980s)

2.6 The River Murray Commission's powers were extended over the next forty years. However, its main role was to ensure that the states received their agreed water allocations.¹⁰ In the late 1960s, the River Murray Commission conducted investigations into salinity in the Murray Valley.¹¹ The results of these investigations led to an amendment of the Waters Agreement in 1982, to enable the River Murray Commission to also take account of water quality issues in its management of water.¹²

2.7 In 1984, the Waters Agreement was further amended to enhance the River Murray Commission's role to address environmental concerns, after evidence became available that land used in the catchment played an important role in relation to the successful management of the Basin's river systems.¹³

6 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

7 Kelly, N, 'A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use', *UNSW Law Journal*, (2007), vol. 30, no.3, p. 639.

8 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

9 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

10 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

11 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

12 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

13 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

2.8 Despite the expansion of the River Murray Commission's powers, by 1985 it had become clear to the Commonwealth and the states that the Waters Agreement and the River Murray Commission were unable to effectively manage the Basin's resources.¹⁴ State-based agencies were also seen as being unable to deal with developing inter-state issues, such as rising water salinity and irrigation-induced land salinity.¹⁵

Murray-Darling Agreement – 1987

2.9 With the acknowledgment that issues in the Basin were not confined to the states, a series of intensive negotiations were held between 1985 and 1987 between the Commonwealth, NSW, Victoria and SA on developing a more comprehensive approach to the management of resources and environmental issues in the Basin, specifically land degradation and salinity.¹⁶ These meetings resulted in the development of the Murray-Darling Basin Agreement (first Agreement) in 1987. The first Agreement led to the development of a process for the effective management of water and other resources across the Basin.¹⁷

Reforms – early 1990s

2.10 The signing of a new Murray-Darling Basin Agreement (second Agreement) in 1992 superseded the earlier Water Agreement and replaced the River Murray Commission.¹⁸ The Commonwealth, NSW, Victoria and SA legislatively ratified the second Agreement in 1993.¹⁹ Queensland and the ACT ratified the second agreement in 1996 and 1998, respectively.²⁰ The second Agreement also resulted in the creation of the Murray-Darling Ministerial Council, the Murray-Darling Basin Commission (Basin Commission), and the Community Advisory Committee.²¹

14 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

15 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

16 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

17 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

18 Murray-Darling Basin Commission, *Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/data/page/44/Murray-Darling_Basin_Agreement.pdf, accessed 17 February 2011.

19 *Murray-Darling Basin Act 1993* (Cth); *Murray-Darling Basin Act 1992* (NSW); *Murray-Darling Basin Act 1993* (Vic); *Murray-Darling Basin Act 1993* (SA).

20 *Murray-Darling Basin Act 1996* (Qld); the ACT formalised its participation through an MOU in 1998, and ratified in the *Murray-Darling Basin Agreement Act 2007* (ACT).

21 Murray-Darling Basin Commission, *The Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/the_mdbc_agreement.html, accessed 17 February 2011.

2.11 The Basin Commission was the executive arm of the Murray-Darling Ministerial Council, and was responsible to both the Murray-Darling Ministerial Council and the governments on the Murray-Darling Ministerial Council.²² The Basin Commission's main functions were to:

- advise the Murray-Darling Ministerial Council in relation to 'the planning, development and management of the Basin's natural resources'; and
- assist the Murray-Darling Ministerial Council in developing measures for the 'equitable, efficient and sustainable use of the Basin's natural resources'.²³

Intergovernmental Agreements – 1994-2004

2.12 In 1994, the Council of Australian Governments (COAG) adopted a strategy for the efficient and sustainable reform of the Australian water industry.²⁴ This strategy was further enhanced in 1996.²⁵ In 2004, COAG agreed to an Intergovernmental Agreement on a National Water Initiative (NWI).²⁶ Through the NWI, the Commonwealth, states and territories agreed on the importance of servicing the water needs of rural and urban communities while ensuring the health of river and groundwater systems. Under the NWI, governments made a number of commitments among other things to:

- return over-allocated water systems to sustainable levels of use;
- improve water planning, including through providing water to meet environmental outcomes;
- expand permanent trade in water;
- introduce better and more compatible registers of water rights and standards for water accounting; and
- improve the management of urban water.²⁷

22 Murray-Darling Basin Commission, *The Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/the_mdbc_agreement.html, accessed 17 February 2011.

23 Clause 17 of the former Murray-Darling Basin Agreement, Murray-Darling Basin Commission, *The Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/the_mdbc_agreement.html, accessed 17 February 2011.

24 COAG Communiqué, 25 February 1994, http://www.coag.gov.au/coag_meeting_outcomes/1994-02-25/index.cfm#water, accessed 17 February 2011.

25 Australian Government Solicitor (AGS), *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 2.

26 COAG Communiqué, 25 June 2004, pp 1-3, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

27 Australian Government Solicitor (AGS), *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 3.

2.13 In addition, the Commonwealth, NSW, Victoria, SA and the ACT signed an Intergovernmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray-Darling Basin.²⁸ The Intergovernmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray-Darling Basin had the following objectives:

- to establish a framework for implementation of the Parties' commitment to invest \$500 million to address water overallocation in the [Basin];
- to implement arrangements for cost effective, permanent, recovery of water to achieve the...environmental objectives of the Living Murray First Step decision...;
- to provide water on an on-going basis to meet agreed environmental objectives in the [Basin]; and
- to improve management of environmental water in the [Basin].²⁹

National Plan for Water Security – 2007

2.14 In January 2007, the Australian Government announced the National Plan for Water Security (Plan).³⁰ The Plan comprised ten points to improve water efficiency and address water over-allocation. It also proposed a number of initiatives, some of which were legislative, and others which would be addressed through programs, such as water buybacks and investment in irrigation infrastructure.³¹

Water Act 2007

2.15 After announcing the Plan, the government introduced the Water Bill 2007 in August 2007. It took effect in March 2008. The Water Act implemented a number of the reforms set out in the Plan, most particularly the provision for a Basin Plan that would set a 'sustainable diversion limit on surface and groundwater extraction in the Basin'.³² The provisions of the Water Act are discussed later in this chapter.

28 COAG Communiqué, 25 June 2004, pp 2-3, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011. Tasmania and Western Australia later signed in June 2005 and April 2006, respectively.

29 COAG Communiqué, 25 June 2004, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/docs/iga_water_overallocation_murray_darling.pdf, accessed 30 May 2011.

30 Australian Government, *A National Plan for Water Security*, 25 January 2007, p. 1, http://www.nalwt.gov.au/files/national_plan_for_water_security.pdf, accessed 17 February 2011.

31 Australian Government, *A National Plan for Water Security*, 25 January 2007, http://www.nalwt.gov.au/files/national_plan_for_water_security.pdf, accessed 17 February 2011.

32 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 3.

Murray-Darling Basin Memorandum of Understanding – 2008

2.16 Following the Water Act's commencement, the Commonwealth, NSW, Victoria, SA, Queensland and the ACT entered into a Memorandum of Understanding in relation to the Basin at a COAG meeting in March 2008.³³ It was agreed that further cooperative agreements would be implemented for the management of the water in the Basin, which built on arrangements established under the Water Act, particularly in relation to matters on which the Australian Government did not have the constitutional power to legislate.³⁴

Intergovernmental Agreement on Murray-Darling Basin Reform – 2008

2.17 In July 2008, COAG agreed to an Intergovernmental Agreement on Murray-Darling Basin Reform (2008 Intergovernmental Agreement).³⁵ The 2008 Intergovernmental Agreement set out further details of the cooperative arrangements, under which the Commonwealth, NSW, Victoria, SA, Queensland and the ACT agreed to renegotiate a revised Murray-Darling Basin Agreement. It was also agreed that the states would provide a limited referral of constitutional powers to the Commonwealth under subsection 51(xxxvii) of the Australian Constitution.³⁶ This resulted in the enactment of the *Water Amendment Act 2008* (Cth) (Water Amendment Act) by the Australian Parliament and the enactment of *Water (Commonwealth Powers) Acts* by relevant states.³⁷

Murray-Darling Basin Agreement – 2008

2.18 A new Murray-Darling Basin Agreement (Basin Agreement) was entered into on 1 December 2008, and took effect on 15 December 2008, concurrently with the

33 COAG Communiqué, 26 March 2008, p. 6, http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/index.cfm#water, accessed 17 February 2011.

34 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 3.

35 COAG Communiqué, 3 July 2008, p. 8, http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm#water, accessed 17 February 2011.

36 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 3.

37 *Water (Commonwealth Powers) Act 2008* (NSW); *Water (Commonwealth Powers) Act 2008* (Vic); *Water (Commonwealth Powers) Act 2008* (SA); *Water (Commonwealth Powers) Act 2008* (Qld).

Water Amendment Act, which inserted the Basin Agreement into the Water Act as a new Schedule 1.³⁸

2.19 The Basin Agreement provided that the Basin Commission would be abolished and its powers transferred to the Murray-Darling Basin Authority (MDBA).³⁹ In addition, the Basin Agreement conferred most of the functions of the former Murray-Darling Ministerial Council, and the Basin Commission's former role in relation to state water shares, on a new Murray-Darling Basin Ministerial Council (Ministerial Council).⁴⁰ The Basin Agreement also established the Basin Officials Committee,⁴¹ which advises the Ministerial Council.⁴²

2.20 The Basin Agreement may be amended by resolution of the Ministerial Council, with any amendment taking effect upon the registration of a legislative instrument by the Australian Government which amends Schedule 1 of the Act.⁴³ The Basin Agreement is currently being reviewed.⁴⁴

Murray-Darling Basin Ministerial Council

2.21 The Ministerial Council's functions are to:

- consider and determine outcomes and objectives on major policy issues of common interest to parties to the Basin Agreement in relation to the management of water and other natural resources of the Basin, including in relation to critical human water needs, to the extent that this is not provided for in the Basin Plan;
- make determinations about matters in the Basin Agreement;
- approve the annual corporate plan, budget and asset management plan prepared by the Murray-Darling Basin Authority; and

38 According to AGS, the 'inclusion of the...Agreement as a Schedule to the Act does not of itself give the Agreement the status of a law of the Commonwealth. [It] remains an intergovernmental agreement, with legal effect given only to those of its provisions that confer functions, powers and duties on the...Authority and...Committee' (referring to sections 18E and 18F of the Act), AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 22.

39 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 8.

40 Established by clause 7 of the Basin Agreement.

41 Subclause 17(1) of the Basin Agreement.

42 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 8.

43 See clause 5 of the Basin Agreement and section 18C of the Water Act.

44 Murray-Darling Basin Authority, 'Murray-Darling Basin Agreement', <http://www.mdba.gov.au/about/governance/murray-darling-basin-agreement>, accessed 22 February 2011.

- make any amendments to the Basin Agreement and its Schedules as it considers desirable.⁴⁵

Basin Officials Committee

2.22 The Basin Officials Committee has functions under both the Agreement and the Act.⁴⁶ Its functions under the Basin Agreement include:

- advising the Ministerial Council in relation to outcomes and objectives on major policy issues relating to the management of the water and other natural resources in the Murray-Darling Basin;
- giving effect to policies and decisions of the Ministerial Council when requested by the Ministerial Council to do so;
- exercising responsibility for high-level decision making in relation to river operations; and
- exercising the powers and discharging the duties conferred on it by the Basin Agreement or the Water Act.⁴⁷

Non-legislative implementation of water reform

2.23 The Australian Government has also used non-legislative measures to implement water reform, including water buy-backs.

2.24 In 2007, the Howard Government announced a National Plan for Water Security. Key parts of this \$10 billion program included the provision of funding to modernise irrigation infrastructure to increase the efficiency of water use and measures to address over-allocation in the Basin through assistance to reconfigure irrigation systems and retire non-viable areas.⁴⁸ More recently, the Water for the Future initiative, including the Sustainable Rural Water Use and Infrastructure Program and the Restoring the Balance in the Murray-Darling Basin Program, which are run by the Department of Sustainability, Environment, Water, Population and Communities, enable water entitlements to be purchased from willing sellers.⁴⁹

2.25 These programs link with reforms under the Water Act for the following reasons:

45 Clause 9 of the Basin Agreement.

46 See, for example, the Basin Officials Committee consultation role under sections 42, 46, 51, 86F and functions under section 201 of the Water Act.

47 Department of Sustainability, Environment, Water, Population and Communities, 'Restoring the Balance in the Murray-Darling Basin', <http://www.environment.gov.au/water/policy-programs/entitlement-purchasing/index.html>, accessed 17 February 2011.

48 Prime Minister the Hon John Howard MP, *A National Plan for Water Security*, 25 January 2007, pp 3-4, <http://trove.nla.gov.au/work/26242959>, accessed 7 June 2011.

49 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, pp 19-20.

- purchases of water will contribute to managing the impact of any Commonwealth share of reductions in or changes in reliability of water allocations under the risk assignment provisions; and
- purchased water will be managed by the Commonwealth Environmental Water Holder, which is established by Part 6 of the Water Act (discussed further below).⁵⁰

Other Commonwealth laws

2.26 In addition to the Intergovernmental Agreements, programs and the Water Act, the Australian Government Solicitor (AGS) has stated that there are also other Commonwealth laws which may impact upon water access entitlements, such as entitlements under the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth).⁵¹ Further, grants may be subject to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), water access entitlements granted to trading corporations are regulated by the *Corporations Act 2001* (Cth), and trading in water entitlements is subject to the *Trade Practices Act 1974* (Cth).

National Water Commission Act 2004 (Cth)

2.27 Pursuant to the Intergovernmental Agreement on a National Water Initiative, the Commonwealth established an independent statutory body, the National Water Commission, to assist with the implementation of that initiative. This was done under the *National Water Commission Act 2004*.⁵²

2.28 The National Water Commission's functions include:

- assisting with the implementation of, and promoting the objectives and outcomes of, the National Water Initiative;
- advising the Minister, the Commonwealth and COAG on water-related matters including:
 - matters of national significance relating to water;
 - Commonwealth programs relating to the management and regulation of Australia's water resources; and
- determining whether a state or territory is implementing its commitments under certain agreements between the Commonwealth and a state or territory relating to the management and regulation of water resources.⁵³

50 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 19.

51 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 17. See, for example, Section 24HA of the *Native Title Act 1993* (Cth).

52 Section 6 of the *National Water Commission Act 2004*.

53 Section 7 of the *National Water Commission Act 2004*.

2.29 Under the *National Water Commission Act 2004*, the National Water Commission is required to undertake a comprehensive review of the 2004 National Water Initiative in 2010–2011.⁵⁴ The National Water Commission is also responsible for auditing the effectiveness of the implementation of the Basin Plan and accredited water resource plans under Part 3 of the Water Act.⁵⁵

Provisions of the *Water Act 2007*

2.30 The key objectives of the Water Act are to:

- establish the Murray-Darling Basin Authority (MDBA) and the Commonwealth Environmental Water Holder (Water Holder);
- provide for the development of a Basin Plan; and
- provide for the management of the Ministerial Council and Basin Officials Committee.

Objectives of the Water Act

2.31 The objectives of the Water Act include:

- enabling the Commonwealth, NSW, Victoria, SA, Queensland and the ACT to manage the Basin's water resources 'in the national interest';
- to give effect to international agreements relevant to the use and management of Basin water resources, and to 'provide for special measures, in accordance with those agreements, to address threats to the Basin water resources';
- in giving effect to those international agreements, to promote the use and management of the Basin water resources 'in a way that optimises economic, social and environmental outcomes':
 - to ensure the return to environmentally sustainable levels of extraction;
 - 'to protect, restore and provide for the ecological values and ecosystem services of the Basin'; and
 - subject to the above two factors, to maximise economic returns to the community from the use and management of the Basin water resources;
- to improve water security of the Basin water resources; and
- to ensure that the management of the Basin water resources takes into account the broader management of natural resources in the Basin.⁵⁶

54 Subsection 7(2) of the *National Water Commission Act 2004*.

55 Part 3 of the Water Act.

56 Section 3 of the Water Act.

Murray-Darling Basin Authority

2.32 The MDBA is established by the Water Act.⁵⁷ The MDBA is a body corporate and is subject to the *Financial Management and Accountability Act 1997* (Cth).⁵⁸ Membership of the MDBA consists of a Chair and four part-time members.⁵⁹ The MDBA staff are employed under the *Public Service Act 1999* (Cth).⁶⁰

2.33 The MDBA must prepare an annual corporate plan and budget, and an asset management plan which is approved by the Ministerial Council;⁶¹ and must carry out its functions in accordance with the Basin Agreement and other corporate documents.⁶²

Functions

2.34 The MDBA has two main types of functions in relation to water management in the Basin. The first are conferred under the Water Act, including:

- preparing a Basin Plan and amendments to the Basin Plan;
- advising the Minister on accrediting state water resource plans;
- enforcing the Basin Plan; and
- monitoring the quality and quantity of Basin water resources and associated ecosystems.⁶³

2.35 The MDBA's other functions are those which were previously functions of the Basin Commission. These are conferred on the MDBA under the Water Act, which provides that the MDBA has, in a referring state or territory, the functions, duties and powers conferred on it by or under the Basin Agreement, in relation to the water and the natural resources of the Basin.⁶⁴

2.36 In addition, the MDBA is responsible for:

57 Section 171 of the Water Act; and Division 1 of Part 9 of the Water Act more generally.

58 See subsection 176(1) of the Water Act and item 154 of the table in Schedule 1 to the Financial Management and Accountability Regulations 1997.

59 Section 177 of the Water Act.

60 Section 206 of the Act.

61 Clauses 34 and 53 of the Agreement, respectively, as set out in Schedule 1 of the Water Act.

62 Subclause 29(2) of the Basin Agreement, as set out in Schedule 1 of the Water Act.

63 The functions of the Murray-Darling Basin Authority are set out under section 172 of the Water Act.

64 Section 18E of the Water Act.

- managing the River Murray and the Menindee Lakes system of the lower Darling River, with the water held in the system being shared between NSW, Victoria and South Australia under the terms of the Agreement;⁶⁵
- advising the Ministerial Council on matters related to the management of the water and other environmental resources of the Murray-Darling Basin;⁶⁶ and
- managing the River Murray in order to distribute water in accordance with the water sharing provisions in Parts XII, XIII and XIV of the Basin Agreement.⁶⁷

Basin Plan and water resource plans

2.37 Under the Water Act, the MDBA is required to prepare a Basin Plan for the responsible Minister, who is ultimately responsible for making the Basin Plan.⁶⁸ The Basin Plan works through the operation of catchment-level water resource plans, which are generally prepared by the states. New state water resource plans must be 'accredited' by the Minister and must be consistent with the Basin Plan.⁶⁹

2.38 The Basin Plan must provide for:

...the integrated management of the Basin water resources in a way that promotes the objects of [the Water] Act, in particular by providing for:

- (a) giving 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
- (b) 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 (including by interception activities); and
- (c) Basin-wide environmental objectives for water-dependent ecosystems of the Murray-Darling Basin and water quality and salinity objectives; and
- (d) the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes; and
- (e) water to reach its most productive use through the development of an efficient water trading regime across the Murray-Darling Basin; and

65 Item 98 of the Agreement, as set out in Schedule 1 of the Water Act. See also Murray-Darling Basin Authority, 'Basin Agreement rules applied as Authority assumes control of Menindee Lakes water', *Media Release*, 12 April 2010, http://www.mdba.gov.au/media_centre/media_releases/mr-assuming-control-of-menindee, accessed 7 June 2011.

66 Item 29 of the Agreement, as set out in Schedule 1 of the Water Act.

67 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 10.

68 Section 44 of the Water Act.

69 Sections 55 and 63 of the Water Act.

- (f) requirements that a water resource plan for a water resource plan area must meet if it is to be accredited or adopted under Division 2; and
- (g) improved water security for all uses of Basin water resources.⁷⁰

2.39 In addition, the Water Act sets out the general basis on which the Basin Plan is to be developed. In particular, the Basin Plan:

- 'must be prepared so as to provide for giving effect to relevant international agreements';⁷¹
- without limiting the first objective, the Basin Plan must also be prepared having regard to the fact that:
- 'the use of the Basin water resources has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity'; and
- 'the Basin water resources require, as a result, special measures to manage their use to conserve biodiversity';⁷²
- promote the sustainable use of the Basin water resources to protect and restore the ecosystems, natural habitats and species reliant on the Basin water resources and to conserve biodiversity;⁷³
- without limiting the first objective, promote both 'the wise use' of Basin water resources and the conservation of 'declared Ramsar wetlands', and take account of 'ecological character descriptions' of Ramsar wetlands and other key environmental sites prepared in accordance with the National Framework and Guidance for Describing the Ecological Character of Australia's Ramsar Wetlands, endorsed by the Natural Resource Management Ministerial Council;⁷⁴ and
- subject to the above considerations, the MDBA and the Minister 'must, in exercising their powers and performing their functions':
 - take into account the principles of ecologically sustainable development;
 - act on the basis of the best available scientific knowledge and socio-economic analysis; and
 - have regard to the following considerations:
 - the National Water Initiative;
 - consumptive and other economic uses of Basin water resources;

70 Section 20 of the Water Act.

71 Subsection 21(1) of the Water Act.

72 Paragraph 21(2)(a) of the Water Act.

73 Paragraph 21(2)(b) of the Water Act.

74 Subsection 21(3) of the Water Act.

- the diversity and variability of the Basin water resources and the need to adapt management approaches to that diversity and variability;
- the management objectives of the Basin States for particular water resources;
- social, cultural, Indigenous and other public benefit issues;
- broader regional natural resource management planning processes;
- the effect, or potential effect, of the Basin Plan on the use and management of water resources that are not Basin water resources;
- the effect, or the potential effect, of the use and management of water resources that are not Basin water resources on the use and management of the Basin water resources;
- the state water-sharing arrangements; and
- any other arrangements between states for the sharing of water.⁷⁵

Requirements of Basin Plan

2.40 The Water Act establishes the mandatory content of a Basin Plan.⁷⁶ Most significantly, a Basin Plan must include a specific limit on the quantity of water that may be taken, on a sustainable basis, from the Basin as a whole, and a limit on the quantities of water that can be taken from the 'water resources, or parts of the water resources, of each catchment area' (known as 'sustainable diversion limits').⁷⁷

2.41 'Sustainable diversion limits' are the amounts of water which can be used for consumption, by way of all forms of extraction, after the environmental requirements have been met.⁷⁸ These limits must reflect an 'environmentally sustainable level of take'.⁷⁹ This is the level of water extraction from a water resource which, if exceeded, would compromise the resource's key environmental assets, key ecosystem functions, productive base or key environmental outcomes.⁸⁰ Limits may be expressed as a formula or in any other way that the MDBA determines to be appropriate.⁸¹

75 Subsection 21(4) of the Water Act.

76 Section 22 of the Water Act.

77 Item 6 of section 22 of the Act.

78 Consumption includes use of water for watercourse diversions, floodplain harvesting and for water taken by farm dams and for forestry: Murray-Darling Basin Authority, 'FAQs: Sustainable Diversion Limits', http://www.mdba.gov.au/basin_plan/faqs/sdl#What_sustainable_diversion_limit, accessed 24 February 2011. See also section 23 of the Water Act.

79 Subsection 23(1) of the Water Act.

80 Section 4 of the Water Act.

81 Subsection 23(2) of the Water Act.

2.42 Other mandatory content includes:

- identification of risks to Basin water resources, such as climate change, and strategies to manage those risks;⁸²
- an environmental watering plan;⁸³
- a water quality and salinity management plan which must include objectives and targets;⁸⁴
- requirements that a state or territory water resource plan will need to comply with in order for them to be accredited;⁸⁵ and
- rules about the trading of water rights in relation to Basin water resources.⁸⁶

2.43 Under Part 2A of the Water Act, the Basin Plan must also deal with matters in relation to critical human water needs. These are defined as the minimum amount of water that can only reasonably be provided from Basin water resources, which are required to meet both core human consumptions in urban and rural areas and 'those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs'.⁸⁷

Compliance with Basin Plan

2.44 The Australian Government and its agencies must perform their functions in a manner which gives effect to the Basin Plan and water resource plans.⁸⁸ Agencies in NSW, Victoria and SA, including operating authorities and holders of water access rights, must not act inconsistently with the Basin Plan or water resource plans.⁸⁹ The MDBA has enforcement powers in relation to both the Basin Plan and water resource plans.⁹⁰

Consultation on the Basin Plan

2.45 There are consultation requirements for the development of a Basin Plan. The MDBA must consult with the relevant states and territories, the Basin Officials

82 Item 3 of section 22 of the Water Act.

83 Item 9 of section 22; and section 28 of the Water Act.

84 Item 10 of section 22; and section 25 of the Water Act.

85 Item 11 of section 22; and Division 2 of Part 2 of the Water Act.

86 Item 12 of section 22; and section 26 of the Water Act.

87 Section 86A of the Water Act.

88 Sections 34, 58 and 86G of the Water Act.

89 Sections 35, 59 and 86H of the Water Act.

90 Part 8 of the Water Act.

Committee, the Basin Community Committee,⁹¹ and members of the public.⁹² Further, when preparing water trading rules, the MDBA must obtain and consider the advice of the Australian Competition and Consumer Commission (ACCC).⁹³

2.46 After the MDBA has provided the Minister with a draft Basin Plan, the Minister may adopt the plan or require the MDBA to further consider it.⁹⁴ The Minister may not request modifications which relate to matters that are of a factual or scientific nature or relate to risk allocation.⁹⁵

2.47 Amendments to the Basin Plan are also subject to consultation requirements.⁹⁶ In addition, the MDBA may propose its own amendments to the Basin Plan.⁹⁷

Allocation of risks

2.48 Under the 2004 National Water Initiative, the Commonwealth and the states and territories agreed on a 'risk assignment framework' in relation to reductions or less reliable allocations of water.⁹⁸ The framework provides for three types of circumstances in relation to the 'risk of reductions in or less reliable water allocations', namely:

- those caused by 'seasonal or long-term changes in climate' and 'periodic natural events such as bushfires and drought' – are to be borne by water access entitlement holders;⁹⁹
- those arising as a result of the capacity of 'bona fide improvements in the knowledge of water systems' to sustain particular extraction levels' are to be borne by water access entitlement holders up to the year 2014 and, after 2014,

91 The Basin Community Committee is an advisory committee established under section 202 of the Water Act. Its function is to advise the MDBA about the performance of the MDBA's functions, including advising about: (a) engaging the community in the preparation of each draft Basin Plan; (b) community matters relating to Basin water resources; and (c) matters referred to it by the MDBA.

92 See, for example, sections 43 and 43A of the Water Act.

93 Section 42 of the Water Act.

94 Section 44 of the Water Act.

95 Subsection 44(5) of the Water Act.

96 Sections 46, 47 and 47A of the Water Act.

97 Section 45 of the Water Act.

98 COAG Communiqué, 25 June 2004, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

99 Clause 48 of the 2004 COAG Intergovernmental Agreement on a National Water Initiative, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

are to be shared in certain proportions between water access entitlement holders, the states and territories and the Commonwealth;¹⁰⁰ and

- those arising from 'changes in government policy (for example, new environmental objectives)' are to be borne by governments.¹⁰¹

2.49 The Water Act, as originally enacted, implemented this arrangement.¹⁰² However, the 2008 Intergovernmental Agreement led to an amendment of these provisions, which has resulted in the Commonwealth taking on the states and territories' share of risk in some circumstances.¹⁰³

2.50 The extent of the Commonwealth's responsibility for risk is to be specified in the Basin Plan. This occurs by allocating to each of the three categories of risk a proportion of the reduction in the sustainable diversion limit or the change in reliability.¹⁰⁴ However, the Act does not specify what steps the Commonwealth must take to manage this risk.¹⁰⁵

2.51 If the Commonwealth does not completely mitigate the impact of reductions that are its responsibility and, as a result, there is a reduction in either allocations to a person's water access entitlement or the reliability of a person's allocations, the Commonwealth can be liable to pay an amount to offset the loss in market value of the entitlement.¹⁰⁶ The Minister will determine whether a water access entitlement holder qualifies for the payment, and the quantum of any payment.¹⁰⁷ The Administrative Appeals Tribunal may review any determination made by the Minister.¹⁰⁸

100 Clause 49 of the 2004 COAG Intergovernmental Agreement on a National Water Initiative, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

101 Clause 50 of the 2004 COAG Intergovernmental Agreement on a National Water Initiative, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

102 Division 4 of Part 2 of the Water Act.

103 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 13.

104 Sections 76 and 82 of the Water Act.

105 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 13.

106 Sections 77 and 83 of the Water Act.

107 Subsection 77(3) and (4); subsections 83(5) and (6) of the Water Act.

108 Subsections 77(7) and 83(8) of the Act.

State water-sharing arrangements

2.52 NSW, Victoria and SA have rights to use the Basin water, as set out under the Basin Agreement.¹⁰⁹ Further, the Basin Plan must consider conditions for triggering one of the three tiers of water-sharing arrangements:

- Tier 1 arrangements – these are essentially the same water-sharing arrangements that existed under the former Murray-Darling Basin Agreement;
- Tier 2 arrangements – these are triggered when Tier 1 arrangements will not be sufficient to ensure that there is enough water to meet water needs;¹¹⁰ and
- Tier 3 arrangements – these are triggered in circumstances of extreme and unprecedented low water availability or quality.¹¹¹

Critical water needs

2.53 The Basin Plan must also specify water quality and salinity trigger points at which the Murray-Darling becomes unsuitable for meeting critical human water needs.¹¹² If the trigger points are met, the MDBA must develop and implement an emergency response.¹¹³ The agreement of the Ministerial Council is required if the response affects the state water-sharing arrangements referred to above.¹¹⁴

Water charge rules

2.54 The Minister is able to make water charge and water market rules, subject to the ACCC's advice.¹¹⁵ The Water Act sets out objectives and principles for water

109 Clauses 88, 94 and 128 of the Basin Agreement, as set out in Schedule 1 of the Act.

110 Section 86D of the Water Act and clause 131 of the Basin Agreement, as set out in Schedule 1 of the Water Act. Once the Basin Plan takes effect, the circumstances in which Tier 1 arrangements will not be sufficient will be specified in the Basin Plan. Under Tier 2 arrangements, Tier 1 arrangements apply, subject to the provisions of a Schedule made by the Ministerial Council under clause 132 of the Basin Agreement. According to AGS, until this Schedule is made, Tier 1 arrangements apply, subject to any agreement by Ministers of the contracting states. When the Basin Plan is made, it will contain provisions that, if a Schedule has not already been made, will act as a default Schedule under Tier 2 until the Ministerial Council determines otherwise under subclause 135(10)): AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 14.

111 Section 86E of the Water Act and clause 133 of the Basin Agreement, as set out in Schedule 1 of the Act. Similarly with Tier 2 arrangements, once the Basin Plan takes effect, the circumstances that constitute unprecedented low water availability and quality will be specified in the Basin Plan.

112 Paragraph 86B(1)(c) of the Water Act.

113 Section 86F of the Water Act.

114 Subsection 86F(2) of the Water Act.

115 Part 4 of the Water Act.

charging, market and trading.¹¹⁶ The ACCC is responsible for enforcing the water charge and water market rules.¹¹⁷

2.55 The Minister may also make water market rules relating to the acts of irrigation infrastructure operators which prevent or delay the making of 'transformation arrangements'. These rules seek to enable trade of water access rights within the Basin.¹¹⁸ 'Transformation' is relevant to trade as often irrigators do not hold water access entitlements directly under state law. Often these entitlements are held collectively by irrigation infrastructure operators on behalf of their members.¹¹⁹

Commonwealth Environmental Water Holder

2.56 A statutory office of the Commonwealth Environmental Water Holder is established under the Water Act.¹²⁰ The Water Holder manages the Commonwealth's water holdings to give effect to relevant international agreements, and must be managed in accordance with the environmental watering plan which forms part of the Basin Plan.¹²¹

2.57 The Commonwealth's water holdings are largely acquired through purchasing arrangements and may only be disposed of in limited circumstances.¹²²

Information about water

2.58 The Water Act also confers functions on the Bureau of Meteorology relating to the collection, holding, management, interpretation and dissemination of Australia's water information.¹²³ A National Water Account must be published regularly;¹²⁴ and National Water Information Standards are issued which may deal with, for example, the measurement and analysis of water, and the reporting of water information.¹²⁵

2.59 The Water Act provides two mechanisms by which a person can be required to provide water information to the Bureau of Meteorology: in compliance with regulations which specifies persons or classes of persons that must provide specified

116 Schedules 2 and 3 of the Water Act.

117 Part 8 of the Water Act.

118 Section 97 of the Water Act.

119 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 16.

120 Part 6 of the Water Act.

121 Section 105 of the Water Act.

122 Section 106 of the Water Act.

123 Part 7 of the Water Act.

124 Section 122 of the Water Act.

125 Section 130 of the Water Act.

water information to the Bureau;¹²⁶ and pursuant to a requirement to give water information made by the Director of Meteorology.¹²⁷

Constitutional powers used to enact the Water Act

2.60 In its Briefing Note No. 90, the Australian Government Solicitor (AGS) advises that 'there is no express legislative power of the Commonwealth to enact a law providing for regulation of water usage' in Australia.¹²⁸ Accordingly, the Water Act relies on a number of constitutional powers under the Australian Constitution.

2.61 AGS states that the most significant constitutional powers under the Australian Constitution used to enact the Water Act are:

- the external affairs power (subsection 51(xxix)), in implementation principally of Australia's obligations under the Convention on Biological Diversity and the Ramsar Convention on Wetlands, but also obligations under other treaties listed in section 4 of the Act under the definition of 'relevant international agreement';
- the corporations power (subsection 51(xx)), in relation to the regulation of the activities of trading or financial corporations concerning water and water access entitlements;
- the interstate trade and commerce power (subsection 51(i)), in relation to the promotion and regulation of interstate trade in water access entitlements; and
- the powers relating to meteorological observations (subsection 51(viii)) and census and statistics (subsection 51(xi)), which support the Bureau of Meteorology's water information functions.¹²⁹

Constitutional powers used to amend the Water Act

2.62 As discussed earlier in this chapter, to amend the Water Act in 2008 by way of the Water Amendment Act, the Commonwealth relied upon subsection 51(xxxvii) of the Constitution, which provides that the Commonwealth may legislate in relation to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any state or states, but so that the law shall extend only to states by whose parliaments the matter is referred, or which afterwards adopt the law.

126 Section 126 of the Water Act and also Part 7 of the Water Regulations 2008.

127 Section 127 of the Water Act.

128 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 18.

129 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 18.

2.63 The relevant states and territories enacted legislation to refer powers to the Australian Parliament, which then relied on these references to support a number of the reforms implemented by the Water Amendment Act.¹³⁰

Other constitutional powers

2.64 AGS advises that section 100 of the Australian Constitution 'acts as a restriction on the use of the Commonwealth's legislative power' in relation to water.¹³¹ This section provides that:

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.

2.65 AGS states that section 100 is not a source of legislative power in itself, but it provides that, when the Commonwealth enacts a 'law or regulation of trade or commerce', which affects the 'waters of rivers', the Commonwealth law 'must not impair the reasonable use of that water by a State or the residents of that State'.¹³² As a result:

...section 100 will not be relevant to significant aspects of the Water Act that are not laws of 'trade or commerce'. Where it is relevant, it only protects 'reasonable' use'.¹³³

2.66 Noting the comments of then Justice Mason of the High Court of Australia in *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 154–155, AGS concludes:

...the purpose of section 100 lies in the importance of the River Murray to [NSW], Victoria and [SA] and the residents of those States, and their apprehension as to the impact of the Commonwealth's legislative powers under subsections 51(i) (interstate and overseas trade and commerce) and 98 (navigation and shipping) of the Constitution. In particular, it appears that it is an aspect of the compromise reached in the federation debates between [SA] (which successfully argued for the Commonwealth to have power to facilitate trade and commerce, navigation and shipping on the River Murray (sections 51(i) and 98)) and [NSW] and Victoria (which

130 The mechanics of the referral are set out in the COAG Intergovernmental Agreement on Murray-Darling Basin Reform—Referral, entered into by the Commonwealth and relevant states, which includes a commitment by the Commonwealth not to amend the referred provisions of the Water Act without the agreement of the referring states, http://www.coag.gov.au/intergov_agreements/docs/murray_darling_basin_referral.pdf, accessed 22 February 2011.

131 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 18.

132 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 19.

133 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 19.

successfully argued for some limitation on this power to protect their 'reasonable use' of the water in the River Murray system (section 100)).¹³⁴

Relevant international agreements

2.67 Two of the international agreements that the Water Act relies upon are the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) and the Convention on Biological Diversity.¹³⁵

2.68 However, the Water Act defines 'relevant international agreement' to include:

- the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Desertification Convention);¹³⁶
- the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention);¹³⁷
- the Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment (China-Australia Migratory Bird Agreement – CAMBA);¹³⁸
- the Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment (Japan-Australia Migratory Bird Agreement – JAMBA);¹³⁹
- the Agreement between the Government of Australia and the Government of the Republic of Korea on the protection of Migratory Birds (Republic of Korea-Australia Migratory Bird Agreement – ROKAMBA);¹⁴⁰
- the Framework Convention on Climate Change (Climate Change Convention);¹⁴¹ and

134 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 19.

135 Convention on Wetlands of International Importance especially as Waterfowl Habitat [1975] ATS 48; Convention on Biological Diversity [1993] ATS 32.

136 Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa [2000] ATS 18.

137 Convention on the Conservation of Migratory Species of Wild Animals [1991] ATS 32.

138 Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment [1981] ATS 6.

139 Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment [1988] ATS 22.

140 Agreement between the Government of Australia and the Government of the Republic of Korea on the protection of Migratory Birds [2007] ATS 24.

141 Framework Convention on Climate Change [1994] ATS 2.

- 'any other international convention to which Australia is a party' which is relevant to the 'use and management of the Basin water resources' and 'prescribed by the regulations'.¹⁴²

Recent events

Release of the Guide to the Proposed Basin Plan – October 2010

2.69 The Guide to the Proposed Basin Plan (Guide) was released by the MDBA on 8 October 2010. The Guide noted that, in order to meet the environmental objectives under the Water Act, an amount of between 22,100 and 26,700 gigalitres was required. This would require an additional volume of between 3,000 and 7,600 gigalitres annually from the current diversion limits.¹⁴³ However, the Guide noted that sustainable diversion limits in this range would 'have significant negative implications on some Basin communities, industries, enterprises and individuals' and that these effects would vary in each catchment and community, 'depending on a complex array of factors'.¹⁴⁴

2.70 As a result, the Guide stated:

In light of the severity of this impact on specific sectors and communities, the Authority has judged that in order to optimise social, economic and environmental outcomes, as it is obliged to do under the [Water Act], it can only consider Basin-wide reductions of between 3,000 and 4,000 [gigalitres per year] for the Basin (reductions of 22-29% of current diversion limits). That is, reductions in current diversions above 4,000 [gigalitres per year] have been judged to be beyond the range of acceptable reductions. A reduction in current water diversions of 3,000-4,000 [gigalitres per year] (or greater than 29%) would represent a reduction in gross value of irrigated agricultural production of around 13-17%, or \$0.8-1.1 billion per year.¹⁴⁵

2.71 As discussed earlier in this chapter, sustainable diversion limits are set according to each catchment area. The sustainable diversion limits must be implemented in state water resource plans, and the effect of these limits on individual water entitlement holders in those states is set out under those state water resource plans.¹⁴⁶

142 Section 4 of the Water Act. It does not appear that any Regulations have been made for the purpose of section 4 of the Water Act.

143 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 57.

144 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 81.

145 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 82.

146 Murray-Darling Basin Authority, 'Basin Plan Guide released for public discussion', *Media Release*, 8 October 2010, <http://www.mdba.gov.au/files/Media-release-Basin-Plan-Guide.pdf>, accessed 22 February 2011.

2.72 Following the release of the Guide in October 2010, a series of public consultations were held by the MDBA in relation to the Guide affected regions during October and November 2010. At the consultations, users of the Basin's waters expressed their strong concerns about the effect that the sustainable diversion limits would have on their livelihoods and local communities.¹⁴⁷

Other inquiries

House of Representatives Standing Committee on Regional Australia

2.73 On 14 October 2010, the Hon Simon Crean MP, Minister for Regional Australia, Regional Development and Local Government, the Hon Tony Burke MP, the then Minister for Sustainable Population, Communities, Environment and Water, and Senator the Hon Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, announced a parliamentary inquiry into the impact of the Basin Plan in regional Australia.¹⁴⁸ The inquiry was undertaken by the House of Representatives Standing Committee on Regional Australia. The Committee released its report, *Of drought and flooding rains*, on 2 June 2011.¹⁴⁹ The Chair of Committee, Mr Tony Windsor MP stated:

The findings of this report show that there are win-win solutions to a lot of the problems in the Basin and that there is a better way through. It will still mean some change, but not great pain, as had been suggested by others.¹⁵⁰

2.74 The report made 21 recommendations, including recommendations which cover:

- improving the way the MDBA proceeds in the next stages in the Basin Planning process;
- stopping all non-strategic water buybacks immediately;

147 See, for example, Anne Delaney 'Massive water meeting for Griffith', ABC Riverina, 15 October 2010, <http://www.abc.net.au/local/stories/2010/10/15/3039023.htm>, accessed 27 May 2011.

148 Joint Media Release, the Hon Simon Crean MP, Minister for Regional Australia, Regional Development and Local Government, the Hon Tony Burke MP, Minister for Sustainable Population, Communities, Environment and Water, and Senator the Hon Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, http://www.minister.regional.gov.au/sc/releases/2010/october/sc005_2010.aspx, accessed on 22 February 2011.

149 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.

150 House of Representatives Standing Committee on Regional Australia, 'Regional Committee release report on impacts of the Guide to the proposed Murray-Darling Basin Plan', *Media Release*, 2 June 2011, <http://www.aph.gov.au/house/committee/ra/murraydarling/media.htm>, accessed 3 June 2011.

- establishing a national water fund to invest in water saving projects, environmental works and measures, strategic purchase of water entitlements and research to improve irrigation efficiency;
- the creation of a government owned corporation, a joint venture with state and territory governments, to manage the national water fund; and
- the creation of a standalone Commonwealth Environmental Water Holder.¹⁵¹

Murray-Darling Basin Authority's social and economic study

2.75 On 17 October 2010, the MDBA announced that a detailed social and economic study would be undertaken into the 'likely social and economic impacts of the proposed Basin [P]lan on local communities'.¹⁵² While the study was due to report in March 2011, the MDBA has deferred the release of the report due to recent flooding in some communities.¹⁵³

Senate Standing Committee on Rural Affairs and Transport

2.76 On 28 October 2010, the Senate referred an inquiry into management of the Murray-Darling Basin, and the development and implementation of the Basin Plan, to the Senate Rural Affairs and Transport References Committee, for inquiry and report by 30 November 2011.¹⁵⁴

Ministerial Statement and AGS advice – 25 October 2010

2.77 On 25 October 2010, the Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities issued a Ministerial Statement on the interpretation of the Water Act.¹⁵⁵ In that statement, the Minister noted that the

151 House of Representatives Standing Committee on Regional Australia, 'Regional Committee release report on impacts of the Guide to the proposed Murray-Darling Basin Plan', *Media Release*, 2 June 2011, <http://www.aph.gov.au/house/committee/ra/murraydarling/media.htm>, accessed 3 June 2011.

152 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 22 February 2011.

153 Murray-Darling Basin Authority, 'Clarification of release of socio-economic study', *Media Release*, 23 March 2011, http://www.mdba.gov.au/media_centre/media_releases/clarification-of-release-of-socio-economic-study, accessed 26 April 2011.

154 *Journals of the Senate*, 28 October 2010, pp 235-236.

155 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'Murray Darling Basin Reform – Interpretation of the Water Act 2007', *Ministerial statement*, 25 October 2010, <http://www.environment.gov.au/minister/burke/2010/pubs/sp20101025.pdf>, accessed 18 February 2011.

MDBA 'has been reported as saying that the Act requires a focus on environmental issues first, with limited attention to social and economic factors'.¹⁵⁶ He advised that he had obtained legal advice from the AGS which had been provided to the Opposition, the Australian Greens and the independents.

2.78 Further, the Minister stated:

Much has been made of the international agreements which underpin the [Act] and it's been suggested that these agreements prevent socio-economic factors being taken into account. In fact, these agreements themselves recognise the need to consider these factors.

The Act specifically states that in giving effect to those agreements, the plan should promote the use and management of the basin water resources in a way that optimises economic, social and environmental outcomes.

It is clear from this advice that environmental, economic and social considerations are central to the [Act] and that the Basin Plan can appropriately take these into account.

I do not offer the advice as a criticism of the [MDBA]. What is important now is how the [MDBA] now responds to it.¹⁵⁷

Nature of the AGS advice

2.79 The AGS advice by Mr Robert Orr QC, Chief General Counsel, and Ms Helen Neville, Senior General Counsel, dated 25 October 2010, sets out the role that the social and economic factors have in the development of a Basin Plan.¹⁵⁸

2.80 In that advice, AGS observes that 'international agreements themselves recognise economic and social factors, and their relevance to decision making'. Further, AGS notes that the Water Act makes it clear that, in giving effect to those agreements, the Plan 'needs to optimise economic, social and environmental outcomes'.¹⁵⁹ AGS advises that neither the Convention on Biological Diversity or the Ramsar Convention requires contracting states to 'disregard economic and social considerations in giving effect to the environmental obligations'. Instead:

156 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'Murray Darling Basin Reform – Interpretation of the Water Act 2007', *Ministerial statement*, 25 October 2010, p. 3, <http://www.environment.gov.au/minister/burke/2010/pubs/sp20101025.pdf>, accessed 18 February 2011.

157 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, , 'Murray Darling Basin Reform – Interpretation of the Water Act 2007', *Ministerial statement*, 25 October 2010, p. 4, <http://www.environment.gov.au/minister/burke/2010/pubs/sp20101025.pdf>, accessed 18 February 2011.

158 AGS, 'The Role of Social and Economic Factors in the Basin Plan', 25 October 2010.

159 AGS, 'The Role of Social and Economic Factors in the Basin Plan', 25 October 2010, p. 1.

Both Conventions establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allows consideration of social and economic factors.¹⁶⁰

Response from the Murray-Darling Basin Authority

2.81 On 26 October 2010, the MDBA issued a media release stating that, in developing the Guide to the Murray-Darling Basin Plan, the MDBA had 'sought and relied on policy guidance' by the Minister's Department, and had consulted AGS for legal interpretation, including having the Guide reviewed by the AGS prior to its release.¹⁶¹ The MDBA's then Chair, Mr Michael Taylor AO, stated that the MDBA would 'clarify with the AGS any divergence between that advice and the position previously advised'.¹⁶²

2.82 On 1 December 2010, Mr Robert Freeman, then Chief Executive Officer of the MDBA, sought the advice of the Attorney-General's Department regarding the release of AGS advice on public interest grounds. This AGS advice related to economic and social considerations under the Water Act.¹⁶³ On 3 December 2010, the Attorney-General's Department replied that the advice in question should not be released. In particular, it noted the AGS advice 'exposes not only matters in relation to which the Commonwealth could be expected to claim legal professional privilege in any litigation surrounding this scheme, but matters which may have implications for other schemes supported by the external affairs and other powers'.¹⁶⁴

2.83 On 7 December 2010, Mr Taylor announced his resignation. His media release stated:

Mr Taylor noted that, balancing the requirements of the [Act] 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 [Act], and in close consultation with [AGS]. However, the [MDBA] has sought, and obtained, further confirmation that it cannot compromise the

160 AGS, 'The Role of Social and Economic Factors in the Basin Plan', 25 October 2010, p. 8.

161 Murray-Darling Basin Authority, 'MDBA welcomes Minister's Statement', *Media Release*, 26 October 2010, http://www.mdba.gov.au/media_centre/media_releases/mdba-welcomes-ministers-statement, accessed 22 February 2011.

162 Murray-Darling Basin Authority, 'MDBA welcomes Minister's Statement', *Media Release*, 26 October 2010, <http://www.mdba.gov.au/files/Media-release-Basin-Plan-Guide.pdf>, accessed 22 February 2011.

163 Attorney-General's Department, *Answer to question on notice from additional estimates hearing 22 February 2011*, Question No. 60, p. 2.

164 Attorney-General's Department, *Answer to question on notice from additional estimates hearing 22 February 2011*, Question No. 60, p. 2.

minimum level of water required to restore the system's environment on social or economic grounds.¹⁶⁵

2.84 On 28 January 2011, the Minister appointed Mr Craig Knowles as the new Chair of the MDBA.¹⁶⁶

2.85 On 12 May 2011, the Minister announced that Mr Robert Freeman would be resigning as Chief Executive Officer of the MBDA for personal reasons, effective 1 June 2011, and would be taking a part-time role with the National Water Commission.¹⁶⁷

165 Murray-Darling Basin Authority, 'Plan for the Murray-Darling Basin – Role of Authority Chair', *Media Release*, 7 December 2010, http://www.mdba.gov.au/files/Media-release-Role-of-Authority-Chair_0.pdf, accessed 22 February 2011.

166 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'New Chair for Murray-Darling Basin Authority', *Media Release*, 28 January 2011, <http://www.environment.gov.au/minister/burke/2011/mr20110128.html>, accessed 10 May 2011.

167 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'Appointments of new chief executive of the Murray-Darling Basin Authority & new chair of the National Water Commission', *Media Release*, 12 May 2011, <http://www.environment.gov.au/minister/burke/2011/mr20110512.html>, accessed 13 May 2011.

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 gegalitres. 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 gegalitres to 4,000 gegalitres...

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.

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&action=audio&date=\(none\)](http://www.abc.net.au/pm/content/2011/s3124477.htm?site=ruralµsite=murraydarling&action=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

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:

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.malcolmtturnbull.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.

DISSENTING REPORT BY THE AUSTRALIAN GREENS

1.1 The crisis in the Murray-Darling Basin is real. It is a situation that has social, economic and environmental consequences that we cannot keep hiding from. Leading scientists are telling us and have been telling us for years that we must as a nation significantly reduce the amount of water being taken from the Basin. Without a healthy river system we will not have a healthy food bowl and basin communities will continue to suffer.

1.2 The majority report outlines the complicated history of regulation of the Murray-Darling Basin and the various interventions of the Commonwealth since Federation leading up to the passing of the *Water Act 2007* (Water Act). Prior to the Water Act it had become patently clear that the water resources of the Basin had been severely mismanaged for decades, with significant environmental consequences as well as damage to the future of productive uses of the Basin water and the future of Basin communities.

1.3 The Water Act is recognition that the Commonwealth must play a key role in the management of the Basin and it builds on the National Water Initiative to 'establish clear pathways to return all water sources to environmentally sustainable levels of extraction'. It is recognition that 'long term economic and social values associated with the Basin water resources depend on maintaining environmental values and achieving environmentally sustainable levels of water extraction'.¹

1.4 The issue before the committee in this inquiry is essentially a legal one that goes to the constitutional basis of the Water Act and the related parameters of developing the Basin Plan under the Act.

1.5 The external affairs power provides a key constitutional underpinning of the Act and the international conventions including, the Ramsar Convention and the Convention on Biological Diversity, are relied upon in this context. The Basin Plan must therefore be prepared to give effect to these conventions. The conventions themselves allow for the consideration of social and economic impacts.

1.6 The legal evidence to the inquiry is clear that, given the reliance on the external affairs power as well as the stated objects of the Water Act, the Murray-Darling Basin Authority (MDBA) and the Minister are required to give environmental considerations precedence in developing the Basin Plan. Social and economic factors

1 Joint Statement on the Water Act 2007 (Cth), *Submission 75*, p. 2.

must also be taken into account but the Act prioritises a scientific assessment of sustainable extraction.²

1.7 What is clearly apparent from the Guide to the Draft Basin Plan is that the MDBA did indeed take into consideration social and economic factors in developing the Guide. The best scientific evidence suggested a reduction of over 7000GL is needed to restore the environmental integrity of the Basin; however, after taking into account social and economic impacts, the Guide recommended reductions of only 3000 – 4000GL. As the Guide itself notes, reductions at the lower end will rely on wetter conditions to meet the environmental obligations of the Act.

1.8 The call for there to be a 'balance' or to 'give equal weighting' between environmental, social and economic considerations in setting sustainable diversion limits fails to acknowledge the reality that without a healthy environment there cannot be healthy communities or sustainable productive use from the Basin. Furthermore, as explained by the Australian Network of Environmental Defender's Offices, 'a requirement in legislation that a decision-maker "give equal weighting" to environmental, social and economic considerations means very little operationally. 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'.³

1.9 The Australian Greens do not support amendments to the Water Act that put its constitutionality in doubt or fundamentally changes its objectives in ensuring long-term sustainability of the Basin's water resources by setting appropriate scientifically-based diversion limits.

1.10 While the MDBA could have undertaken its responsibilities under the Act in developing the Guide to the Draft Basin Plan in a more consultative manner and better explained its process and intended outcomes, those problems were not a result of the Water Act.

Senator Sarah Hanson-Young

2 See Gilbert + Tobin Centre of Public Law, *Submission 15*; Joint Statement on the Water Act 2007 (Cth), *Submission 75*; and Australian Network of Environmental Defender's Offices, *Submission 16*.

3 Australian Network of Environmental Defender's Offices, *Submission 16*, p.7.

ADDITIONAL COMMENTS BY SENATOR NICK XENOPHON

1.1 Any consideration of the *Water Act 2007* needs to take into account the following issues:

- the importance of the Murray-Darling Basin as playing a key role in Australia's food supply, and the importance of having a healthy river system to sustain this;
- the variability of the climate in the Murray-Darling Basin, and the resulting highly variable water flows in the Basin;
- the future effects of climate change on the environment of the Basin, as predicted by the CSIRO; and
- the power of the states, and the power of the Murray-Darling Basin Authority (MDBA) to enforce the proposed Basin Plan.

1.2 In addition, I draw attention to the issue of 'early adopters'; that is, irrigators and farmers in the Basin who have already taken steps to implement water saving technologies. Many of these early adopters are based in South Australia, where irrigators in the Riverland have spent many millions of dollars of their own money to implement water saving technologies since the late 1960s. This means that they are now generally not able to access the Water for the Future scheme, of which irrigators upstream are now taking advantage. In essence, irrigators and farmers who took steps to become more efficient early on are now at a distinct disadvantage.

1.3 Further, this is particularly important in the context of the MDBA's Guide to the Proposed Basin Plan, in which the MDBA outlines the dollar value per hectare of irrigated product in each area of the Basin (table reproduced overleaf).¹

1 Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan*, 2010, p. 95.

Table 7.1 Average non-irrigated gross value of agricultural production per hectare, and average gross value of irrigated agricultural production per hectare, by Basin region

Region	Average gross value of non-irrigated agricultural production (\$/ha)	Average gross value of irrigated agricultural production (\$/ha)
Condamine	106	4,028
Border Rivers (QLD)	145	6,348
Border Rivers (NSW)	145	4,049
Warrego	15	3,747
Paroo	80	6,602
Namoi	200	2,752
Macquarie	127	3,310
Moonie	109	3,627
Gwydir	165	3,285
Barwon Darling	25	2,487
Lachlan	147	2,934
Murrumbidgee	189	2,149
Ovens	488	7,025
Goulburn Broken	461	4,496
Campaspe	546	4,142
Wimmera	291	4,813
Loddon	366	2,236
Murray (NSW)	79	1,702
Murray (VIC)	79	4,261
Lower Murray Darling	79	7,024
SA Murray	79	9,176
Eastern Mount Lofty Ranges	411	8,241
Basin average	184	3,295

Source: adapted from ABARE (2010) (see notes for Figure 7.3)

1.4 It is critical in considering a Basin Plan that the relative efficiencies of each area are taken into account when allocating resources. Low efficiency areas must have an onus placed on them to improve, while credit needs to be given to early adopters in more efficient areas.

1.5 In addition and critically, the MDBA's Guide to the Proposed Basin Plan also emphasises the importance of an open Murray Mouth to the health of the Basin as a whole.² It states:

...an open mouth is essential to the environmental health of the Basin for a range of reasons including:

- export of salt and nutrients from the Basin — without salt export land will salinise and water quality will deteriorate with negative effects on both the environment and consumptive use for all irrigation and human water needs throughout the Basin
- a healthy Coorong — tidal exchange between the Southern Ocean and the Coorong is important in maintaining water quality in the Coorong

2 Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan*, 2010, pp 113-114.

(particularly the southern Coorong) and in maintaining water levels that inundate mudflats, which are important habitat for a range of plant and animal species

- assist with maintaining a range of healthy estuarine, marine and hypersaline conditions in the Coorong, including healthy populations of 'keystone' species such as tuberous tassel in the South Lagoon and widgeon grass in the North Lagoon
- migration of diadromous fish species (fish that require access to both fresh and saline water to complete their life cycle) — seven such species, including common galaxias and estuary perch, require this connectivity.³

1.6 It is vital that this aim continues to be a priority in considering a Plan for the Basin, because if the river system is not healthy, not only are the ecosystems of the river at risk, but also the viability of agriculture in the Basin.

Senator Nick Xenophon
Independent Senator for South Australia

3 Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan*, 2010, p. 113.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Mr Paul McCormack
2	Professor John Briscoe
3	Conservation Council of South Australia
4	Mrs Robyn O'Bryan
5	Ms Faye Shepherd
6	Mr Glenn Osboldstone
7	Mr Gary Hughes
8	Mr Rob Kane
9	Mr Bill Hampel
10	Mr Alan Carpenter
11	Murrumbidgee Valley Food and Fibre Association
12	NSW Irrigators' Council
13	Dr A K Lethlean
14	Ms Maria Riedl
15	Gilbert + Tobin Centre of Public Law
16	Australian Network of Environmental Defender's Offices
17	Clarence Valley Conservation Coalition
18	Fair Water Use (Australia)
19	National Irrigators' Council
20	Riverina Citrus
21	Ms Jane Judd
22	Ms Helen Leach
23	Murray Irrigation Limited
24	Mr Walter Morrison
25	Australian Water Campaigners
26	Nature Conservation Council of NSW
27	Murray Group of Concerned Communities

28	Ryde-Hunters Hill Flora and Fauna Preservation Society
29	United Dairy Farmers of Victoria District Council 3
30	Dr Kerri Muller
31	River, Lakes and Coorong Action Group
32	Environment Victoria
33	High Security Irrigators – Murrumbidgee
34	Clarence Environment Centre
35	Snowy River Alliance
36	Riverina and Murray Regional Organisations of Councils
37	Ms Kim Wheatley
38	National Farmers' Federation
39	Murrumbidgee Irrigation
40	Ms Judith Turley
41	Ms Kate McLaren
42	Gwydir Valley Irrigators Association
43	Cotton Australia
44	Border Rivers Food and Fibre
45	Friends of the Earth Melbourne
46	Inland Rivers Network
47	National Aglime Association
48	Blue Mountains Conservation Society
49	Ricegrowers' Association of Australia
50	Mr Rob Smyth
51	The Law Society of New South Wales
52	Southern Riverina Irrigators
53	Manduka Cooperative
54	Mrs Josephine Kelly
55	Victorian Farmers Federation
56	Ms Betty Nyman
57	Ms Bev Smiles
58	NSW Farmers' Association
59	Environmental Farmers Network
60	Mr Patrick Byrne, Mr Ken Trewin and Mr Neil Eagle

61	Confidential
62	Southern Sydney Branch of the National Parks Association of NSW
63	Mudgee District Environment Group
64	Ms Meg Stewart
65	Ms Alanna Moore
66	Mr Peter Cowman
67	Mr James Moore
68	Name Withheld
69	Ms Shirley Drake
70	Ms Beth Williams
71	Name Withheld
72	Mr Ron Webster
73	Australian Conservation Foundation
74	Mr Peter Murray
75	Professor Douglas Fisher, Associate Professor Alex Gardner, Professor Lee Godden, Ms Janice Gray, Professor Jan McDonald, Dr Chris McGrath, Associate Professor Poh-Ling Tan
76	Mr Anthony Firth
77	Griffith Business Chamber
78	National Parks Association of NSW
79	Mr Clinton Pagden
81	Mr David Lindsay
82	Ms Brigitte Bode
83	Professor Lee Godden
84	Mr Terence Dwyer
85	Ms Alzana Brown
86	The Hon Paul Caica MP, South Australian Minister for the River Murray and Minister for Water
87	Mr L Wray
88	Mr John Bentley
89	Mr and Mrs Ian and Robyn Crush
90	Ms Elisabeth Brasseur
91	Mr M Lloyd
92	Mr and Mrs Richard and Helena Roberts

93	Ms Alison Walpole
94	Dr Kris Deuar
95	Peel Valley Water Users Association
96	Mrs Vicki Dunne MLA
97	Ms Louise Burge
98	Ms Caren Martin, Omega Orchards
99	Mr Ronald Wilde
100	Murray Darling Association

Form letters

Form letter received by 8 individuals

ADDITIONAL INFORMATION RECEIVED

- 1 Response to question on notice provided by Attorney-General's Department on 27 May 2011
- 2 Response to questions on notice provided by Australian Network of Environmental Defender's Office on 26 May 2011
- 3 Response to questions on notice provided by Dr Anita Foerster and Associate Professor Alex Gardner on 30 May 2011
- 4 Response to questions on notice provided by Rural Issues Committee, Law Society of New South Wales on 30 May 2011
- 5 Response to questions on notice provided by Department of Sustainability, Environment, Water, Population and Communities on 31 May 2011
- 6 Response to question on notice provided by National Farmers' Federation on 2 June 2011
- 7 Response to questions on notice provided by the Murray-Darling Basin Authority on 2 June 2011

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 18 May 2011

BOUWHUIS, Mr Stephen, Assistant Secretary, Office of International Law, Attorney-General's Department

BRISCOE, Professor John, Private capacity

CORKE, Mr Kerry, Adviser to Mrs Vicki Dunne MLA

DUNNE, Mrs Vicki, Shadow Attorney-General and Shadow Minister for Water, ACT Legislative Assembly

FAULKNER, Mr James, Assistant Secretary, Constitutional Policy Unit, Attorney-General's Department

FOERSTER, Dr Anita, Research Associate, Centre for Resources, Energy and Environmental Law

FREEMAN, Mr Rob, Chief Executive Officer, Murray-Darling Basin Authority

GARDNER, Associate Professor Alexander, Private capacity

GREGSON, Mr Andrew, Chief Executive Officer, New South Wales Irrigators' Council

KELLY, Mrs Josephine, Private capacity

KERR, Ms Deborah, Manager, Natural Resource Management, National Farmers' Federation

LINNEGAR, Mr Matt, Chief Executive Officer, National Farmers' Federation

O'BRIEN, Mr Daniel David, Chief Executive Officer, National Irrigators' Council

PARKER, Mr David, Deputy Secretary, Water Group, Department of Sustainability, Environment, Water, Population and Communities

RIVERS, Ms Nicola, Law Reform Director, Australian Network of Environmental Defender's Offices

RYAN, Ms Georgiena, Member, Rural Issues Committee, Law Society of New South Wales

SLATYER, Mr Tony, First Assistant Secretary, Water Reform Division, Department of Sustainability, Environment, Water, Population and Communities

SYDES, Mr Brendan, Chief Executive Officer, Australian Network of Environmental Defender's Offices