



Murray Darling Basin

Royal Commission:

Issues Paper 2

Submission to the
Royal Commission

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Legal validity of Basin Plan

SRI welcomes the opportunity to provide the following comments on Issues Paper #2 released by the Murray-Darling Basin Royal Commission. We will keep our comments brief as we are not in a position to enter legal arguments about the validity or otherwise of the Basin Plan under the *Water Act 2007*.

“The Government stands by its interpretation of the Water Act.... We are determined to optimise all three outcomes; healthy rivers, strong communities, and continued food production.” Tony Burke, 2010.¹

The capacity of the Water Act to deliver against a triple bottom line has been reviewed multiple times by many. Officially, the Water Act has been reviewed by the Senate Legal and Constitutional Affairs Committee (2011) and by an independent panel conducting a regulatory review of the Water Act (2014).

In 2010 when the Basin Plan was being developed, then Minister Tony Burke released legal advice from the Australian Government Solicitor that he said interpreted the Water Act in a way that allowed consideration of the “triple bottom line” outcomes, that is social, economic and environmental.

In its response to the Senate Legal and Constitutional Affairs Committee’s report, the Government of the day said the advice released by Tony Burke showed that there was no need to amend the Basin Plan to allow consideration of social and economic outcomes as they could be considered under the Act as it currently stands.

In the Issues Paper, the Commissioner notes that the Water Act relies on the implementation of various international agreements for its constitutional validity noting the most important agreements are the *Ramsar Convention* and the *Biodiversity Convention*. The AGS advice to Minister Burke found that these treaties in themselves allow consideration of social and economic factors.

“International agreements themselves recognise economic and social factors and their relevance to decision making,” Mr Robert Orr QC, Chief General Counsel, 2010²

The 2014 review of the Water Act found that the concept of sustainable development is central to two conventions focussed on by the Commissioner. They found the two conventions involved “using resources so as to meet human needs to preserve the environment for the present and the future.”³

In reviewing the Water Act, Paul Kildea and George Williams suggested the following “clear legal path” for the construction of a Basin Plan⁴:

¹ <http://www.environment.gov.au/minister/archive/burke/2010/mr20101207.html>

² AGS, 'The Role of Social and Economic Factors in the Basin Plan', 25 October 2010, p. 1

³ Report of the Independent Review of the Water Act 2007, Commonwealth of Australia, 2014, p4

⁴ <http://sites.thomsonreuters.com.au/journals/2011/05/19/journals-excerpt-the-water-act-and-the-murray-darling-basin-plan/>

1. Be prepared to implement relevant international conventions;
2. Take social and economic factors into account in the meeting of the core environmental objectives; and
3. Once the threshold for meeting international conventions has been met, social and economic factors more generally may be taken into account.

The Issues Paper refers to the need for the Basin Plan to set sustainable diversion limits (SDLs) based on the environmentally sustainable level of take (ESLT) and refers to the definition contained in Section 4 of the Water Act. The definition in itself is open to interpretation because it does not further define the concepts that cannot be compromised. For example, the Commissioner interprets the term “productive base” as contained in the definition to be a reference to the “environmentally productive base”⁵, however, there is scope for debate.

The Senate Legal and Constitutional Affairs Committee noted that there are a “number of different views” regarding the meaning of the definition of the ESLT. In evidence to the Committee the then CEO of the MDBA, Rob Freeman noted that the MDBA too “productive base” to mean water quality “which is essential not only for the environment but also for economic use of water.”⁶

The Commissioner goes onto reference the Guide to the Proposed Basin Plan and its recommendations which were based on an “end of system” flow analysis. However, the ESLT definition itself makes reference to the needs of the water resource rather than the end of system. The MDBA, in setting the individual water resource SDLs first established the environmental needs in the water resource through the identification of Key hydrological indicator sites and determined the local environmental water needs as well as “shared zone” SDL reduction amounts “where appropriate”⁷. If one were to take the definition of the ESLT as black and white, then the addition of a “shared” component for water recovery exceeds the requirement to determine the ESLT of the water resource.

Following initial posturing and threats of challenges⁸, all states had signed inter-governmental agreements with the Commonwealth by 2013, including the provision for the sustainable diversion limit adjustment mechanism and associated timelines. This would imply that, at the time, all States were comfortable with the associated interpretations of the Water Act and the establishment of SDLs.

Specifically, regarding the adjustment mechanism, the Independent Expert Panel who reviewed the Water Act in 2014 found:

“The Act and the Basin Plan contain safeguards that appear appropriate and adequate to ensure that the Act’s objects will be achieved in the sustainable diversion limit adjustment mechanism process.”⁹

⁵ Issues Paper #2, Murray Daring Basin Royal Commission, footnote 5, p13

⁶ *A Balancing Act: provisions of the Water Act 2007*, Senate Legal and Constitutional Affairs References Committee, 2011, p34

⁷ *Attachment G – synthesis of analysis associated with the determination of an ESLT for surface and groundwater in the Basin Plan*, MDBA, 2012.

⁸ “SA Launches Strong and United Response to Draft Basin Plan”, Media Release, SA Government, 28 November 2011

⁹ *Report of the Independent Review of the Water Act 2007*, Commonwealth of Australia, 2014, p24

Conclusion

“...it is not possible to define environmental outcomes based on science alone, and that the process of setting environmental outcomes includes value based decisions that inherently allow for social and economic factors to be considered.” Davis and Skinner¹⁰, Committee for Economic Development of Australia.

The attached report by Sharon Davis and Dominic Skinner provides a sound reasoning why social and economic considerations must form part of the decision-making process even when prioritising environmental objectives due to the need for value judgements.

The paper supports the notion espoused by the late Peter Cullen that science should inform, but not dictate, policy. There has been much science and review of the Basin Plan, both scientifically and legally. The Basin Plan, including the current SDLs and the northern basin review and adjustment mechanism was legislated in 2012 and the intergovernmental agreements between all jurisdictions were signed by 2013.

As irrigators, we do not have capacity to provide a robust legal opinion, suffice to say that we have taken it on faith that the Federal legislators and the state jurisdictions who are signatories to the IGAs have done so legitimately and with legal validity. We believe there is scope within the international agreements to allow consideration of social and economic factors in the determination of the ESLT and therefore the SDL. We also believe the Water Act enables adaptive management that provides scope for the ESLT to be reviewed and refined with new knowledge or new projects that underpins the SDL adjustment mechanism.

We have publicly welcomed the confirmation of the SDL adjustment mechanism via the failure of the disallowance motion moved by the Australian Greens and we will continue to work with the Government and relevant agencies to ensure the Basin Plan meets its environmental, social and economic objectives.

¹⁰ <http://www.ceda.com.au/CEDA/media/Attachments/pdf/15343~waterprojectdavis Skinnerfinal.pdf>