



Australian Government

Australian Government Response to the Senate Legal and Constitutional Affairs References Committee Report:

A Balancing Act: provisions of the Water Act 2007

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Introduction

The Australian Government is committed to the protection and restoration of key environmental assets within the Murray-Darling Basin (the Basin) in a way that optimises economic, social and environmental outcomes for the Basin and for Australia.

The Australian Government's commitment to the Basin involves a number of actions collectively seeking to achieve healthy rivers, strong communities and sustainable food and fibre production, including investment in improving irrigation infrastructure efficiency, purchasing of water entitlements to provide water for the environment, improving the operation of the water market, improving the quality and extent of information on water resource availability and use, and legislative measures.

The making of the Basin Plan, which responds to the needs of the system as a whole, is an important part of these reforms. Sensible reform within the Basin will provide for a healthy river system, strong regional communities and food production.

Response to Recommendations

Majority Report

Recommendation 1

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.

Not agreed.

The advice in question 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.

Summary advice regarding the role of social and economic factors in developing the Basin Plan was publicly released by the Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP on 25 October 2010. This advice can be distinguished from other Australian Government Solicitor (AGS) advice as it was prepared on the understanding that it would be publicly released. The advice outlined the extent to which social and economic factors can be taken into account in developing the Basin Plan.

Recommendation 2

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

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.

Not Agreed.

The AGS advice released by the Minister on 25 October 2010 confirms that environmental, economic and social considerations are relevant to decisions under the Act, and that in particular development of the Basin Plan can appropriately take these into account. As such there is no need to amend the *Water Act 2007* (the Act) to enable consideration of social and economic outcomes.

In addition, the Government notes that under the Legal Services Directions 2005, made by the Attorney-General under the *Judiciary Act 1903*, constitutional and international law advice to the Government is tied to the Solicitor-General, the Attorney-General's Department, the AGS, and, in relation to some aspects of international law advice, the Department of Foreign Affairs and Trade. As constitutional and international law issues permeate considerations of the Act it would not be appropriate for an independent third party to undertake review of legal advice or recommend amendment to the Act.

Recommendation 4

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

Not agreed.

The Government does not consider any measures are necessary to strengthen the constitutional validity of the Act and notes that the Majority Report does not identify any such measures.

Dissenting Report by Government Senators

The Australian Government agrees with the Dissenting Report by Government Senators.

Dissenting Report by the Australian Greens

The Australian Government notes this report, and provides the following further explanation of its position in relation to taking social and economic issues into account.

In summary, the general purposes of the Water Act and the Basin Plan are:

- to give effect to relevant international agreements,
- to provide for the establishment of environmentally sustainable limits on the quantities of water that may be taken from Basin water resources,
- to provide for the use of the Basin water resources in a way that optimises economic, social and environmental outcomes,
- improved water security for all uses, and
- subject to the environmentally sustainable limits, to maximize the net economic returns to the Australian community.

An objective of the Act and the Basin Plan is to give effect to relevant international agreements, and this reflects the fact that 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 Commonwealth Constitution. The agreements are international environmental agreements including the Convention on Biological Diversity and the Ramsar Convention relating to wetlands.

The international agreements themselves recognise economic and social factors, and their relevance to decision making.

The Act further makes clear that in giving effect to those agreements the Basin 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 those outcomes.