

**Submission to the Senate Standing Committee on Legal and Constitutional Affairs**  
**Inquiry into provisions of the *Water Act 2007***

**Summary**

1. This submission addresses the Inquiry's terms of reference 1(a) to 1(e) in relation to the *Water Act 2007* (**the Act**) and is directed to the question of whether social and economic outcomes are relevant to determining water allocation for the environment under the Act. Reference will be made to the legal advice from the Australian Government Solicitor dated 25 October 2010 which was tabled in the House of Representatives by Minister Burke on that day ("the AGS advice")<sup>1</sup>. I agree generally with the analysis set out in the AGS advice, however, its subject matter was limited, as will be discussed below.
2. In summary, it is submitted that:
  - (a) social and environmental outcomes are not relevant to identifying key environmental assets or determining the water allocation for those assets under the Act;
  - (b) the AGS advice does not say otherwise;
  - (c) Minister Burke acknowledged that that is so in his Ministerial statement to the House of Representatives on 25 October 2010;<sup>2</sup>
  - (d) the terms of reference to the House of Representatives Standing Committee on Regional Australia Inquiry into the socio-economic impact of the proposed Murray-Darling Basin Authority Guide to the proposed Basin Plan on Regional Communities is premised on the same view of the legal position;
  - (e) the International Conventions do not oblige the Commonwealth to ignore social and economic outcomes when determining the water allocation for the environment;
  - (f) the Act can be amended to permit social and economic outcomes to be considered when determining the water allocation for the environment and be consistent with the International Conventions on which the Act is based.

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<sup>1</sup> A copy of the AGS advice accompanies this submission

<sup>2</sup> A copy of the Minister's statement accompanies this submission

**1(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, and**

**1(b) the differences in legal interpretations of the Act**

3. Terms of reference 1(a) and 1(b) may be addressed together.
4. The AGS advice “examines the ways in which the Murray Darling Basin Authority (MDBA) and the Minister are required to take into account social and economic factors in developing and making the Basin Plan, and the relationship between socio-economic factors and the implementation of international environmental agreements”<sup>3</sup>. The AGS advice also indicates, by omission, when those factors are not to be taken into account.
5. The AGS advice addresses sustainable diversion limits at paragraphs 25 to 28. The key provision of the Act is s23 which requires that a long-term average sustainable diversion limit for the Basin water resources “*must reflect an environmentally sustainable level of take*”.
6. The Act defines an “*environmentally sustainable level of take*” as the level of water that can be taken without compromising key environmental assets, key ecosystem functions, the productive base, or key environmental outcomes, for the water resource<sup>4</sup>.
7. As the AGS advice notes, the Act does not give specific guidance as to which environmental assets are key<sup>5</sup>. That advice then goes on to consider in general terms, the matters to be considered when identifying which are “key”<sup>6</sup>.
8. At paragraph 28, the AGS advice gives an example of when the objective of optimizing the economic, social and environmental outcomes could be taken into account when deciding whether an environmental asset is “key”. This paragraph is instructive. That objective would only be relevant if the asset “was **not** necessary to achieve the specific requirements of the Act”<sup>7</sup>. Therefore, if an asset is necessary to achieve the specific requirements of the Act, the objective of optimizing the economic, social and environmental outcomes is not a relevant consideration. In other words, that objective is not relevant to identifying key assets.
9. The AGS advice does not consider whether, once key environmental assets have been identified, the objective of optimizing economic, social and environmental outcomes, is

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<sup>3</sup> Paragraph 1

<sup>4</sup> Section 4

<sup>5</sup> The AGS advice paragraph 26; “environmental assets” are defined in s4(1) of the Act

<sup>6</sup> The AGS advice, paragraphs 26 and 27

<sup>7</sup> Emphasis added

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? Given the subject the AGS advice addressed, if there had been scope under the Act to advise that economic and social outcomes were relevant to the determination of the water allocation for the identified key assets, that advice would have said so.

10. The above analysis shows that economic and social outcomes are not relevant to the identification of key environmental assets or to the determination of water allocation for those assets. The AGS advice does not say otherwise. That the analysis is correct was acknowledged by the Minister in his statement on 25 October 2010, when he said *subject to the environmentally sustainable limits* (the Act) *maximizes the net economic returns to the Australian community*<sup>8</sup>. Water for human use is what is left after the “*environmentally sustainable limits*” have been determined.
11. Another indication that the Government knows that social and economic outcomes are not relevant to the determination of the water allocation for key environmental assets is the Government-initiated House of Representatives Standing Committee on Regional Australia. It is entitled “Inquiry into the Socio-Economic Impact of the proposed Murray-Darling Basin Authority Guide to the proposed Basin Plan on Regional Communities”. The Inquiry’s terms of reference are directed to considering the impact of the reduced water allocation for irrigators proposed in the Guide. If the Government does not accept the Authority’s approach, which was based on an understanding of the legal position as set out above, why spend the time and money on an inquiry which is premised on that understanding?
12. For the above reasons, there is no ambiguity or difference of legal interpretation of the Act in relation to the question whether social and economic outcomes are to be taken into account when identifying key assets or determining the allocation of water for those assets. They are not.

**1(c) the constitutional power of the Commonwealth to legislate in the area of water**

13. Section 9 of the Act sets out the Constitutional basis of parts of the Act including Part 2, and s9A sets out the Constitutional basis for other parts in respect of which States have also referred their powers pursuant to s 51 (xxxvii) of the Constitution.

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<sup>8</sup> Emphasis added

14. Professor George Williams has written in relation to the Act:

*Power over water and rivers was left to the states at Federation in 1901, and the Commonwealth has not been granted a clear constitutional mandate in this area.*

*The federal Parliament passed the Water Act to impose the national interest on the management of the Murray-Darling system. To do so, parliament had to rely upon a hodgepodge of federal power over things such as interstate trade and commerce, astronomical and meteorological observations, census and statistics', weights and measures, corporations and external affairs.*

*The most important power is that over external affairs, to which the High Court has given a wide interpretation since the 1983 dispute over the damming of the Franklin River in Tasmania. So long as the right international convention can be found, this power provides a wide basis for legislating in what had been areas of state control.*<sup>9</sup>

15. The AGS advice addresses the constitutional underpinnings of the Act at paragraph 9 and footnotes 25 and 26. It said:

*“An overarching objective of the Act and the Plan is to give effect to relevant international agreements. 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.”*

16. Footnote 26 of the AGS advice says:

*“The external affairs power in s51(xxix,) of the Constitution supports laws that are ‘capable of being reasonably considered to be appropriate and adapted’ to fulfilling Australia’s obligations under international agreements: Commonwealth v Tasmania (Franklin Dam case).<sup>10</sup> Part 2 of the Water Act, which deals with most aspects of the making of the Basin Plan ... relied solely on the Commonwealth’s own constitutional power.”<sup>11</sup>*

17. The above adequately sets out the Constitutional basis relied on by the Commonwealth to exercise power to pass the Act<sup>12</sup>.

**1(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**

18. Both Professor Williams and the AGS advice, refer to two of the key international agreements upon which the Act is based, the *Convention on Biological Diversity* done at Rio de Janeiro on 5 June 1992 (**the COB**) and the *Convention on Wetlands of*

<sup>9</sup> The Sydney Morning Herald, 26 October 2010

<sup>10</sup> (1983) 158 CLR 1, 259

<sup>11</sup> Other parts of the Act are supported by the referral of powers by States pursuant to s51(xxxvii) of the Constitution

<sup>12</sup> See also s11 of the Act which reads down provisions of the Act relying on paragraph 51(i) or (xx) of the Constitution by referring to the referral of powers pursuant to paragraph 51(xxvii) of the Constitution

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*International Importance especially as Waterfowl Habitat* done at Ramsar, Iran, on 2 February 1971 (**the Ramsar Convention**)<sup>13</sup>.

19. Professor Williams said:

*“In passing the Water Act, the Commonwealth identified a number of international conventions upon which to base its management of the Murray-Darling Basin. However, in doing so the conventions must be implemented faithfully.*

*Any basin plan must be consistent with the international agreements or face being struck down by the High Court. The result is a Water Act that says that the authority must ensure as a first priority that the Basin Plan gives effect to the international conventions.”*<sup>14</sup>

20. In summary, the AGS advice says that the Act refers to “obligations” of the Commonwealth under each of those Conventions in ss21(2) and 21(3) of the Act respectively<sup>15</sup>.

21. The provisions dealing with the Basin plan are in Part 2 of the Act which includes ss19 to 86. As set out earlier, Part 2 is supported principally by the COB and the Ramsar Convention. As the AGS advice does, I consider those two conventions.

22. The question I pose is do those conventions oblige the Commonwealth to legislate as it has, to require that only environmental outcomes are relevant to determining what are key assets and the water allocation for those assets?

23. I agree with Professor Williams and what is implicit in the AGS advice, that the Act has to be **consistent** with the international agreements upon which it is based, and in particular upon which Part 2 of the Act is based. However, what is the Commonwealth “obliged” to do by the international conventions?

24. The AGS advice introduces its discussion on the COB:

*“The Convention on Biological Diversity requires, amongst other things, that State Parties, as far as possible and as appropriate ...”*<sup>16</sup>

25. It goes on to refer to some of the requirements under the COB and then sets out how they are reflected in the Act in s21(2) of the Act<sup>17</sup>.

26. The AGS advice deals with the obligations under the Ramsar Convention and how they are reflected in s21(3) of the Act at paragraphs 20 to 22. The first obligation is to conserve wetlands included in the List of Wetlands of International Importance

<sup>13</sup> The Sydney Morning Herald, 26 October 2010, and the AGS advice at paragraphs 16 to 24

<sup>14</sup> The Sydney Morning Herald, 26 October 2010

<sup>15</sup> The AGS advice at paragraph 20

<sup>16</sup> AGS advice paragraph 16, emphasis added

<sup>17</sup> AGS advice, paragraphs 16 and 17

**(Ramsar wetlands)** and, *as far as possible*, the ‘wise use’ of wetlands in a State’s territory.

27. The AGS advice goes on to state that neither of the Conventions requires that the parties to it disregard economic and social considerations in giving effect to environmental “obligations”:

*“Both Conventions establish a framework in which environmental objects have primacy but the implementation of environmental objectives allows consideration of social and economic factors. In short it would be an over-simplification to regard implementation of the agreements as being concerned with ‘purely’ environmental objectives as opposed to social and economic factors. In short it would be an over-simplification to regard implementation of the agreements as being concerned with ‘purely’ environmental objectives as opposed to social and economic considerations.*

*Further, the 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 over allocation. These discretionary judgments should, in accordance with the objects of the Act and purpose of the Plan, optimize economic, social and environmental outcomes.”<sup>18</sup>*

28. The language of both Conventions is “high level” and highly qualified. The phrases “*as far as possible and as appropriate*” and variants of the phrases appear throughout both Conventions. Both Conventions acknowledge the sovereignty of the contracting states. The Ramsar Convention was entered into by Australia in 1975 and the COB in 1993. Australia was not obliged to do anything in relation to the Murray-Darling Basin water resource by either convention<sup>19</sup>. Over the years, Ramsar wetlands Listings have been made within the Basin which reflected choices that have been made.
29. It was not until 2005 that the Commonwealth chose to rely on the external affairs power to act to resolve a problem in the Murray-Darling Basin which the States who had control of the water resources could not. Having chosen to act, the Commonwealth legislation must be consistent with the Conventions relied upon. Adopting the language of the High Court in the *Franklin Dam* case, the Water Act must be “capable of being reasonably considered to be appropriate and adapted” to fulfilling Australia’s obligations under those Convention<sup>20</sup>.

<sup>18</sup> AGS advice, paragraphs 23 and 24

<sup>19</sup> The only obligation under the Ramsar Convention was that each Contracting Party designate at least one wetland to be included in the List when signing the Convention or when depositing its instrument of ratification or accession (Article 2(3))

<sup>20</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 259

30. Neither Convention requires that consideration of social and economic outcomes be precluded when determining key environmental assets or the water allocation for those assets. The AGS advice confirms that is correct – the Commonwealth has a wide discretion as to how it implements the Conventions<sup>21</sup>. The Commonwealth Government chose to preclude such consideration. That choice is reflected in the structure of Part 2 of the Act, in particular ss21, 22 and 23, and in the definitions of “*environmentally sustainable level of rake*”, and “*environmental assets*” in s4 of the Act. Neither of the phrases “*environmental assets*” nor “*environmentally sustainable level of take*” is a term used in either of the Conventions.

**1(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.**

31. An amendment is proposed. to the definition of “*environmentally sustainable level of take*” in s4:

*“environmentally sustainable level of take for a water resource means:*

- (1) *the level at which water can be taken from that water resource which, if exceeded would compromise:*
  - (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,*
- (2) *The object of optimizing economic, social and environmental outcomes must be taken into account when determining each of the following:*
  - (a) *The environmentally sustainable level of take for a water resource;*
  - (b) *key environmental assets of the water resource;*
  - (c) *key ecosystem functions of the water resource;*
  - (d) *the productive base of the water resource;*
  - (e) *key environmental outcomes for the water resource.*

32. Item 4 of s22 should be amended:

*“The objectives and outcomes must address (a) environmental, social and economic outcomes.*

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<sup>21</sup> AGS advice, paragraphs 23 and 24

33. Consequential amendments of the Act would be necessary. Such amendments are beyond the scope of this submission.

**Josephine Kelly**

**Barrister**