

The river's needs are the only consideration

A Murray-Darling basin plan based on social and economic factors could be successfully challenged, writes **Josephine Kelly**.

No one in federal Parliament is being honest with the people of the Murray-Darling basin and the Australian public. The Water Act puts the environment first when allocating water in the basin. Social and economic considerations are not relevant to deciding how much water the environment needs. Water available for human use is what is left.

That is why cuts in allocations for human use published by the Murray-Darling Basin Authority (the MDBA) in its guide were so large, and will be in the final plan unless the act is amended.

But government, opposition and independent MPs are going along with Water Minister Tony Burke's "triple bottom line", that environmental, economic and social considerations are central to the

legislation. Mr Burke has implicitly acknowledged that social and economic considerations are not relevant when determining water allocation for the environment.

Tabling legal advice in the House of Representatives on October 25, he said the act provided for environmentally sustainable limits on the quantities of water that might be taken from the basin, subject to those limits, the act maximised the net economic returns to the community. The legal advice he tabled also indirectly acknowledged that reality.

That advice, *The Role of Social and Economic Factors in the Basin Plan*, begins: "This paper examines the ways in which the Murray-Darling Basin Authority and the minister are required to take into account social and economic factors in developing and making the basin plan, and the relationship between social-economic factors and implementation of international environmental agreements."

Critically, the advice did not consider when social and economic factors were not to be taken into account. Section 23 says long-term

average sustainable diversion limits (SDLs) (water for human use) "must reflect an environmentally sustainable level of take". The advice says section 23 requires the MDBA and the minister to determine the "key environmental assets" that have to be sustained. It then gives an example of how the object of optimising economic, social and environmental outcomes could be

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relevant to deciding what are key environmental assets: "The MDBA and the minister could not identify an environmental asset as key if this was not necessary to achieve the specific requirements of the act and would have significant negative social and economic effects."

In other words, if an environmental asset is necessary to achieve the act's requirements, all of which relate to the natural environment, it will be a key asset, and social and economic

considerations are not relevant. The advice does not consider the next step required by section 23, the determination of water allocations necessary to ensure those assets are not compromised.

That reflects its limited scope of considering only when social and economic considerations are to be taken into account. They are not to be taken into account when deciding the water allocation for the environment. The summary says: "... 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."

And where there is no choice? Section 23 is not discretionary. There are no options when determining the water that the environment needs. The environment is the only consideration.

It would be irresponsible for the MDBA to proceed, and for the government to allow it to proceed, with the preparation of the Murray-Darling Basin Plan, taking into

account social and economic considerations when deciding water allocations for the environment.

The comments of MDBA chairman Mike Taylor reported in the article "Lower water cuts on table" in *The Australian* (October 27, 2010) suggest that is where the authority is heading. The validity of a plan prepared on that basis would be open to legal challenge — successfully, in my view.

However, if the MDBA proceeds according to the act, and does not consider social and economic factors when deciding the water allocation for the environment, the outrage of basin residents is hard to imagine when the inevitably large reductions in allocations for human use are published. Every member of the federal Parliament is misleading the basin residents and the public while they stick to Bourke's "the triple bottom line" mantra. Tony Abbott's opposition apparently cannot admit legislation enacted by the Howard government gave priority to water for the environment.

■ *Josephine Kelly is a Sydney barrister.*

The Australian Financial Review Tuesday 16 November 2010