



# australian network of environmental defender's offices

## Submission to Senate inquiry into Provisions of the Water Act 2007

March 2011

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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## INTRODUCTION

1. The Australian Network of Environmental Defender's Offices (ANEDO) is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to provide comment on the *Water Act 2007* (**Water Act**) and the Murray-Darling Basin Plan (**the Plan**).
2. EDO lawyers have extensive experience advising on water law and water management reform in each State. At the Federal level, EDO offices have been involved with the development of the Water Act and the Plan for a number of years. For example EDO Victoria and EDO NSW, in conjunction with peak environment groups, reviewed and commented on the Water Act as it was being developed. EDO offices have been advising peak environment groups across Basin States for the past 18 months on the development of the Plan and the interpretation of the Water Act. We attended the Murray-Darling Basin Authority (MDBA) peak bodies forums in 2009 and 2010 and have attended MDBA information sessions on the Guide.<sup>1</sup>

## SUMMARY OF KEY POINTS

- In our view some of the terms of reference demonstrate a tendency to misunderstand or oversimplify the operation of the Act and the objectives it seeks to achieve. We have therefore addressed some preliminary matters before responding directly to the terms of reference.
- 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. The Act is based on a recognition that long term social and economic values depend on environmental health.
- The SDLs and the environmentally sustainable level of take requirements encompass both natural ecosystems that rely on the Basin, as well as the functions that support continued productive and recreational use of the Basin. For example SDLs must be set at a level that would mitigate pollution and limit algal blooms, remove excess salinity from the Basin and reduce acidity, which are all functions that are critical for continued social and economic use of the Basin.
- The view put forward by some stakeholders that the Water Act focuses solely on 'environmental' considerations with social and economic considerations sidelined is incorrect. The Act acknowledges that human use of the Basin should continue and that the Basin Plan should seek to optimise those uses.
- When various commentators refer to 'environmental' requirements having priority they are referring to the concept of what is the long term sustainable extraction level. This concept picks up both natural ecosystem requirements *and* requirements to maintain productive and social use of the Basin and therefore should not be seen solely as an 'environmental' requirement as per the common understanding of that word.
- To include 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

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<sup>1</sup> Previous ANEDO submissions on water management can be found at [www.edo.org.au](http://www.edo.org.au)

the Basin. Although that formulation has superficial appeal, it is problematic and counterproductive in practice.

- The purpose of the NWI was to address decades of over extraction by State Governments and provide a more consistent and modern water management framework across all States. The Act is consistent with the NWI and that approach.
- All States, both major Federal political parties and the vast majority of stakeholders agreed that the Commonwealth should have a role in water management. 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.
- 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. Amendments to the Act will not assist to achieve that purpose.

## **KEY EXPLANATIONS AND BACKGROUND**

3. In our view some of the terms of reference demonstrate a tendency to misunderstand or oversimplify the operation of the Act and the objectives it seeks to achieve. We have therefore found it necessary to address some preliminary matters before responding directly to the terms of reference in our concluding comments. We hope that our analysis is helpful to the Committee in its deliberations.

### **How must the Basin Plan be developed under the Water Act?**

4. 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.<sup>2</sup> 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.<sup>3</sup> Other purposes of the Basin Plan are to improve water security for all users and for water to reach its most productive use through efficient water trading.<sup>4</sup> The Act is based on a recognition that long term social and economic values depend on environmental health.
5. The Act contains mandatory contents which must be included in a Basin Plan such as an identification of the risks to Basin water resources, strategies to manage or address those risks, rules for trading Basin water resources, an environmental watering plan, a water quality and salinity plan and long term average sustainable diversion limits (SDLs).<sup>5</sup>

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<sup>2</sup> This can be seen through the objects of the Act, the provisions of the Act and the purpose and basis of the Basin Plan

<sup>3</sup> Water Act 2007 ss 20, 21, 22

<sup>4</sup> Water Act 2007 s23

<sup>5</sup> Water Act 2007 s22

6. The SDLs are described as the maximum long term average annual average quantities of water that can be taken on a sustainable basis from the Basin or a part of the Basin.<sup>6</sup> SDLs must reflect an ‘environmentally sustainable level of take’.<sup>7</sup> ‘Environmentally sustainable level of take’ is defined as the level at which water can be taken from the water resource which, if exceeded, would compromise key ecosystem functions, key environmental assets, the productive base of the water resource, and key environmental outcomes including ecosystem function, biodiversity, water quality and water resource health.<sup>8</sup>
7. Importantly, the SDLs and the environmentally sustainable level of take requirements encompass both natural ecosystems that rely on the Basin, as well as the functions that support continued productive and recreational use of the Basin. For example SDLs must be set at a level that would mitigate pollution and limit algal blooms, remove excess salinity from the Basin and reduce acidity.<sup>9</sup> These are all functions that are critical for continued social and economic use of the Basin. Thus the SDLs (and the Act as a whole) recognise the importance of social and economic uses of the Basin and also recognise that these activities depend on continued ecosystem health.
8. Giving effect to international agreements is not a mandatory content of the Plan, rather it is a basis on which the Plan must be made - i.e. the Plan must be made in such a way that it will give effect to the relevant international agreements, so far as they are relevant to the use and management of the Basin.<sup>10</sup> The Plan must also be based on the best available science and socio-economic analysis, and provide for the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes (as well as a range of other considerations)<sup>11</sup>.
9. In achieving the requirements of the Act and the Basin Plan, including the SDLs, the MDBA must do it in such a way to optimise economic, social and environmental factors.<sup>12</sup> That is, when setting SDLs or determining other elements of the Plan the MDBA must do it in a way that achieves the best economic, social and environmental outcomes.

### **Does the Act prioritise environmental considerations?**

10. In the simplest terms the Act requires a determination of how much water has to stay in the system so that (a) we don’t degrade the ecosystems that rely on it, (b) we can continue to farm in the Basin and (c) we can keep using the Basin for social and recreational pursuits.

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<sup>6</sup> Water Act 2007 s22 item 6

<sup>7</sup> Water Act 2007 s23

<sup>8</sup> Water Act 2007 s4

<sup>9</sup> Some of these are specifically set out in notes to the definitions at s4

<sup>10</sup> Water Act 2007 s21. The relevant international agreements are the biodiversity convention, the Ramsar convention, the desertification convention, the migratory species conventions, the climate change convention and any other prescribed agreement (none prescribed)

<sup>11</sup> Water Act 2007 ss 20 and 21

<sup>12</sup> See for example Water Act s3 and 20

11. As can be seen from the above description, the view put forward by some stakeholders that the Water Act focuses solely on ‘environmental’ considerations with social and economic considerations sidelined is incorrect. The Act acknowledges that human use of the Basin should continue and that the Basin Plan should seek to optimise those uses. Similarly the view that the SDL is purely focused on keeping ecosystems functioning for their own sake is also incorrect (although ecosystem health for that purpose is certainly an important part of the SDLs). The SDL is partly aimed at halting the degradation of Basin-dependent ecosystems, and partly aimed at maintaining the system in a state where it can continue to support economic uses. Economic considerations are part of the decision of what the SDLs should be, as the question of what is sustainable includes consideration of how much water is needed to maintain the productive base of the resource, and resource health.
12. To achieve its key purpose of returning extraction in the Basin to long term sustainable levels to support continued ecosystem health and productive use, the 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. This will of course include some value judgements around such things as which assets and which water resource health issues should be prioritised, however a scientific assessment is the starting point and the key determinant.
13. The requirement to set SDLs therefore does not prioritise ‘environmental’ considerations, it prioritises a scientific assessment of what is sustainable extraction.
14. When various commentators refer to ‘environmental’ requirements having priority they are referring to the concept of what is the long term sustainable extraction level. As can be seen from the above this concept picks up both natural ecosystem requirements *and* requirements to maintain productive and social use of the Basin and therefore should not be seen solely as an ‘environmental’ requirement as per the common narrow understanding of that word. It is the productive base of the whole system – for ecosystem health *and* human use – that is compromised by over-extraction. Much of the confusion around the Act comes from a misunderstanding of this concept.
15. As noted above the Plan must be made in such a way that it can give effect to relevant international agreements.<sup>13</sup> One section of the Act elaborates briefly on this requirement, primarily in relation to the Ramsar convention and the biodiversity convention.<sup>14</sup>
16. The references to relevant international agreements in the Act re-state obligations that Australia has already committed to and is already required to comply with at international law. It recognises Australia’s international obligations to protect and maintain ecosystems and attempts to embed those in our actions. There is nothing new in these obligations and the Federal and State Governments have an obligation to comply with them regardless of their inclusion in the Act. Those obligations are an important recognition of Australia’s biodiversity and natural

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<sup>13</sup> Water Act s21

<sup>14</sup> Water Act s21

ecosystems and it is appropriate that they be included in legislation that manages a natural resource upon which so many natural ecosystems rely.

17. It should also be noted that those agreements recognise that development and use of natural resources will occur and they contain concepts such as ‘wise use’ of natural systems.<sup>15</sup>
18. The criticisms that the Act is purely about ‘environmental’ considerations also ignore the considerable social and economic considerations in the Act. The Act gives significant priority to economic and social considerations through the development of the sustainable diversion limit,<sup>16</sup> the requirement to optimise social, economic and environmental factors,<sup>17</sup> and the lead in time for implementation of the SDLs through transitional water resource plans<sup>18</sup>, interim water resource plans<sup>19</sup> and the option of a temporary diversion limit for up to five years<sup>20</sup>.

### **What does it mean to ‘balance equally’ or give ‘equal weighting’ to economic, social and environmental factors?**

19. Senator Joyce, in referring this inquiry to the Committee indicated that the Act was intended to have a triple bottom line which was an ‘equal balance’ between environmental, social and economic factors.<sup>21</sup> However the notion of an ‘equal weighting’ or ‘equal balancing’ of factors is meaningless as an operative provision in natural resource management legislation.
20. One of the key strengths of the Act is its decision-making framework for sustainable resource use. Water planning under state water legislation over two decades of water reform has failed to achieve sustainable water extraction. The Water Act uses the learnings from state schemes to go beyond those systems to achieve sustainable water extraction. To include 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. Although this formulation has superficial appeal, it is problematic and counterproductive in practice. Legislation often contains directions to ‘have regard to’ economic, social and environmental factors, or to ‘assess’ the economic, social and environmental impacts of a decision, but legislation does not contain directions to ‘equally balance’ those factors because in practice it is not possible.
21. 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

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<sup>15</sup> For example in the Ramsar Convention

<sup>16</sup> Water Act s4 and 23

<sup>17</sup> Water Act s3 and 20

<sup>18</sup> Water Act s241

<sup>19</sup> Water Act s242

<sup>20</sup> Water Act ss22 and 24

<sup>21</sup> See media release, Senator Barnaby Joyce, “Water Act inquiry” 9 February 2011 accessed at <http://www.barnabyjoyce.com.au/Newsroom/MediaReleases/Water/tabid/61/articleType/ArticleView/articleId/1228/Water-Act-Inquiry-and-Terms-of-Reference.aspx>

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 incommensurable factors? Any attempt to equally balance will always in fact be a value judgement by the decision-maker.

22. There is clearly a view taken by some stakeholders that an ‘equal weighting’ of factors would result in more of the Basin water resources remaining for farming and irrigation purposes. However, in light of the extent of over-extraction in the Basin and the evidence gathered to date regarding what is sustainable it would also be open to a decision-maker to determine that if environmental factors were considered equally with economic factors it would justify a much greater reduction in consumptive use than the current 3000-4000GL reduction currently proposed in the Guide to the Basin Plan. This is particularly the case when the Authority’s analysis found that 3000GL is the minimum level that could be considered sustainable and that 7600GL is what is actually required to meet environmental values.
23. While some stakeholders may hope that an ‘equal balance’ would allow for a greater compromise on the reduction of entitlements, the level of uncertainty in the development of the Basin Plan will be increased, as will the risk of not achieving the aim of long term sustainable extraction in the Basin, which will only lead to ongoing uncertainty and reduced security for entitlement holders.

## **The NWI and the development of the Water Act**

### *National Water Initiative*

24. In part, the argument that the Water Act was intended to provide an equal balance to economic, social and environmental factors is based on an argument that the National Water Initiative (NWI) sets up an equal balance between environmental, social and economic factors and the Act was meant to do the same.<sup>22</sup>
25. The NWI does not proceed on the basis that a choice must be made between environment on the one hand and social and economic uses of water on the other. Instead it is premised on the realisation that the sustainability of the productive base of the Basin for environmental and human uses requires over-allocation to be addressed as a priority and foundational issue. The purpose of the NWI was to address decades of over extraction by State Governments and provide a more consistent and modern water management framework across all States.

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<sup>22</sup> See for example National Party media release “MDB cuts at odds with water plan” 2 November 2010 accessed at <http://www.nationalparty.org/News/LatestNews/tabid/94/articleType/ArticleView/articleId/5999/categoryId/1/MDB-water-cuts-at-odds-with-national-water-plan.aspx> and NSW Irrigators Council briefing note “How did we end up with this” 9 November 2010 accessed at <http://www.nswic.org.au/pdf/Water%20Act/100712%20-%20Water%20Act%20Briefing%20Paper.pdf>

26. Clause 5 of the NWI states:

The Parties agree to implement this National Water Initiative (NWI) in recognition of the continuing national imperative to increase the productivity and efficiency of Australia's water use, the need to service rural and urban communities, and to ensure the health of river and groundwater systems by establishing clear pathways to return all systems to environmentally sustainable levels of extraction. The objective of the Parties in implementing this Agreement is to provide greater certainty for investment and the environment, and underpin the capacity of Australia's water management regimes to deal with change responsively and fairly (refer paragraph 23).

27. 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'.<sup>23</sup> This objective is operationalised throughout the NWI<sup>24</sup>. 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. There are references to 'optimising' environmental, social and economic outcomes just as there are in the Water Act. The NWI does not state that over-allocated and overused systems do not need to be returned to sustainable levels of extraction if the economic and social impacts would not be too great. Instead the NWI sets down a pathway to achieve sustainable extraction levels while also recognising the importance of efficient and productive use of the Basin's water resources. It also recognises the importance of maintaining ecosystems which rely on the Basin water resources.<sup>25</sup>

28. This is entirely consistent with the Water Act which seeks to achieve the same objectives.

#### *National Plan for Water Security*

29. The National Plan for Water Security (NPWS) was announced by the Howard Government in 2007 as the policy basis for the Water Act.<sup>26</sup> The NPWS was aimed at "improving water efficiency and addressing over-allocation of water in rural Australia".<sup>27</sup> It contained a 10 point plan including "addressing once and for all water over-allocation in the Murray-Darling Basin" and setting "a sustainable cap on surface and groundwater use in the Murray-Darling Basin".<sup>28</sup> In the detail of the NPWS it states:

The Plan substantially addresses over-allocation in the MDB with the objective of putting the MDB back on a sustainable track, significantly improving the health of

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<sup>23</sup> National Water Initiative, clause 23 (iv)

<sup>24</sup> For example clause 25 (ii), 25(v), 26(i), 41-45.

<sup>25</sup> See for example clause 23 (iii), 25(ii), 25(iv), 35, 43, 58(iv), 78. (The NWI refers to the need to achieve environmental outcomes which is defined as: maintaining ecosystem function (eg. through periodic inundation of floodplain wetlands); biodiversity, water quality; river health targets (schedule B(i))

<sup>26</sup> The NPWS can be accessed here <http://www.nalwt.gov.au/key.aspx>

<sup>27</sup> NPWS p1

<sup>28</sup> NPWS p1



the rivers and wetlands of the Basin, and bringing substantial benefits to irrigators and the community alike.<sup>29</sup>

30. The NPWS committed to the development of a Commonwealth Water Act that would achieve these objectives and a number of the others laid out the NPWS. It clearly indicated that the Water Act was intended to address over-extraction and return the Basin to sustainable levels for ecosystem health, to improve water security and to support economic and social uses of the Basin.

#### *Development of the Water Act*

31. In 2007 the Government conducted targeted stakeholder consultation on version 61 of the Water Bill. This version was produced at a time when the Commonwealth believed that it would secure a referral of powers from the States which would assist in firming up the Act's constitutionality. The provisions of the Act that relate to the Basin Plan that are in force today are largely the same as version 61 that the Government consulted on in 2007. Version 61 of the Bill still required that the Basin Plan be consistent with the Ramsar convention, biodiversity convention, migratory species conventions and desertification convention<sup>30</sup>. It did not contain the more extensive provisions that indicate how those conventions should be implemented but it almost all other respects it is the same Bill.
32. Version 61 was generally accepted at the time to be consistent with the NWI. Although the current Act gives greater prominence to implementation of international agreements it is largely the same Act, and has the same intent. A comparison of the two versions shows that the major addition is section 21(1)-(3) which gives additional guidance as to the effect of international agreements. However, inclusion of provisions in relation to international environmental agreements is consistent with the NWI which recognises the importance of protecting water dependent ecosystems<sup>31</sup>
33. By the time the Bill was introduced into Parliament it contained the above provisions in relation to giving effect to international agreements. A Senate inquiry held at the time found that despite some reservations from stakeholders about various specific aspects of the Bill there was 'broad support for the Bill' amongst all stakeholders<sup>32</sup> (apart from the State of Victoria). In particular a number of stakeholder groups indicated that they had been appropriately consulted and were comfortable with the contents of the Bill.<sup>33</sup>

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<sup>29</sup> NPWS p3

<sup>30</sup> Water Bill 2007 v61, clause 21(2)

<sup>31</sup> See note 5 above

<sup>32</sup> Senate Standing Committee on Environment, Telecommunications, Information Technology and the Arts *Report on the Water Bill 2007 [Provisions] and Water (Consequential Amendments) Bill 2007 [Provisions]* August 2007, p27 accessed at [http://www.aph.gov.au/senate/committee/ecita\\_ctte/completed\\_inquiries/2004-07/waterbill\\_2007/report/index.htm](http://www.aph.gov.au/senate/committee/ecita_ctte/completed_inquiries/2004-07/waterbill_2007/report/index.htm)

<sup>33</sup> Senate Standing Committee on Environment, Telecommunications, Information Technology and the Arts *Report on the Water Bill 2007 [Provisions] and Water (Consequential Amendments) Bill 2007 [Provisions]* August 2007, p13-14 accessed at [http://www.aph.gov.au/senate/committee/ecita\\_ctte/completed\\_inquiries/2004-07/waterbill\\_2007/report/index.htm](http://www.aph.gov.au/senate/committee/ecita_ctte/completed_inquiries/2004-07/waterbill_2007/report/index.htm)

## **TERMS OF REFERENCE**

34. The following discussion addresses the specific terms of reference, in light of the discussion above.

**The provisions of the Water Act 2007, 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;**

35. As discussed above, the Act provides a much more integrated method for incorporating relevant economic, social and environmental factors to reach the desired outcome than simply trying to 'balance' undefined economic, social and environmental considerations. The key purpose of the Act and the Basin Plan are to return extraction in the Basin to sustainable levels for ecosystem health and continued productive and social use of the Basin. The provisions of the Act set down an appropriate pathway to do that.
36. The presumption in this term of reference that the Act was intended to contain the nebulous direction to equally weight different factors is in our view incorrect, and as demonstrated above to do so would not assist in achieving the purpose of long term sustainable extraction levels. We hope the Committee in its report will recognise this misinterpretation and make a recommendation that reflects the need to achieve long term sustainable extraction in the Basin.

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

37. The claim that there are differences in legal interpretations of the Act has been greatly exaggerated and again demonstrates a misunderstanding of the legal issues. The debate over supposedly differing legal interpretations has been fuelled largely by the media and other commentators but for the most part is false. EDO lawyers have advised clients on the meaning of the Act and have also considered a number of other lawyers' interpretations of the Act, including the AGS advice to Minister Burke. Although we have not seen the legal advice from the AGS to the MDBA, a close reading of the Guide and discussions with MDBA staff have indicated the substance of that advice. Further the AGS has indicated that the advice to the MDBA is 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 as outlined in our discussion above. 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.
38. For all intents there is a consistent interpretation of the key areas of the Act. It is commentary and understanding of those interpretations that has differed.

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

39. As the Committee will be aware the Constitution does not provide the Commonwealth with direct powers in relation to the regulation of water management. Commonwealth legislation with respect to water largely depends for its validity on a referral of powers by the States or the use of another indirect power in the Constitution or a combination of the two. In this case the Water Act relies on a number of Constitutional heads of power as well as a referral from Basin States.<sup>34</sup>
40. The reason for the NPWS and the resulting Water Act was because the Commonwealth determined that it needed to exercise leadership in water management due to the failure of the previous consensus based model of water management between the Commonwealth and the States.<sup>35</sup> A reliance solely on what the States are prepared to refer undermines the intent of Commonwealth leadership in the broader public interest.
41. 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 one of the aims of this inquiry is to ‘insulate the Act against challenge’<sup>36</sup> then it would be advisable that these constitutional foundations remain.
42. All States, both major Federal political parties and the vast majority of stakeholders agreed that the Commonwealth should have a role in water management. 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.

**(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;**

43. As noted above the Act mentions the need to give effect to a number of international agreements and also includes a provision that gives some direction as to what is needed to implement those agreements.<sup>37</sup>
44. The Plan must be made in such a way that it will give effect to the relevant international agreements, so far as they are relevant to the use and management of the Basin.<sup>38</sup> For example, Basin Plan must be prepared “having regard to the

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<sup>34</sup> The Constitutional heads of power are trade and commerce; postal, telegraphic and telephonic; astronomical and meteorological observations; census and statistics; weights and measures; corporations power; external affairs; incidental powers; and governing of territories..

<sup>35</sup> See for example statements in the NPWS

<sup>36</sup> As stated by Senator Joyce - see note 1

<sup>37</sup> Water Act s21

<sup>38</sup> Water Act 2007 s21.

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 fact that the Basin therefore requires special measures to manage their use to conserve biodiversity.<sup>39</sup> In this way the Act recognises and attempts to operationalise our already existing obligations under international law. These requirements sit alongside the other requirements of the Act such as the SDLs. They are not to be pursued instead of the other requirements, they are one of the many integrated factors in the Act.

45. Although their inclusion in the Act strengthens the Federal Government’s constitutional claims to legislate in this area, the content of the Act was driven by the established policy objectives contained in the NWI and the NPWS. The inclusion of operative provisions in relation to international environmental agreements is consistent with the NWI which recognises the importance of protecting water dependent ecosystems<sup>40</sup>

**(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;**

46. As noted above, the Act already has economic and social considerations at its heart. To require in legislation that ‘equal weighting’ needs to be given means very little operationally and will be of no guidance. A discussion of the weaknesses of that approach are outlined above. More importantly, 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.
47. 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. Amendments to the Act will not assist to achieve that purpose.

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<sup>39</sup> Water Act 2007 s21

<sup>40</sup> See note 24 above