



## The Basin Plan: legal debates and developments

by Daniel Montoya

### 1. Introduction

The Murray-Darling Basin extends over 1 million km<sup>2</sup> of south-eastern Australia, covering three-quarters of NSW, more than half of Victoria, significant portions of Queensland and South Australia, and all of the ACT. While the average long-term annual inflow into the Basin has been calculated as 32,553GL, over the past 114 years inflows have ranged from a high of around 117,907 GL in 1956 to a low of around 6,740 GL in 2006. On average, approximately 42% of annual surface-water run-off in the Basin is diverted for consumptive use.<sup>1</sup>

In 2006, over 2 million people lived in the Basin. Agricultural production in the Basin accounts for 40% of Australia's agricultural production and is estimated to be worth \$15 billion annually. The Basin is also environmentally significant, containing 16 Ramsar-listed wetlands covering 636,500 ha and one World Heritage site.

On 28 November 2011, the Murray-Darling Basin Authority released the [proposed Basin Plan](#). As required by the *Water Act 2007* (Cth), the Plan sets out proposed management objectives for the water resources of

the Basin. The proposed Basin Plan, like the Authority's [Guide to the proposed Basin Plan](#) released in October 2010, has been subject to criticism from a number of parties.

A key criticism has concerned the interpretation of the *Water Act 2007* (Cth). In particular, the debate has focused on whether the Act provides for equal weight to be given to environmental, social and economic factors in the development of the Basin Plan. Competing interpretations of the Act can be broadly divided into two groups: those that hold that there is currently adequate scope in the Act for equal consideration to be given to environmental, social and economic factors; and those that maintain that the Act gives primacy to environmental factors over social and economic factors.

After providing background information on the *Water Act 2007* (Cth), this e-brief charts the debate over the interpretation of the Act since the release of the *Guide to the proposed Basin Plan*. It ends by summarising the NSW Government's current position on the proposed Basin Plan, outlining three possible High Court challenges to the Plan and setting out the next stages in the Plan's development.

## 2. The Water Act 2007 (Cth)

Flowing through four States and a Territory, management of the Murray-Darling Basin's (MDB) water resources has always been a complex affair. Prior to 2007, MDB water management responsibilities largely lay with the States. However, this changed with the introduction of the *Water Act 2007* (Cth).<sup>2</sup>

### 2.1 The Water Act in its original form

The *Water Act 2007* (Cth) (the Water Act) was introduced to allow the Commonwealth to assume significant planning and management powers and responsibilities for water resources in the Murray Darling Basin.<sup>3</sup> Originally, the Commonwealth Government sought the referral of relevant constitutional powers from the States to the Commonwealth to enable it to manage the MDB in the national interest. This approach stalled after the Victorian and Commonwealth Governments failed to agree on the draft legislation, with the result that the original version of the *Water Act 2007* was based exclusively on the Commonwealth's existing constitutional powers.<sup>4</sup>

Section 9 of the Water Act sets out the constitutional powers upon which the legislation in its original form was based. According to s9, the Act relies on any implied legislative powers of the Commonwealth along with a number of specific powers under the Commonwealth Constitution, including:

- Trade and commerce with other countries, and among the States (s51(i));
- Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (s51(xx)); and

- External affairs (s51(xxix)).<sup>5</sup>

Only two provisions of the Commonwealth Constitution relate directly to water.<sup>6</sup> Section 98 provides:

The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

Section 100 provides:

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Also relevant is section 99 of the Commonwealth Constitution, which provides:

The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

The prohibitions on Commonwealth power established by ss99 and 100, particularly as these relate to the trade and commerce (s51(i)) and corporations (s51(xx)) powers, are addressed in the Water Act. Section 11 of the Act provides:

(1) If:

(a) the operation of a provision of this Act, or of regulations or another instrument made under this Act, in reliance on the Commonwealth's legislative powers under paragraph 51(i) or (xx) of the Constitution would be invalid because of section 99 or 100 of the Constitution; and

(b) the operation of that provision in reliance on another legislative power, or other legislative powers, of

the Commonwealth would not be invalid because of section 99 or 100 of the Constitution;

it is the intention of the Parliament that the provision operate in reliance on the legislative power or powers referred to in paragraph (b).

(2) Without limiting paragraph (1)(b), the reference in that paragraph to a legislative power of the Commonwealth includes a reference to a legislative power under a referral under paragraph 51(xxxvii) of the Constitution.

(3) If:

(a) a provision of this Act, or of regulations or another instrument made under this Act, operates in relation to trade or commerce; and

(b) the operation of the provision is invalid, under section 99 or 100 of the Constitution, in relation to trade or commerce between the States;

it is the intention of the Parliament that the provision operate in relation to trade or commerce within the States.

## 2.2 The 2008 amendment and the referral of powers

In March 2008, at the first COAG meeting following the election of the Rudd Government, the Commonwealth, NSW, Victorian, Queensland, South Australian and ACT Governments signed a [Memorandum of Understanding on MDB reform](#). In July 2008, this MOU was implemented through the signing of an [Agreement on Murray-Darling Basin Reform](#). These reforms required a referral of powers from the participating States, as enacted in NSW by the [Water \(Commonwealth Powers\) Act 2008](#) (NSW).

The [Water Amendment Act 2008](#) (Cth) gave effect to the Agreement by inserting the following parts into the Water Act:<sup>7</sup>

- Part 1A: The Murray-Darling Basin Agreement;
- Part 2A: Critical human water needs;
- Part 4A: Extended operation of Basin water charge and water market rules;
- Part 10A: Transitional matters relating to the Murray-Darling Basin Commission; and
- Part 11A: Interactions with State laws.

The Amending Act also replaced the following Part:

- Part 4: Basin water charge and water market rules.

Section 9A of the Water Act sets out the constitutional basis for Parts 1A, 2A, 4, 4A, 10A and 11A of the Act as follows:

- The legislative powers that the Commonwealth has under section 51 of the Constitution, other than paragraph 51(xxxvii); and
- The legislative powers referred to the Commonwealth by referring States under paragraph 51(xxxvii) of the Constitution.

## 2.3 Specific provisions

Under the Water Act, a new governance structure for the Murray-Darling Basin was formed, comprising: the Murray-Darling Basin Authority; the Murray-Darling Basin Ministerial Council (now known as the [Legislative and Governance Forum on the Murray-Darling Basin](#))<sup>8</sup>; the Basin Officials Committee; and the Basin Community Committee. Relevant

responsibilities held by the Murray-Darling Basin Authority (MDBA) include: the development of a Basin Plan; advising the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities on the accreditation of State water resource plans; and managing water sharing between the States.

Several provisions of the Water Act relate to the consideration of environmental, social and economic factors in the development of the Basin Plan, including:

- the objects section (section 3);
- the definition of 'environmentally sustainable level of take' (section 4);
- section 20 which sets out the purpose of the Basin Plan;
- section 21 which sets out the general basis on which the Basin Plan is to be developed;
- section 22 which outlines the mandatory content of the Basin Plan; and
- the meaning and effect of 'long-term average sustainable diversion limits' (subsection 22(6) and section 23).

## 2.4 The Basin Plan

The Basin Plan is a legislative instrument. The specific purposes of the Plan, as set out in section 20 of the Water Act, include:

- giving effect to relevant international agreements;
- establishing and enforcing environmentally sustainable limits on the extraction of water;
- providing for Basin-wide environmental objectives for water-dependent ecosystems; and

- providing for the use and management of Basin water resources in a way that optimises economic, social and environmental outcomes.

## 3. The Guide to the proposed Basin Plan

In October 2010, the MDBA released the [Guide to the proposed Basin Plan](#) (the Guide) to present proposals to the community for discussion. The proposals concerned the key decisions the Authority was required to make under the Water Act. As stated in the Guide:

In accordance with the Water Act, the Authority has followed the process outlined below to develop the proposals in the Guide. It has:

- established a range for the amount of water needed for the environment based on the best available science. Additional water that falls within that range will meet the environmental water requirements of the *Water Act 2007* (Cwlth)
- considered the social and economic effects of providing additional water to the environment within that range, to meet its statutory requirement to optimise economic, social and environmental outcomes
- considered scenarios for establishing surface-water and groundwater long-term average sustainable diversion limits (SDLs) and how they will balance the environmental water requirements with the potential social and economic impacts
- presented SDL proposals for surface water and groundwater that meet these requirements
- examined the social and economic effects of the SDL proposals

- in response to the social and economic assessment, developed proposals for transitional arrangements to support communities, individuals, industries and businesses to make the transition to the SDLs, when finalised.<sup>9</sup>

The MDBA's analysis found that an additional volume of between 3,000 and 7,600 GL/y from current diversion limits would be required to meet environmental objectives under the Act. The Guide noted that:

Consumptive water reductions in this range would have significant negative implications on some Basin communities, industries, enterprises and individuals. The scale of this effect would vary with each catchment and community, depending on a complex array of factors.

...

In light of the severity of this impact on specific sectors and communities, the Authority has judged that in order to optimise social, economic and environmental outcomes, as it is obliged to do under the Water Act 2007 (Cwth), it can only consider Basin-wide reductions of between 3,000 and 4,000 GL/y for the Basin (reductions of 22–29% of current diversion limits). That is, reductions in current diversions above 4,000 GL/y have been judged to be beyond the range of acceptable reductions. A reduction in current water diversions of 3,000–4,000 GL/y (or greater than 29%) would represent a reduction in gross value of irrigated agricultural production of around 13–17%, or \$0.8–1.1 billion per year.<sup>10</sup>

#### 4. The Australian Government Solicitor's advice

On 25 October 2010, Tony Burke, Minister for Sustainability, Environment, Water, Population and Communities, issued a [Ministerial Statement](#) on the interpretation of the Water Act. In that statement, the Minister stated:

The MDBA has been reported as saying that the Act requires a focus on environmental issues first, with limited attention to social and economic factors. For this reason I sought legal advice from the Australian Government Solicitor to determine whether the interpretations referred to publicly by the MDBA matched the requirements of the Act. I also stated here in the House that following receipt of the advice I would make it public.<sup>11</sup>

According to the Minister, the Australian Government Solicitor's [advice](#) outlined that the Water Act:

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

Much has been made of the international agreements which underpin the Water Act and it's been suggested that these agreements

prevent socio-economic factors being taken into account. In fact, these agreements themselves recognise the need to consider these factors.<sup>12</sup>

The Act specifically states that in giving effect to those agreements, the plan should promote the use and management of the basin water resources in a way that optimises economic, social and environmental outcomes.

It is clear from this advice that environmental, economic and social considerations are central to the Water Act and that the Basin Plan can appropriately take these into account.<sup>13</sup>

On 26 October 2010, the MDBA issued a media release stating that:

The Authority has, throughout the development of the Guide, sought and relied on policy guidance by the Department of Sustainability, Environment, Water, Population and Communities and close consultation with the Australian Government Solicitor for legal interpretation. The Guide itself was reviewed by the Australian Government Solicitor before it was released.

The Chair of the Authority, Michael Taylor AO, confirmed that the Authority is closely studying the AGS advice released by the Minister and will clarify with the AGS any divergence between that advice and the position previously advised.<sup>14</sup>

On 1 December 2010, the MDBA sought the advice of the Attorney-General's Department regarding the release on public interest grounds of AGS advice it has received. On 3 December 2010, the Attorney-General's Department replied that the advice in question should not be released. In particular, the Department noted that:

... the AGS advice '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'.<sup>15</sup>

On 7 December 2010, Mr Taylor announced his resignation. His media release stated:

Mr Taylor noted that, balancing the requirements of the *Water Act 2007* against the potential social and economic impact on communities will be a significant challenge. The *Guide* was developed with full regard to the requirements of the *Water Act*, and in close consultation with the Australian Government Solicitor. However, the Authority has sought, and obtained, further confirmation that it cannot compromise the minimum level of water required to restore the system's environment on social or economic grounds.<sup>16</sup>

## 5. 2011 Senate inquiry

In June 2011, the Senate Legal and Constitutional Affairs References Committee released the findings of its inquiry into the Water Act entitled [\*A Balancing Act: provisions of the Water Act 2007\*](#). The Committee concluded that the Water Act, as currently drafted, is uncertain and ambiguous. The Committee stated that:

... we are strongly concerned that, given the wide range of interpretations applied to the Act in the evidence provided to this inquiry, any plan delivered, whether balanced or not, will be subject to arguments that it may not comply with the requirements of the Act and may therefore be the subject of potential legal challenge. Such continued uncertainty and delay

would be the worst of all outcomes for the environment, communities and economies of the Murray-Darling Basin.<sup>17</sup>

With regard to balancing environmental, social and economic objectives, the Committee stated that:

... it seems more likely to the committee that the use of the external affairs power, in conjunction with international agreements for the protection of the environment, has created a legislative framework in the Water Act for the development of the Basin Plan where environmental considerations can be, and are, given substantially more 'weight' than social and economic considerations.

... There would appear to be no scope for the MDBA to reduce cuts to water use below an environmentally sustainable level of take based on social, economic or other considerations. In the committee's view, this finding is consistent with the legal advice of the AGS and the approach taken by the MDBA in the Guide.<sup>18</sup>

The Committee questioned the constitutional validity of the Water Act:

The committee agrees that the ambiguities in the provisions of the Water Act, in relation to the development of the Basin Plan, have largely resulted from the absence of a clear constitutional power for the Commonwealth over water regulation in Australia. In the committee's view, the basis upon which the Water Act is established is unsound: there are clear question marks over the adequacy of the constitutional heads of power (namely, the external affairs power), as well as the limited state referral powers, upon which the Act relies.<sup>19</sup>

The Senate Committee consequently made four recommendations:

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

The Government Senators on the Committee lodged a dissenting report in which they disagreed with the Committee's conclusions and recommendations. The Australian Greens Senate Committee member also lodged a dissenting report.

## 6. Responses to the 2011 Senate inquiry

It appears that the MDBA has only made one specific mention of the Senate Committee's inquiry since its release. This can be found in the MDBA's 2010-11 Annual Report, in which it states:

As it [the MDBA] finalises the draft Basin Plan for release for consultation in mid-November 2011, MDBA is considering those report recommendation [sic] that fall within its remit.<sup>20</sup>

On 27 March 2012, the Commonwealth Government tabled its [response](#) to the Senate inquiry in which it did not agree with any of the Committee's recommendations. In response to recommendation 1, the Government stated that:

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.<sup>21</sup>

In response to recommendations 2 and 3, the Government stated that:

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.<sup>22</sup>

## 7. The Proposed Basin Plan

On 28 November 2011, the MDBA released the [proposed Basin Plan](#) (the Plan). The Plan recommends that a long-term environmentally sustainable level of take of water from the Basin will be achieved by reducing consumptive use of water by 2,750 GL/y from a 2009 baseline level.

Chapter 5 of the Plan sets out its management objectives and outcomes. Management objectives and outcomes are identified for: the Plan as a whole; environmental outcomes; water quality and salinity; long-term sustainable diversion limits; and the trading of tradeable water rights. Section 5.02 sets out the management objective and outcomes for the Plan as a whole as follows:

(1) The management objective for the Basin Plan as a whole is to achieve a healthy working Murray-

Darling Basin, including a healthy environment, strong communities and a productive economy, through the integrated and cost effective management of Basin water resources.

(2) The management outcomes that correspond to the objective in subsection (1) are that Basin water resources are used in a way that:

- (a) optimises economic, social and environmental outcomes; and
- (b) gives effect to relevant international agreements; and
- (c) improves water security for all uses of Basin water resources.<sup>23</sup>

Section 5.05 sets out the management objective and outcomes in relation to long-term sustainable diversion limits as follows:

(1) The management objective in relation to long-term average sustainable diversion limits is to establish environmentally sustainable limits on the quantities of surface water and groundwater that can be taken for consumptive use from Basin water resources and in doing so:

- (a) inform environmental water recovery measures, including water purchasing and infrastructure that improves water use efficiency; and
- (b) provide greater certainty for all water users, including in times of drought and low water availability; and
- (c) provide time for water access entitlement holders and communities to transition and adjust to long-term average sustainable diversion limits.

(2) The management outcomes that correspond to the objective in subsection (1) are:

(a) the ecological and other values of water dependent ecosystems in the Murray-Darling Basin are protected and restored so that ecosystems remain healthy in a changing climate; and

(b) well informed water recovery measures, including water purchasing and infrastructure, enable a transition to long-term average sustainable diversion limits; and

(c) greater certainty of access to Basin water resources; and

(d) water access entitlement holders and communities of the Murray-Darling Basin are better adapted to reduced quantities of available water.<sup>24</sup>

According to the Plain English Summary of the proposed Basin Plan:

In setting SDLs, MDBA has taken into account the need for:

- **water-dependent ecosystems** to be protected and restored, so rivers and groundwater systems remain healthy in a changing climate
- efficient and productive industries and resilient communities
- greater certainty of access to the Basin's water resources
- time for Basin science to advance further and for communities to adjust to new arrangements ...

In determining the proposed SDLs, MDBA first needed to understand the water needs of the natural environment. This is a complex task and there is no established science or method that currently provides a succinct or definitive answer. There are tens of thousands of 'environmental assets' — rivers, wetlands, floodplains and aquifers — in the Basin, and to study the water requirements and natural flow

regimes of all these would take many years. Therefore, MDBA looked at a subset of representative environmental sites and functions throughout the Basin ...

In conjunction with MDBA's environmental research, socioeconomic studies were undertaken or commissioned by MDBA to ascertain the likely effects of a range of SDLs on Basin communities and economies ... The results were used to ensure that the SDLs proposed would not have unduly harsh community impacts, and so that in places where impacts might be felt more strongly, strategies can be put in place to support these communities through the transition. The seven-year transition to SDLs and the 2015 review are examples of these strategies.

From this strong scientific basis and building on feedback received, judgements were made about how much water the Basin and its catchments need to be healthy in the long-term, while continuing to support communities and economies. This is the foundation of the SDLs set out in the proposed Basin Plan.<sup>25</sup>

## 8. Potential High Court challenges

Three parties have flagged potential High Court challenges to the proposed Basin Plan: the South Australian Government; a coalition of environment and community groups; and a group of South Australian and Victorian water users.

### 8.1 South Australian Government

A South Australian Government High Court challenge to the Basin Plan was flagged as early as 29 October 2011 by the current SA Premier, Jay

Weatherill, eight days after he was sworn in.<sup>26</sup> Following the release of the proposed Basin Plan on 28 November 2011, Mr Weatherill reiterated the possibility of a High Court challenge.<sup>27</sup> In addition, the SA Government commissioned a high level taskforce to "co-ordinate the scientific and ecological analysis of the plan and consider South Australia's legal rights in relation to [the] matter."<sup>28</sup>

Since the taskforce was formed, the SA Government has released [three technical reviews](#) of the proposed Basin Plan, as well as an [expert panel assessment](#) conducted by The Goyder Institute for Water Research. Released on 2 April 2012,<sup>29</sup> the Goyder Institute report found that many environmental goals would not be met under the proposed Basin Plan.

The SA Government appears to be developing a High Court challenge around the scientific reviews of the proposed Basin Plan as well as a recently rediscovered 106-year-old legal opinion written by a former Chief Justice of the High Court. The opinion, entitled "Waters of Murray River and its Tributaries and Interstate Rights to Divert Them", was written by Isaac Isaacs on 22 March 1906. The opinion states that:

South Australia and its residents have rights in respect and to the use of the waters of the Murray and its tributaries capable of being judicially asserted and enforced.<sup>30</sup>

According to the SA Premier:

The relationship between the commonwealth and the states regarding the River Murray was the single biggest issue in contest when the Australian Constitution was being drafted and debated over 110 years ago, and is one of the few substantial matters on which the

High Court has not yet pronounced an opinion.<sup>31</sup>

On 4 April 2012, the SA Parliament [debated](#) the [final report](#) of a parliamentary inquiry into the Draft Murray-Darling Basin Plan. The Natural Resources Committee concluded in its report that:

... in its current draft form, the Basin Plan meets neither the objectives of the *Water Act 2007* nor the social, economic, cultural and environmental needs of the State of South Australia.<sup>32</sup>

The Committee's report also sets out a number of recommendations, including that the SA Government should lobby for significant changes to the Basin Plan.

On 16 April 2012, the SA Government lodged its [response](#) to the proposed Basin Plan with the MDBA. The response made [71 recommendations](#) and states that:

While there are elements of the draft plan that should be retained in a revised final plan, the South Australian Government cannot support the draft Basin Plan in its current form. The draft Plan does not deliver essential outcomes for South Australian environments and communities.<sup>33</sup>

The SA Government argues that, amongst other points, the draft Basin Plan:

- fails to protect our environment;
- does not use the best available science;
- does not recognise South Australia's history of responsible water stewardship;
- does not take into account the measures needed to help iconic sites in South Australia to

recover from the effects of drought and over-allocation; and

- does not adequately recognise Aboriginal cultural needs.<sup>34</sup>

The response sets out in some detail possible grounds for a legal challenge:

It is essential that the Basin Plan is valid and able to withstand legal challenge during its life. It must correctly reflect the objects and purposes of the international instruments upon which it depends for its validity and those of the *Water Act 2007* and it must apply the best available science to that task. It cannot prescribe conditions that reflect political expediency while contradicting the objects of the Act, its specific requirements and the best available science. It must honour the constitutional rights of each State. In its present form it would be vulnerable to the contention that it is at the very least *ultra vires* the Act and invalid. It cannot be predicted whose interests might at any one time whether now or far into the future be served by challenging the validity of the Basin Plan.

It should also be noted that in any controversy or proceedings in which these issues are raised a number of other claims might well be advanced. The claims of the Indigenous owners of the land would loom large in this context.

South Australia and South Australian interests have also suffered losses and damage as a direct result of the abuse of the River system. Some remedial works have been undertaken at the cost of the MDBA but a great many have been paid for by the State. The desalination plant is one major example. Damage to agriculture and other businesses and to the

environment has been massive and is quantifiable.<sup>35</sup>

According to the response, unless substantial alterations are made to the Plan, it will be vulnerable to a finding that it is *ultra vires*<sup>36</sup> the *Water Act 2007* and therefore invalid for the following reasons:

- it contradicts the objects and purposes of the international instruments upon which it depends for its validity;<sup>37</sup>
- it contradicts, both in substance and form, the objects and purposes of the *Water Act 2007* pursuant to which it was prepared;
- if implemented it would deny South Australia's rights under the Australian Constitution and under the general law;
- it does not constitute a 'plan' in the sense required by the *Water Act 2007*;
- it fails to provide for and contain a substantial number of matters that are required of it by the *Water Act 2007* and in particular by sections 19, 20, 21 and 22 of the Act;
- it is based upon assumptions that are at odds with the best available science and it fails to apply the best available science;
- it seeks to have regard to matters that are beyond the scope and purpose of the *Water Act 2007*; and
- it has been prepared for a purpose other than the purpose for which the power to prepare it was conferred.<sup>38</sup>

While the SA Government [response](#) or the Premier's accompanying [media release](#) do not specify the circumstances under which the SA

Government might launch a High Court challenge, such a challenge seems to be on the cards. In his media release, the Premier stated that:

We want long-standing injustices corrected and South Australia will not settle for second best.<sup>39</sup>

The SA Government response states that:

South Australia has long pursued its rights in relation to Basin resources. We have worked actively to protect our river environment. We have struggled for the guaranteed supply of water for critical human needs. We have argued for a minimum entitlement of water resources and we've achieved upstream storage rights ...

We maintain that the rights of South Australians will only be met by delivery of a healthy river system and will continue to pursue our rights if the Basin Plan does not meet these requirements.<sup>40</sup>

## 8.2 Coalition of environment and community groups

On 2 April 2012, it was reported that a coalition of ten major environment and community groups were considering launching a legal challenge to the proposed Basin Plan.<sup>41</sup> The coalition commissioned a [legal analysis](#) of the proposed Basin Plan by the Victorian branch of the [Environmental Defenders Office](#) (EDO).<sup>42</sup> According to the EDO:

In our view the Proposed Basin Plan (draft Plan) does not comply with the Act in a number of respects. In addition, it is clear from the draft Plan and the associated explanatory materials that the approach the MDBA has taken in the development and drafting of the Basin Plan has been to consistently give provisions

their weakest interpretation and/or give effect to them in the weakest way.<sup>43</sup>

The EDO gives several examples of the way in which the proposed Basin Plan does not comply with the Water Act, including:

- The management objectives for the Basin as described in Chapter 5 of the Basin Plan do not accord with the Water Act;
- The MDBA's approach to determining the environmentally sustainable level of take does not accord with the Water Act as it prioritises social and economic considerations and operational constraints above the issue of what extraction level is sustainable;
- The MDBA's approach to setting SDLs does not accord with the Water Act as it prioritises possible negative social and economic factors and operational constraints above the consideration of what is sustainable, and it appears to have set an SDL that is likely to compromise many aspects of the environment; and
- The MDBA's decision to increase groundwater extraction by more than double current amounts does not appear to be based on best available science and does not align with the precautionary principle – both requirements of the Water Act.<sup>44</sup>

The EDO concludes that:

Although there are a number of problems with the legal instrument itself, most of these issues could be resolved with minor changes. The major legal issue is therefore not with the legal instrument itself, but with the way the MDBA has made

decisions regarding the environmentally sustainable level of take and the sustainable diversion limits. The considerations they have used to make these decisions do not accord with the requirements of the Act and therefore the Plan may be invalid. These issues could be resolved if the MDBA reconsidered its approach to setting SDLs to ensure it aligned with the Act.<sup>45</sup>

### 8.3 South Australian and Victorian water users

The lawyer for a class action representing 1,200 water users from South Australia and western Victoria, including the irrigator group Murray Valley United<sup>46</sup>, stated in April 2012 that legal writs would be filed in the High Court within weeks.<sup>47</sup> This potential challenge to the proposed Basin Plan is focused primarily on the constitutional validity of the *Water Act 2007* (Cth). According to *The Australian*, the challenge will claim that the Act contravenes s100 of the Constitution.

## 9. NSW Government position

On 13 April 2012, the NSW Deputy Premier and Nationals Leader, Andrew Stoner, and the NSW Minister for Primary Industries, Katrina Hodgkinson, released a [joint media release](#), together with the [NSW submission](#) on the proposed Basin Plan. Mr Stoner and Ms Hodgkinson stated that:

NSW remains committed to effective water reform in the Basin but the proposed Murray-Darling Basin Plan is unacceptable in its current form.<sup>48</sup>

Together with 40 recommendations, the NSW submission sets out eight key NSW positions that have not been adequately met, either by the

proposed Basin Plan or by associated Commonwealth water programs:

1. Best available science - the Basin Plan should be based on best available science;
2. Triple bottom line - the draft Plan should balance the needs of the environment, communities and economy;
3. Structural adjustment - unavoidable social and economic costs should be identified and mitigated through a Commonwealth structural adjustment package;
4. Equitable State Share - water recovery should be equitably shared between Basin States;
5. Diversified strategic water recovery - water should be recovered through a combination of infrastructure, environmental works and measures, rules review and strategic buyback;
6. State implementation requirements - State implementation requirements should be clearly defined;
7. State implementation costs - Any new or extended implementation costs to be met by the Commonwealth; and
8. Improved water management - the Basin Plan should deliver improved water management without excessive intervention or reporting requirements.<sup>49</sup>

In the conclusion to its submission, the NSW Government appears to suggest that, in its opinion, the proposed Basin Plan does not meet the requirements of the Water Act, stating that:

A key object of the Basin Plan under the Commonwealth *Water Act 2007* is to provide for the use and management of Basin water resources to *optimise*

environmental, social and economic outcomes. The NSW Government position is that the Basin Plan should meet a triple bottom line outcome, balancing the needs and interests of the environment, communities and the economy.<sup>50</sup>

## 10. Next stages

The MDBA received over 10,000 submissions on the proposed Basin Plan. What happens next is as follows:

- The MDBA will prepare a document that summarises the submissions received, how they have been addressed, and any changes made as a result;
- The amended Basin Plan will be given to each member of the Legislative and Governance Forum of the Murray-Darling Basin for comment;
- Subject to the Basin Ministers' response, the MDBA may submit a revised Plan to the Minister for Sustainability, Environment, Water, Population and Communities for consideration; and
- The Minister may then approve the plan or request further changes and only when satisfied will present the Plan to the Commonwealth Parliament.<sup>51</sup>

As reported on 18 April 2012, the Commonwealth Government intends to implement the Basin Plan by the end of 2012.<sup>52</sup>

## 11. Conclusion

While everyone agrees on the need for a viable response to the challenges facing the Murray-Darling Basin, the devil, as ever, is in the detail.

Several stakeholders argue that the proposed Basin Plan does not comply with the Water Act, thereby leaving it open to legal challenge. Given the debate that followed the release of the *Guide to the proposed Basin Plan*, it is perhaps surprising that the MDBA has not expressly addressed these arguments. While not expressly stated, the MDBA's position appears to be that there is currently adequate scope in the Act for equal consideration to be given to environmental, social and economic factors.

As of 19 April 2012, the [ACT Government](#) is the only Basin State or Territory Government that supports the proposed Basin Plan.<sup>53</sup> The NSW, South Australian and Victorian<sup>54</sup> Governments do not support the proposed Basin Plan in its current form. The Queensland Government, while not having made a formal submission on the proposed Basin Plan, has stated that it has:

... significant concerns about some of the cutbacks, in terms of water usage for people on the land in Queensland, and we won't be agreeing to anything until we've had time to actually assess what those actually are.<sup>55</sup>

The Federal Opposition has stated that it will only support the Plan in Parliament if it is "overwhelmingly" supported by the Plan's stakeholders.<sup>56</sup>

The legal complexities discussed in this e-brief are the result of the limitations and prohibitions on Commonwealth power, on one side, and the scope of State powers and referral of those powers, on the other. Even if all limits and prohibitions on Commonwealth power were removed, the practical complexities of balancing environmental, social and economic factors would remain.

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<sup>1</sup> [Proposed Basin Plan 2011](#), Schedule 1

<sup>2</sup> For a detailed summary of the Water Act 2007 (Cth) in connection with the NSW water regulatory regime, see the following publication: D Montoya, [Water: Regulatory Frameworks in Rural NSW](#), Briefing Paper 04/2010, 2010.

<sup>3</sup> The Senate Standing Committee on Environment, Communications, Information Technology and the Arts conducted an [inquiry](#) into the Water Bill 2007.

<sup>4</sup> A Martyn, P Pyburne and B McCormick, [Water Bill 2007](#), Parliamentary Library Bills Digest no.30, 14 August 2007

<sup>5</sup> The international agreements to which the Commonwealth Government is a signatory, and under which it exercises the external affairs power, include the [Ramsar Convention on Wetlands](#) and the [Convention on Biological Diversity](#).

<sup>6</sup> See the following publication for an overview of the connection between the Constitution and the management of water in Australia: P Kildea and G Williams, [The Constitution and the management of water in Australia's rivers](#), *Sydney Law Review*, December 2010, 32(4):595-616.

<sup>7</sup> The Senate Standing Committee on Rural and Regional Affairs and Transport conducted an [inquiry](#) into the Water Amendment Bill 2008.

<sup>8</sup> This change was made in 2011.

<sup>9</sup> Murray-Darling Basin Authority, [Guide to the proposed Basin Plan - Overview](#), Volume 1, 2010, p.xiii

<sup>10</sup> *Ibid.*, p.81-82

<sup>11</sup> Hon. Tony Burke, [Ministerial statement: Murray Darling Basin Reform: Interpretation of the Water Act 2007](#), 25 October 2010, p.3

<sup>12</sup> See n5

<sup>13</sup> *Ibid.*, p.3-4

<sup>14</sup> Murray-Darling Basin Authority, [MDBA welcomes Minister's Statement](#), 26 October 2010

<sup>15</sup> Senate Legal and Constitutional Affairs References Committee, [A Balancing Act: provisions of the Water Act 2007](#), June 2011, p.29

<sup>16</sup> Murray-Darling Basin Authority, [Plan for the Murray-Darling Basin - Role of Authority Chair](#), 7 December 2011

<sup>17</sup> n15, p.62

<sup>18</sup> n15, p.62-63

<sup>19</sup> n15, June 2011, p.63

<sup>20</sup> Murray-Darling Basin Authority, [Murray-Darling Basin Authority Annual Report 2010-11](#), 2011, p.172

- <sup>21</sup> Australian Government, [Australian Government Response to the Senate Legal and Constitutional Affairs References Committee Report: A Balancing Act: provisions of the Water Act 2007](#), 27 March 2012, p.1
- <sup>22</sup> *Ibid.*, p.2
- <sup>23</sup> [Proposed Basin Plan 2011](#)
- <sup>24</sup> [Proposed Basin Plan 2011](#)
- <sup>25</sup> Murray-Darling Basin Authority, [Plain English summary of the proposed Basin Plan - including explanatory notes](#), November 2011, p.20
- <sup>26</sup> *The Australian*, [Weatherill vows to end the war over water](#), 29 October 2011
- <sup>27</sup> *The Australian*, [Weatherill stands his ground on water flows](#), 1 December 2011
- <sup>28</sup> Government of South Australia, [SA Launches Strong and United Response to Draft Basin Plan](#), Media Release, 28 November 2011
- <sup>29</sup> Government of South Australia, [Science shows 2750GL is not enough](#), Media release, 2 April 2012
- <sup>30</sup> *The Australian*, [Old brief may sink Murray plan](#), 31 March 2012
- <sup>31</sup> *Ibid.*
- <sup>32</sup> South Australian House of Assembly Natural Resources Committee, [Water Resource Management in the Murray-Darling Basin](#), March 2011, p.vii
- <sup>33</sup> Government of South Australia, [South Australian Government Response to the Draft Murray-Darling Basin Plan](#), 16 April 2012, p.19
- <sup>34</sup> *Ibid.*, p.19
- <sup>35</sup> *Ibid.*, p.21
- <sup>36</sup> *ultra vires* (Latin, *ultra*, beyond + *vires*, powers) An act or decision beyond the legal power of the person or institution making it, and thus invalid.
- <sup>37</sup> See n5
- <sup>38</sup> n33, p.21
- <sup>39</sup> Government of South Australia, [More water and an enforceable Plan for the future](#), News Release, 16 April 2012
- <sup>40</sup> n33, p.7-8
- <sup>41</sup> *The Australian*, [Legal threat to Murray-Darling plan](#), 2 April 2012
- <sup>42</sup> econews.com.au, [Experts say Murray-Darling water plan illegal](#), 2 April 2012
- <sup>43</sup> Environmental Defenders Office (Victoria), [Legal analysis of the Proposed Murray-Darling Basin Plan](#), March 2012, p.3
- <sup>44</sup> *Ibid.*, p.3
- <sup>45</sup> *Ibid.*, p.3
- <sup>46</sup> In 2009, Murray Valley United (MVU) lodged a claim in the Federal Court. In substance, MVU's case was that the Commonwealth,

- aided and abetted by the Victorian Government and the Rural Water Corporation, had contravened s100 of the Constitution. On 16 April 2010, the claim was summarily dismissed by the Federal Court [*Campisi vs Commonwealth* [2010] FCA 379]
- <sup>47</sup> *The Australian*, [Water rights 'fight to the bloody end'](#), 4 April 2012
- <sup>48</sup> The Hon Andrew Stoner and the Hon Katrina Hodgkinson, [NSW backs basin communities - will not support proposed Murray-Darling Basin Plan](#), Media Release, 13 April 2012
- <sup>49</sup> NSW Government, [NSW Government submission on the proposed Murray Darling Basin Plan](#), 13 April 2012, p.i
- <sup>50</sup> *Ibid.*, p.21
- <sup>51</sup> Murray-Darling Basin Authority, [What's Next](#), no date [online - accessed 18/04/2012]
- <sup>52</sup> *The Australian*, [No turning on basin plan](#), 18 April 2012
- <sup>53</sup> This interpretation of the ACT Government's position is based on statements made in the [ACT Hansard](#). This is because, as of 18 April 2012, the ACT Government had not lodged a submission on the proposed Basin Plan or issued a media release stating its position.
- <sup>54</sup> State Government Victoria, [The Victorian Government submission to the proposed Basin Plan: Whole of Victorian Government submission](#), April 2012
- <sup>55</sup> *The Australian*, [Scientists slam Murray-Darling plan](#), 13 April 2012
- <sup>56</sup> *Australian Financial Review*, [Murray plan on the skids: Joyce](#), 19 April 2012

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