

Submission to the Murray-Darling Basin Royal Commission

– Issues Paper Two

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This submission was prepared by Dr Anita Foerster (Melbourne Law School) and Prof. Alex Gardner (UWA Law School) and is based on the previous extensive work of both authors in the field of Australian water law. It addresses the issues of legal construction of key provisions of the *Water Act 2007* (Cth) [the Water Act] and the implications of this construction for the validity of the Basin Plan and proposed changes to the Sustainable Diversion Limit [SDL]. In particular, it addresses the legal issue of “whether social and economic outcomes are to be considered in determining an ESLT [environmentally sustainable level of take], or whether such outcomes are to be engaged with only after an ESLT has been determined”: Issues Paper para 3[b].

The submission is organised around the four key concerns raised by the Commissioner in Issues Paper 2.

1. The manner in which the Water Act has been construed in order to determine a long-term average sustainable diversion limit which reflects an environmentally sustainable level of take.

In a series of previous publications, both authors have considered the legal force of the requirements in the Water Act to establish a SDL within the Basin Plan which reflects an environmentally sustainable level of take [ESLT].¹

In general terms, we concur with the views expressed by the Commissioner in Issues Paper 2 that ‘there is force in the proposition that the Water Act, properly defined, requires environmental considerations to be paramount, and that economic and social outcomes are irrelevant to the determination of an ESLT, and hence to the setting of a Basin-wide SDL’ (para 14). This is particularly important in the making of the inaugural Basin Plan that needs to give effect to the specific objects ‘to ensure the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused’ and ‘to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin ...’.²

Our interpretation of the legislative scheme is as follows.

- As noted in Issues Paper 2, the strong environmental provisions governing the preparation of the Basin Plan are a reflection of the constitutional basis for the legislation and, particularly, the reliance on the external affairs power to legislate to give effect to relevant international agreements, including the Ramsar Convention and the Biodiversity Convention.³ This heavy reliance is reflected in the objects of the

¹ Anita Foerster, “The Murray-Darling Basin Plan 2012: An ecologically sustainable level of trade-off?” (2013) 16(1) *Australasian Journal of Natural Resources Law and Policy* 41; Anita Foerster, ‘What’s in the Basin Plan?’ (2013) 28(3) *Australian Environment Review*, 487; Alex Gardner et al, *Water Resources Law* (2nd edition, 2018), chapters [4.9], [14.33] to [14.34] and [16.133] to [16.141].

² *Water Act 2007* (Cth) s 3(d)(i) & (ii).

³ *Water Act 2007* (Cth), ss 9 and 9A.

Act⁴ and the purposes of the Basin Plan⁵ and the basis on which it is to be developed.⁶ This interpretation of the Act's key provisions is consistent with the international obligation under the Ramsar Convention and the Biodiversity Convention to restore wetlands, including through measures such as environmental water allocations ('EWAs').⁷ "The reason for providing EWAs is that environmental quality is both significant for its inherent value and for socio-economic values."⁸

- The Water Act establishes a duty or threshold responsibility to ensure the return of water extraction to environmentally sustainable levels via the Basin Plan. This is achieved via the statutory object to ensure the return to environmentally sustainable levels of extraction,⁹ together with the mandatory purpose and content of the Basin Plan directed at SDLs.¹⁰ There is no doubt that a short-to-medium-term objective is to deal with the overallocation and overuse in the MDB. As explained in the second reading speech for the Water Bill 2007:¹¹

"The Water Bill and the national plan [for water security announced by the Prime Minister on 25 January 2007] build on the 2004 National Water Initiative agreement, signed by all governments. The key objectives of the National Water Initiative are to improve the efficiency of water use and establish clear pathways *to return all water sources to environmentally sustainable levels of extraction*. These are the objectives of the Water Bill ...".

While the statutory objects also reference a range of social and economic objectives – such as maximising net economic returns and optimising economic, social and environmental outcomes – the plain truth is that the Act prioritises provision of water to the environment for the short-to-medium-term objective of returning to environmentally sustainable levels of extraction, redressing a long-term historical imbalance in favour of economic uses of the Basin water resources.¹² The optimising of economic, social and environmental outcomes should be understood as the long-term object in giving effect to relevant international agreements following the return to environmentally sustainable levels of extraction.¹³

- The Act also establishes a legal standard for the SDL.¹⁴ It must reflect an ESLT, which is further defined as "the level at which water can be taken from a 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" (emphasis added).¹⁵ This is a strong environmental standard. We largely agree with the statement in the Issues Paper 2 at paras [3b] and [14] that this definition comprises 'entirely environmental criteria' to be applied in determining the SDL. However, we would add that the definition is not concerned solely with inherent environmental *values* but is consistent with the recognition that long term human use of water

⁴ *Water Act 2007*, ss 3(b) and (c).

⁵ *Water Act 2007*, s 20(a).

⁶ *Water Act 2007*, s 21(1).

⁷ For further discussion of the obligation to restore wetlands, see, J Jensen and A Gardner, "A Legal Obligation to Restore Wetlands by Environmental Water Allocations" (2018) 1 [Chinese Journal of Environmental Law](#) 158-201.

⁸ *Ibid* at 159-160.

⁹ *Water Act 2007* (Cth), s 3(d)(i).

¹⁰ *Water Act 2007* (Cth), ss 20 (b), 22(1) – item 4(c) and 6.

¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 8 August 2007, 5 (The Hon Malcolm Turnbull, Minister for the Environment and Water) (emphasis added).

¹² The objective to maximise net economic returns from the use and management of Basin water resources (s 3(d)(iii)) is explicitly made subject to the clear environmental objectives in s 3(d)(i) and (ii). See also Alex Gardner et al, *Water Resources Law* (2nd edition, 2018), chapters [4.9].

¹³ *Water Act 2007* (Cth), s 3(b) and (c).

¹⁴ *Water Act 2007* (Cth), s 23(1).

¹⁵ *Water Act 2007*, s 4. The *Water Act* s.4 further defines "environmental outcomes".

depends on maintaining environmental values. Thus, for instance, the definition addresses the 'productive base' of the water resource and 'key environmental outcomes'. The latter specifically includes a reference to water quality and water resource health and the importance of flow in mitigating pollution and limiting noxious algal blooms,¹⁶ factors that are critical to ongoing human use.

- What the Act does not do is specify a detailed process for determining the SDL against this ESLT standard. Apart from general guidelines and considerations (such as requiring the use of best available science and socioeconomic analysis and requiring that the principles of ecologically sustainable development be taken into account),¹⁷ the Act leaves this task largely to the Murray-Darling Basin Authority (MDBA) as an issue to be determined in the preparation of the Basin Plan. Thus, it is for the MDBA to develop a process to identify *key* environmental assets, ecosystem functions etc and to determine the level of water extraction that would not *compromise* these assets and functions.

Against this background, the concerns that have been raised in Issues Paper 2 about the validity of the MDBA's approach to the determination of the SDL are well justified. When the Basin Plan was first gazetted, numerous commentators raised similar concerns, including the following.

- The SDLs within the Basin Plan did not, on the basis of best available science, provide enough water to meet the water requirements of key environmental assets and ecosystem functions that were identified by the MDBA as critical to achieving an ESLT,¹⁸ and
- The determination of the SDLs by the MDBA clearly sought to minimise social and economic impacts of water recovery for the environment. The MDBA also placed considerable weight on factors such as existing system constraints that make it difficult to deliver the water requirements required to achieve an ESLT, using this as a justification for lowering the water to be recovered for the environment.¹⁹ On the above legal interpretation, these were considerations which should not have been treated as centrally relevant to the determination of the ESLT.

2. What the consequences of that construction [of ESLT] might be for the proposed SDL Adjustment Amendments to the Basin Plan?

The SDL adjustment mechanism was included in the Basin Plan to address the political complexities surrounding the setting of SDLs by deferring their final determination.²⁰ Introduced towards the end of the planning process, it was part of the broader political compromise required to garner sufficient support for the plan.²¹ Essentially, the SDL Adjustment mechanism provided more time for devising projects (for

¹⁶ *Water Act 2007* (Cth), s 4.

¹⁷ *Water Act 2007* (Cth), s 21(4)(b).

¹⁸ In an independent review of the scientific approach to determining the SDL in the proposed Basin Plan, the CSIRO noted that 'the proposed SDLs would be highly unlikely to meet specified ecological targets even in the absence of future climate change.' See, W J Young et al, *Scientific Review of the Estimation of an Environmentally Sustainable Level of Take for the Murray-Darling Basin* (Final Report to the MDBA) (CSRIO 2011), 29-30. See also, Wentworth Group of Concerned Scientists, *Statement of the 2011 Proposed Murray-Darling Basin Plan: The Draft Murray-Darling Basin Plan should be withdrawn because it does not provide the information required to make an informed decision on the future of the river system* (Jan 2012) and Jonathon La Nauze and Emma Carmody, 'Will the Basin Plan Uphold Australia's Ramsar Convention obligations?' (2012) *Australian Environment Review*, 311.

¹⁹ See, Environmental Defender's Office (Vic), *Legal Analysis of the Proposed Murray-Darling Basin Plan* (March 2012).

²⁰ Alex Gardner et al, *Water Resources Law* (2nd edition, 2018), [16.133].

²¹ See discussion in Anita Foerster, "The Murray-Darling Basin Plan 2012: An ecologically sustainable level of trade-off?" (2013) 16(1) *Australasian Journal of Natural Resources Law and Policy* 41, 54-55.

delivery of both irrigation and environmental water) that could minimise the socio-economic impacts associated with recovering water for the environment to achieve an ESLT. At the time the Basin Plan was gazetted, it was anticipated that *supply measures*,²² in particular, may be able to provide the equivalent of 650GL/yr of water, thereby significantly reducing the amount of water recovery required to achieve the ESLT.²³

Importantly, as Issues Paper 2 outlines, the way the mechanism is designed allows for an adjustment of the SDL prior to the implementation of projects and, therefore, prior to the actual realisation of water savings or efficiencies to justify the adjustment. The Water Act was specifically amended to provide for the adjustment of the SDL in this way without invoking the formal amendment process under the Act.²⁴ Section 23A allows the Basin Plan to include a process for proposing adjustments to the SDL and section 23B provides for the subsequent adoption of the adjustment as an amendment to the plan. While these provisions do provide a legal basis for the SDL Adjustments that are the subject of this inquiry, it is important to note that the amended legislation does reiterate that the resulting SDL must still reflect an ESLT.²⁵ Further, the Basin Plan itself provides that an adjusted SDL must achieve equivalent environmental outcomes as compared with benchmark environmental outcomes associated with the original SDLs in the plan.²⁶ The plan also provides a detailed method for determining whether such equivalent outcomes are achieved.²⁷

Issues paper 2 raises concerns that the majority of supply measures that have been proposed as the basis for the adjustment of the SDL have not been implemented and do not need to be implemented until 30 June 2024. While this appears to be consistent with the process outlined in the Basin Plan and contemplated by the broad amendments to the Act noted above, it does introduce considerable uncertainty around whether or not the resulting SDL does in fact reflect an ESLT as required by the Act. While the authors have not been able to give specific consideration to the substance of the proposed amendments nor to the process followed by the MDBA, we would agree with the contention that, until these projects are realised and shown to have achieved their modelled results, the SDL cannot be taken to reflect an ESLT as required by the Act.

There are a number of factors that suggest however that this uncertainty would not of itself affect the validity of the Basin Plan. First, the Water Act ss 23A & 23B do not specify any time limits for the operation of the SDL adjustment mechanism – that is left to the Basin Plan. Secondly, the Water Act provides for the adoption of the SDL (reflecting the ESLT) at the date of the adoption of the Basin Plan and for the ultimate achievement of that ESLT after a period of years following the transitional period in which temporary diversion provisions may operate to permit the actual take of water to be higher than the actual SDL.²⁸ Thus, while the Water Act anticipates that there would always be a certain ESLT amount, it has not anticipated that the ESLT amount would always be in operation. Indeed, it clearly provides for a period of time to realise the ESLT. Thirdly, the Basin Plan provides for the reconciliation of adjustments to be proposed in 2024 if it appears to the MDBA that the adjustment amounts resulting from the notified measures produce a different result from the determinations made as soon as practicable after the measures were notified.²⁹ In theory,

²² I.E. measures that increase environmental outcomes with less water, thus making more water available for consumptive use.

²³ Note to *Basin Plan 2012* (Cth) cl 7.09(b).

²⁴ *Water Act 2007* (Cth), ss 23A, 23B, inserted by *Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Act 2012* (Cth) assented to on 21 November 2012.

²⁵ *Water Act 2007* (Cth), s 23A(3)(b).

²⁶ *Basin Plan 2012* (Cth) cls 7.15, 7.17.

²⁷ *Ibid*, Schedule 6.

²⁸ *Water Act* s 24.

²⁹ *Basin Plan* [7.11] and [7.10].

any errors in the calculation of the SDL adjustment measures adopted as amendments of the Basin Plan could be addressed in 2024.

In summary, it appears to us that the main argument suggesting the invalidity of the Basin Plan rests with the evidence that the MDBA calculated the ESLT having regard to socio-economic criteria as well as the environmental criteria. The uncertainties introduced by the Adjustment Mechanism may not be 'good policy', as Issues Paper 2 suggests [para 11(b)]. Indeed, previous modelling of predicted water savings and efficiencies associated with water infrastructure projects have been shown to significantly overestimate water savings.³⁰ However in our view, given the process for adjustment provided by the Act and the Basin Plan itself, the adjustments do not suggest invalidity at this point in time.

3. What the consequences of that Water Act construction might be for the proposed NBR Amendment

Similar to the above, we have not been able to give specific consideration to the substance of the proposed amendments to the SDL resulting from the NBR, nor the processes followed in proposing this amendment. We concur with the Commissioner's view that it is not 'good policy' to allow an amendment to the SDL on the basis of projects that have not yet been implemented and where there is some uncertainty around full implementation. However, the fact that the Act authorises the SDL adjustment and the Plan provides for reconciliation adjustments in 2024 suggests that the proposed Plan amendments would not be inconsistent with the statutory requirements to set an SDL that reflects an ESLT. This proposition says nothing about whether the measures purporting to support the SDL adjustment may comply with the Basin Plan.

4. Whether the Basin Plan itself complies with the Water Act if the Basin-wide long term average SDL does not reflect an ESLT.

As noted above at 1, we share the concerns of the Commissioner regarding the legal construction of key provisions of the Water Act in the development of the Basin Plan by the MDBA and its ultimate adoption by the Minister.

These concerns raise the question whether the failure to fulfil the legislative direction that the SDL reflect an ESLT for water management areas and the whole of the Basin means that all or part of the Basin Plan is unlawful. In turn, this raises the further questions of whether the concept of ESLT is justiciable – i.e. capable of being decided by a court of law – and mandatory – i.e. that non-compliance spells invalidity of the Basin Plan. These questions are discussed in Alex Gardner et al, *Water Resources Law* (2nd edition, 2018), [16.136] – [16.141], upon which our arguments below are based. These sections contain detailed discussion of potential grounds of judicial review for a legal challenge to the plan, the likelihood of a breach of the legislative direction giving rise to an invalid approval, and what remedy might the court give.

To summarise:

- The Federal Court of Australia would have the jurisdiction to hear an application for judicial review on the ground that the Commonwealth Minister approved a diversion limit for the Basin Plan as a whole or for a water resource plan area that does not reflect an ELST. It is unlikely that such an application would be available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), because such a decision

³⁰ For example, see the independent audit of major irrigation infrastructure renewal project in northern Victoria: G E Brouwer, 'Investigation into the Food-bowl Modernisation Project and Related Matters' (Report to the Legislative Council and the Legislative Assembly (Victoria), Victorian Ombudsman, 23 Nov 2011)

may be characterised as ‘legislative’ and not ‘of an administrative character’ and, thus, not a decision to which that Act applies.³¹ However, judicial review of the Minister’s decision would be available under s 39B of the *Judiciary Act 1903* (Cth) or simply by application for a declaration under the *Federal Court Act* s 21. While time limits apply to the prerogative writ remedies that may be sought, the actual application of those time limits will depend on the character of the challenge (to the making or enforcement of the Plan) and will be less of an issue if the remedy sought is declaration or injunction.

- There are a number of potential grounds of review that could be argued³² including that the ESLT is a jurisdictional fact that could be determined by a court, so that the Minister has no authority to approve a Basin Plan that does not meet this criterion; or the approval is unreasonable or irrational; or that there has been a failure to consider relevant considerations and evidence. We consider that these lines of argument would be difficult to establish primarily because the Water Act grants considerable discretion to the MDBA in determining the ESLT. Further, the statutory language used to define the ESLT uses general scientific concepts and propositions. We suggest that a court may be reluctant to embark upon a consideration of matters of fact against these concepts and provisions to make a judgement upon whether or not the SDL is set at a level that compromises the key environmental criteria.
- A further potential ground of review (as the Commissioner outlines) is that the MDBA and the Minister considered irrelevant factors in determining the ESLT; namely, that the social and economic effects were considered in setting the ESLT when, on a proper construction of the Act, they should not have been. The evidence to establish such an argument would lie mainly in the interpretation of the MDBA’s documents and not be so difficult to establish. The authors have an open mind to the feasibility of the argument that the Water Act mandate to set the SDLs to reflect an ESLT was not achieved because there was an improper consideration of social and economic factors in determining the SDLs.
- Even if one of these lines of argument were upheld and the court found there to be significant legal defects with the Basin Plan, it does not necessarily follow that the court would invalidate its adoption. As with the environmental water allocation in the Gwydir River case (*Nature Conservation Council of New South Wales Inc v The Minister Administering the Water Management Act* (2005) 137 LGERA 320; [2005] NSWCA 9 at [90]–[95]), the court may apply *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 to say that the failure to apply the Act’s declaration of environmental sustainability is not intended to lead to the consequence of legal invalidity of the Basin Plan. This is especially so if a challenge were brought long after the approval of the Basin Plan when there may be much public inconvenience in a remedy that invalidated the Basin Plan.
- Further, there is the question of determining an appropriate remedy for invalidity. A declaration would leave the Plan in place but susceptible to non-enforcement. An order that the Plan be set aside would leave the Minister subject still to the legal duty to make the Plan, and so it should be made again with all the consequential costs. Despite the centrality of the ESLT provisions in the Act, it is unlikely that a court would go further and actually direct the Minister as to what would be an ESLT. The impracticality of a remedy with retrospective invalidity is telling of its implausibility.
- Yet Parliament’s direction should be given some legal effect because of the fundamental importance of achieving sustainability in the MDB and the clear legislative intent shown in the Water Act’s objects and

³¹ Administrative Decisions (Judicial Review) Act 1977 (Cth) s 3(1), definition of a ‘decision to which this Act applies’.

³² We do not consider here the potential to challenge the constitutionality of the Basin Plan on the basis of its failure to implement the Ramsar Convention and Biodiversity Convention.

operative provisions. The court may be confined to declaring the correct interpretation of the Act for future application, such as in the making of any amendments to the Basin Plan,³³ including under the SDL adjustment mechanism, or in a review of the Plan by the Authority, such as the regular 10 yearly reviews or a review requested by the Minister or all of the Basin States.³⁴ Such an approach would be consistent with the High Court's caveat in *Project Blue Sky* that a person with sufficient standing would be entitled to sue for a declaration that a government body was acting in breach of the Act and, in an appropriate case, obtain an injunction restraining any future action based on an unlawful interpretation of the Act.³⁵

Conclusion

We thank the Commission for the opportunity to provide input to this important inquiry. The suggestion that the Basin Plan does not in fact comply with the Water Act, as a result of the approach taken to determining the SDL, has lingered since its adoption in 2012 but has been put aside as implementation has taken centre stage. We look forward to the Commissioner's further consideration of these questions and recommended course of action.

We would argue that amending the Water Act to clarify that social and economic outcomes are to be treated equally with environmental outcomes in the determination of an ESLT may be difficult, given the constitutional basis for the legislation. Such an approach would also undo a very important reform for the future sustainability of MDB communities whose continued use of water resources in the long term depends on re-establishing an environmentally sustainable level of extraction, particularly in light of climate change projections. In our view it would be preferable to more fully investigate the options for amending the Basin Plan to reflect an ESLT or at least ensuring that the proper construction of the Act is applied going forward, including in the making of any amendments to, and in the review of, the Basin Plan.

³³ *Water Act* s 45.

³⁴ *Water Act* s 50.

³⁵ Alex Gardner et al, *Water Resources Law* (2nd edition, 2018), at [16.32].