

A Sustainable Murray-Darling Basin

The Legal Challenges

by

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A Matrix of Legal Instruments

- International Agreements
- The Constitution
- The Water Act 2007 (Cth)
- The Murray-Darling Basin Agreement
- State Water Entitlements stated in the Agreement
- The Murray-Darling Basin Plan
- Water Resource Plans
- Commonwealth Environmental Water Holdings
- Water Entitlements and Rights under State and Territorial water legislation

Water Act 2007

Section 3 (c) and (d)

Objects of the Act

- (c) to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes; and
- (d) (i) to ensure the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused; and
 - (ii) to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin; and
 - (iii) subject to subparagraphs (i) and (ii) – to maximise the net economic returns to the Australian community from the use and management of the Basin water resources

Water Act 2007

Section 21 (3) (a) and (4) (a)

Duties in Relation to Basin Plan

(3) Without limiting subsection (1), the Basin Plan must also:

(a) promote the wise use of all the Basin water resources.

(4) Subject to subsections (1), (2) and (3), the Authority and the Minister must, in exercising their powers and performing their functions under this Division:

(a) take into account the principles of ecologically sustainable development.

Water Act 2007

Section 22 (1) Item 6

Mandatory Content of Basin Plan

The maximum long-term annual average quantities of water that can be taken, on a sustainable basis, from:

- (a) the Basin water resources as a whole; and
- (b) the water resources, or particular parts of the water resources, of each water resource plan area.

The averages are the ***long-term average sustainable diversion limits*** for the Basin water resources, and the water resources, or particular parts of the water resources, of the water resource plan area.

Water Act 2007

Section 23 (1)

Long-term Average Sustainable Diversion Limits

A long-term average sustainable diversion limit for the Basin water resources, for the water resources of a particular water resource plan area or for a particular part of those water resources must reflect an environmentally sustainable level of take.

Water Act 2007

Section 22 (3) (b) and (c)

Requirements to be Included in a Water Resource Plan

The requirements for a water resource plan for a water resource plan area must include requirements in relation to:

- (b) the incorporation, and application, of the long-term annual diversion limit for the water resources of the water resource plan area; and
- (c) the sustainable use and management of the water resources of the water resource plan area within that diversion limit.

Guide to the Proposed Basin Plan

Interpretation of Sections 22 (1) and 23 (1) of Act

The *Water Act 2007* (Cwlth) sets two broad requirements for the Authority in identifying SDLs. These are:

- to establish SDLs that reflect an environmentally sustainable level of take (Water Act s 23 (1)) which is a level of extraction that will not compromise the environmental water requirements of key environmental assets including water-dependent ecosystems; ecosystem services and sites with ecological significance; key ecosystem functions; the productive base; and key environmental outcomes for the water resource.
- that, in doing so, the economic, social and environmental outcomes are optimised and the net economic returns maximised.

Guide to the Proposed Basin Plan

Methodology for Achieving Optimisation of Outcomes

The Authority has set three objectives to achieve this optimisation.

These are:

- to meet key environmental outcomes and address the issues regarding the ecological health of the Basin
- to ensure each catchment can satisfy its own environmental requirements such that key water-dependent ecosystems in each catchment can be returned to good health
- to minimise social and economic impacts on Basin communities and industries, recognising that significant reductions will occur in some catchments given previous overallocation by governments

Guide to the Proposed Basin Plan

Process for Setting Sustainable Diversion Limits

Establish the current diversion limits and determine the environmental water requirements of the Basin

Assess the social and economic impacts of meeting the environmental water requirements

Determine the limit of reductions beyond which social and economic impacts are unacceptably high

Analyse SDL scenarios that meet the total environmental water requirements of the Basin, while optimising the social and economic impacts

Propose SDLs for the purposes of consultation, taking into account all available evidence

Water Act 2007

Section 86 A (1)

Duty to Address Critical Human Water Needs in Basin Plan

The Basin Plan must be prepared having regard to the fact that the Commonwealth and the Basin States have agreed:

- (a) that critical human water needs are the highest priority water use for communities who are dependent on Basin water resources; and
- (b) in particular that, to give effect to this priority in the River Murray System, conveyance water will receive first priority from the water available in the system.

Water Act 2007

Section 86 A (2)

Critical Human Water Needs

Critical human water needs are the needs for a minimum amount of water, that can only reasonably be provided from Basin water resources, required to meet:

- (a) core human consumption requirements in urban and rural areas; and
- (b) those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs.

Water Act 2007

Section 86 B (1)

Duty to State Amount of Water Required for Critical Human Water Needs

The Basin Plan must:

- (a) include a statement of the amount of water required in each Basin State that is a referring State (other than Queensland) to meet the critical human water needs of the communities in the State that are dependent on the waters of the River Murray System; and
- (b) include a statement of the amount of conveyance water required to deliver the water referred to in paragraph (a).

Water Act 2007

Section 34 (1)

Effect of Basin Plan on Commonwealth Agencies

The Authority, and the other agencies of the Commonwealth, must perform their functions, and exercise their powers, consistently with, and in a manner that gives effect to, the Basin Plan.

Water Act 2007

Section 35 (1)

Effect of Basin Plan on other Agencies and Persons

The Basin Officials Committee, an agency of a Basin State, an operating authority, an infrastructure operator or the holder of a water access right must not:

- (a) do an act in relation to Basin water resources if the act is inconsistent with the Basin Plan; or
- (b) fail to do an act in relation to Basin water resources if the failure to do that act is inconsistent with the Basin Plan.

Murray-Darling Basin Agreement

Clause 30 (1)

How Authority must Perform Functions

The Authority must not exercise any of its functions in relation to river operations in a manner that has the potential to have a material effect on State water entitlements unless it does so in accordance with a decision of the Committee made under this Agreement, or a provision of the document approved under clause 31.

Murray-Darling Basin Agreement

Clause 62

State Must Ensure Operations are Lawful

A State Contracting Government must grant all powers, licences or permissions with respect to its territory as may be necessary for:

- (a) the construction, operation or maintenance of any works;
- (b) the implementation of any measures; or
- (c) the carrying out of any operation,

required to be undertaken by any other Contracting Government or a public authority pursuant to this Agreement.

Water Act 2007

Section 165 (1) (b)

Conditions for Enforcement Notice

This section applies if the Authority is satisfied that a person:

- (b) has engaged in, is engaging in or is likely to engage in conduct that:
 - (i) was, is or would be inconsistent with the Basin Plan or a water resource plan; or
 - (ii) prejudiced, is prejudicing or would prejudice, the effectiveness or the implementation of the Basin Plan or a water resource plan; or
 - (iii) had, is having or would have an adverse effect on the effectiveness or the implementation of the Basin Plan or a water resource plan.

Water Act 2007

Section 165 (3)

Content of Enforcement Notice

The Authority may direct the person under subsection (2) not to exercise some or all of:

- (a) the water access rights; or
- (b) the irrigation rights; or
- (c) the water delivery rights;

that the person holds.

Guide to the Proposed Plan

The Legal Outcomes of the Plan

The proposed Basin Plan will clearly and unambiguously indicate:

- what obligations apply
- to whom the obligations apply
- whether the obligations are imposed by the Basin Plan or whether the plan requires water resource plans to impose the obligations.

The Basin Plan's features will enable the regulated entities to identify their obligations, and enable the Authority to enforce them.