

Briefing Paper

Basin Plan Legal Advice

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Background

NSW Irrigators Council and a range of other groups have contended for some time that the *Water Act* requires that precedence be given to environmental outcomes at the expense of social and economic outcomes. We have noted that this is not compliant with the triple bottom line outcomes envisaged in the National Water Initiative (NWI). As a result, we have advocated amendments to the *Act* to ensure equal treatment of the three outcomes.

Further background is available in our *Water Act* Briefing Paper available [here](#).

Murray-Darling Basin Authority Position

Prior to the release of the Guide to the Basin Plan, Murray-Darling Basin Authority (MDBA) Chairman Mike Taylor has been upfront in his belief that the *Act* requires primacy for environmental outcomes. He made this view known in several public fora.

During the public “consultation” sessions subsequent to release of the Guide, Mr Taylor has repeatedly pointed to the *Act* when questioned in respect of equal consideration for social and economic objectives. Authority Chief Executive Officer Rob Freeman, who has joined Mr Taylor in similar statements to consultations sessions, made his belief clear in a Senate Estimates hearing when he noted that the lower level Sustainable Diversion Limit (3,000 gigalitres) could not be lowered regardless of social and economic consequences due to environmental priority.

NSWIC understands that the MDBA sought legal advice in respect of this matter when developing the Draft Plan (and, presumably, Guide) over the course of the past two years. We understand that the advice was received from the Australian Government Solicitor under the hand of Robert Orr QC, the Chief General Counsel. Neither the instructions to Mr Orr nor the advice received has been publicly released.

Minister Burke Position

Immediately upon his appointment as Minister, NSWIC advanced the position that the *Water Act* is an unbalanced piece of legislation that must be altered to achieve a triple bottom line outcome in accordance with the NWI.

Minister Burke has repeatedly stated that a triple bottom line outcome is what he seeks but that he is reluctant to reopen the *Act*. He has sought (and received) legal advice as to whether the Plan can or must take social and economic consequences into consideration in setting the Plan. The advice was received from the Australian Government Solicitor also under the hand of Mr Orr. It was tabled in Parliament, accompanied by a Ministerial Statement the essentially advocated that the advice allows equal consideration.

The Advice

We believe that Minister Burke may have overplayed the advice provided by Mr Orr. Whilst it certainly does address how and when issues of social and economic impacts can be taken into account in establishing the Basin Plan, it is not, in our opinion, explicit in requiring *equal* consideration pursuant to the NWI.

Moreover, Minister Burke's position that the advice confirms that social and economic aspects *can* be given equal consideration is not, in our opinion, fully reflected in the advice. In our opinion, the advice notes that *where a choice exists* in fulfilling an environmental requirement, consideration of social and economic matters can be undertaken in making that choice. This is a significant variance from equal weighting to achieve a true triple bottom line outcome.

The advice notes "an overarching objective of the Act and the Plan is to give effect to relevant international agreements."¹ The international agreements, as NSWIC has long noted, are environmentally focused. To that extent, it is logical to assume that the "overarching objective" of the Act is also environmentally focused. More specifically, social and economic objectives are only considered "in giving effect to those agreements."² That is, they are secondary to the agreement which is primarily environmental.

The crux of the matter is contained within paragraph 12 of the advice which states, *inter alia*;

"...where in applying the particular provisions of the Act that give effect to the agreements a discretionary choice must be made between a number of options the decision-maker must, having considered the economic, social and environmental impacts, choose the option which optimises the economic, social and environmental outcomes."

That is, where a choice exists then social and economic factors can be taken into account. Where not choice exists, social and economic considerations continue to be ignored. The primary conventions upon which the Act is based effectively rule out that choice being made upfront, *viz*;

*"Both Conventions establish a framework in which environmental objectives have primacy..."*³

At situation where choice cannot be made does not and cannot approach a true triple bottom line outcome.

¹ Legal advice, AGS, at par 9.

² Act s 3(c) as noted in advice par 10.

³ Legal advice, AGS, at par 23.

Position of NSWIC

NSWIC appreciates that Minister Burke sought legal advice on this matter, but has reached a very different conclusion to him. We believe that the legal advice confirms that the *Water Act* places primacy on environmental outcomes above all else in clear contravention of the NWI. The advice shows that social and economic considerations do not have equivalent standing.

We note that Professor George Williams of the University of New South Wales has also concluded that the *Act* and the advice require environmental needs to be given primacy.⁴

We do acknowledge that the advice allows social and economic factors to be taken into account where choice exists and we expect that the MDBA will take this into account in its current work.

Our position, however, essentially remains unchanged. The *Water Act* does not deliver the equal weighting of social, environmental and economic factors that was agreed to by NSW, other States and the Commonwealth in the National Water Initiative. The *Act* is fundamentally unbalanced and must be altered to provide the outcome that this State signed up to.

ENDS

⁴ www.abc.net.au/rural/news/content/201010/s3049282 viewed 27 October 2010.