



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: SW:MAP

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18 March 2011

Ms Julie Dennett
The Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
P.O. Box 6100
Parliament House
CANBERRA ACT 2600

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Dear Ms Dennett,

Re: Inquiry into the provisions of the Water Act 2007

I refer to your email dated 15 February 2011 inviting comment in relation to the above Inquiry.

Your correspondence was referred to the Law Society's Rural Issues Committee (Committee) which considers issues of relevance to practitioners in rural and regional New South Wales and their clients. The Committee is comprised of practitioners who practice in rural and regional NSW. All of the Committee members have a basic understanding of the NSW *Water Management Act 2009* and dealings that take place under that Act. The Committee also includes amongst its membership practitioners with extensive expertise in water law.

The Committee welcomes the opportunity to provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the provisions of the *Water Act 2007* ("the Act").

Should you have any queries in regard to the submission, please contact Maryanne Plastiras, Executive Member of the Rural Issues Committee by telephone to (02) 9926 0212 or email to maryanne.plastiras@lawsociety.com.au.

Yours sincerely,

Stuart Westgarth
President

INQUIRY INTO THE PROVISIONS OF THE WATER ACT 2007

In summary the Committee is of the view that the current draft Basin Plan does not consider fully the social and economic impacts of the Basin Plan on rural and regional communities. In the Committee's view, the Act is drafted in such a manner that arguably the Murray-Darling Basin Authority (MDBA) is not required to fully consider those impacts and is not required to do anything to minimise those impacts.

The Committee believes the Act should be redrafted so as to ensure that any Basin Plan minimises the social and economic impacts on Australia's rural and regional communities. The Act ought to reflect the core objective of the 2004 National Water Initiative, being to:

Achieve a nationally compatible market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes.¹

On a broader view, taking into account Australia's international obligations, Australia not only has an obligation to minimise social dislocation on its own rural peoples, it also has an obligation to the world's poor to maximise, in an environmentally sustainable manner, its agricultural output.

The Committee makes the following comment on the areas of reference:

- (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**

The objectives set out in section 3 do not stipulate there be an equally weighted consideration of economic, social and environmental factors. Subsection (c) refers to optimising economic, social and environmental outcomes, but this is in the context that it is one objective amongst eight. The objectives appear to ignore the decision making phase, by the use of the word "outcomes".

Section 3 (d) outlines quite clearly that subparagraph (iii) (maximising the net economic returns....) is subject to (i) and (ii) of that section, (namely the return to environmentally sustainable levels of extraction etc). Of the eight purposes of the Basin Plan set out in section 20, only one purpose mentions social/economic outcomes, whilst there are three references to environmental factors. This tends to suggest the focus is on environmental factors, not on achieving a balance between the environment and social needs.

Based on these three examples alone, the present drafting of the Act provides no clear direction on whether environmental, social and economic factors are to be given equal consideration with respect to the decision making process and indeed, is ambiguous in exactly what factors are to be given consideration. This may result in a very discretionary process.

There does not appear to be any requirement in the Basin Plan for the MDBA to consider the social, economic and environmental effects of State water planning over the previous 10 years.

The items listed in section 22(1) as the Mandatory Content of the Basin Plan do not include any requirement for the Plan to outline what the social and economic effects are likely to be; or to minimise any negative economic or social effects.

The overarching objective of the Act and the Basin Plan appears to be that it gives effect to relevant international agreements. This is supported by the treaty implementation aspect of the external affairs power in the Constitution.

Some of the international agreements referred to, for example, the Convention on Biological Diversity, concern the preservation of biological diversity. Whilst this, together with a number of the other Conventions (such as Ramsar) does not exclude social or economic considerations, they establish a framework where environmental objectives have primacy. They do not provide for an equal consideration of economic, social and environmental factors. If the overarching objective of the Act is to give effect to relevant international agreements, and those international agreements do not consider the three factors equally, then it is difficult for the Act to achieve this.

(b) The differences in legal interpretations of the Act

The following comment from the MDBA website certainly appears to indicate that the Australian Government Solicitor itself has provided two differing legal interpretations of the Act:

The Water Act is quite complex. The Authority has, throughout the development of the Guide, sought and relied on policy guidance by the Department of Sustainability, Environment, 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. "To the extent that this latest advice suggests that the Authority has greater leeway in relation to social and economic considerations than previously advised, we welcome the advice and will certainly take that into account in our further work on the proposed Basin Plan," Mr Taylor said.ⁱⁱ

The differences in legal interpretation seem to emanate from the question of whether the words "in giving effect to those agreements..." in subsection 3 (c); and "subject to subparagraphs (i) and (ii)" in subsection 3(d)(iii) have a limiting effect on the words that follow.

Those who have the view that the Constitutional basis for the Act relies upon the "Relevant International Agreements" would argue that the words must be words of limitation. Those who are looking for a broader interpretation would argue that they are not words of limitation.

Views such as those put forward by George Williamsⁱⁱⁱ would suggest that that the words must be ones of limitation and while the Act allows for consideration of social and economic effects it is in the context of providing for the environment first.

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

The Constitutional powers underpinning the Act are set out in sections 9 and 9A of the Act.

There are a number of powers relied upon including the Corporations power, the implied nationhood power, the power to regulate interstate and overseas trade and commerce, the referral power of the States and the external affairs power.

The only direct reference in the Constitution to water is in section 100 which contains a restriction on the ability of the Commonwealth to abridge the rights of States to the "reasonable use of the waters of rivers for conservation or irrigation". That restriction has been read down somewhat in other contexts to apply only to laws made under section 51(i) Constitution.^{iv}

In order for the Act to give economic and social considerations equal weight to environmental considerations it may be that the Government has two choices:

1. bring the States back to the table so that they all refer their powers to the Commonwealth. This would do away with the need to rely on the external affairs power which is currently leading to unequal consideration to the environment; or
2. look beyond international agreements of an environmental nature and consider whether there are other international agreements that might provide balance in the Act by requiring it to consider equally environmental, social and economic impacts.

(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.

Section 3 includes as one of the objects of the Act to the give effect to relevant international agreements and, in particular, to provide for special measures, in accordance with those agreements, to address the threats to the Basin water resources. "Relevant international agreements" has been defined in section 4 and lists a number of international conventions, agreements or treaties to which Australia is a party.

The "relevant international agreements" are all agreements relating to environmental matters and the requirement to give effect to those agreements necessarily gives the Act an emphasis on environmental factors.

The approach of the Act to Australia's international obligations is narrow and selective. Australia is a party to other conventions that are relevant to the Basin Plan but which are not listed in the Act.

Two in particular stand out: *Food Aid Convention 1991* and *Food & Agriculture Organisation of the United Nations ("FAO")*.

The constitution of the FAO lists in its preamble the objects of the members in subscribing to the constitution as:

- *Raising levels of nutrition and standard of living of peoples under their respective jurisdictions;*
- *Securing improvements in the efficiency of the production and distribution of all food and agricultural products;*
- *Bettering the condition of rural populations; and thus contributing toward and expanding world economy*
- *and ensuring humanity freedom from hunger.* ^v

From a purely introspective Australian viewpoint, the draft Basin Plan is directly contrary to the third object of the FAO. The Basin Plan specifically states that it will have a negative impact on the conditions of Australia's rural population and will lead to a contracting of Australia's agricultural economy.

From an international viewpoint however, the Basin Plan and the Act that allows for the promulgation of such a plan, may be contrary to Australia's obligations as a member of FAO. In the Committee's view, Australia's legal obligations to reduce poverty are at least as equally important as any of our obligations to protect our environment.

By undertaking a deliberate strategy to reduce Australia's food production capabilities (and possibly turning Australia from net exporter to a net importer of food) the Australian government is ignoring its legal and humanitarian obligations to the worlds' poor. Such a dramatic change in Australia's food production will have an impact on world prices. The following is quoted from the FAO website:

The double whammy of high food prices and the global economic slump pushed an additional 115 million people into poverty and hunger. By 2009, the total number of hungry people in the world had topped one billion.

According to new global hunger figures, that number has since dipped to 925 million people. However, with the recent sharp increase in food prices, that number may rise.

From July to September 2010, wheat prices had surged by 60 to 80 percent in response to drought-fuelled crop losses in Russia and a subsequent export ban by the Russian Federation. Rice and maize prices also rose during that period.

By December 2010, the FAO Food Price Index had topped its 2008 peak, with sugar, oils and fats increasing the most.

And the cost of basic food staples remains high in many developing countries, making life difficult for the world's poorest people who already spend between 60 and 80 percent of their meagre income on food.

It is not difficult to imagine that reducing Australia's food production will add to international price pressure and similar to the situation in Russia may lead to increased food prices pushing more people into poverty and hunger.

(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

The Committee suggests the following amendments to the Act:

- Amending section 3 to remove the words of limitation from section 3(c) and 3(d)(iii).
- Amending the definition of “relevant international agreements” in section 4 to encompass in particular those that involve agriculture or food production may allow the Commission to give greater consideration to economic and social considerations. Such an amendment should look beyond Australia’s obligations under environmental treaties and consider more broadly Australia’s international obligations.
- Including in section 20 a requirement to minimise social dislocation.
- Including in section 20 a requirement to maximise Australia’s agricultural output in an environmentally sustainably manner.

(f) Any other related matter – access to justice

As members of the communities in which they live, the Committee would also like to take this opportunity to make some general comment on the impact of the draft Murray-Darling Basin Plan.

Of particular concern to the Committee is the flow-on effect of the socio-economic impact of the Basin Plan on rural and regional Australia to the provision of justice in rural and regional areas.

One of the primary issues on the agenda for the Law Council of Australia is the recruitment and retention of solicitors to rural, regional and remote areas. Rural, regional and remote areas across all of Australia are losing skilled professionals. Statistically, there are about 3 legal practitioners per 10,000 residents in remote Australia compared to 11 per 10,000 residents in capital cities.^{vi} Succession planning has been cited as the biggest worry of practices in rural Australia with 42% of lawyers practicing in rural areas saying they would not be practicing in 5 years time. One-third of young lawyers interviewed by the Law Council indicated they only intended to practice in their rural area for less than 2 years, with most leaving to seek better remuneration or work in the city.

The Attorney-General in May 2010 announced that the Australian Government would provide \$1.1million to work with the Law Council of Australia to attract legal practitioners to work in legal assistance programs in RRR areas of Australia. 51% of the firms in country areas undertake legal aid work. 70% of firms undertake pro-bono or unpaid voluntary work. That work includes not just assisting those clients who fall on hard times; it includes providing governance to all sorts of community organisations: pre-schools, schools, sporting bodies and charities. Legal practitioners in rural and regional communities are therefore a valuable and necessary service, not just ensuring access to justice for underprivileged persons but ensuring community organisations function well.

It is a reality that functioning law practices rely on functioning communities. Legal practices are like any other business, they must be able to make a profit and sustain a reasonable standard of living for those who put their capital at risk to operate them. Rural and regional legal practices rely on the income from farming communities to survive.

Anecdotally, the average legal practice working in a small town of 3,000 – 10,000 people would find the top 5 clients provide 20-30% of their revenue. In many cases 3 of those 5 top clients would be large agribusiness clients. Farmers and businesses that rely on farmers probably then comprise up to 70% of the rest of the client base. Profit margins in rural practices vary greatly, but the majority could not afford to have 10% of their gross fee base leave. The type of cutbacks envisaged by the draft Basin Plan could easily see this type of impact on farming communities.

It is not only financially difficult for legal practitioners working in these communities; it becomes emotionally difficult as well. Dealing with farmers or small businesses who are being forced out of their homes and business because of financial pressures is extraordinarily difficult. Legal practitioners, like many professionals living in areas where there is large social dislocation caused by the types of government decisions such as the cutbacks envisaged in the Basin Plan, are forced to deal with clients suffering depression, family breakdowns and at the worse contemplating suicide. The pressure of dealing with this on a day to day basis can itself lead to depression. It also contributes to those leaving the legal profession or at least, leaving rural and remote areas.

It also needs to be appreciated that there is a difference between the type of structural change contemplated in the Basin Plan and drought. Even if it lasts 10 years, drought is not permanent.

In summary, if the viability of rural and regional communities is undermined so too is the viability of the professional practices that provide services to them, be they accountants, bankers, surveyors, doctors or legal practitioners. In the case of legal practitioners, this is simply going to make access to justice in rural and regional areas considerably more difficult.

ⁱ See: <http://www.coag.gov.au/meetings/250294/attachment>, para 23

ⁱⁱ http://www.mdba.gov.au/media_centre/media_releases/mdba-welcomes-ministers-statement

ⁱⁱⁱ <http://www.smh.com.au/opinion/politics/when-water-pours-into-legal-minefields-20101025-170uf.html> and Submission to House of Representatives Standing Committee on Regional Australia, dated 12 January 2011

^{iv} *Morgan v The Commonwealth* (1947) 74 CLR 421; see discussion on this point at p 91, *Water Resources Law*, 2009 by Gardner, Bartlett and Gray

^v Constitution of the Food and Agriculture Organisation of the United States, Quebec 16 Oct 1945,

^{vi} Recruitment and Retention of Lawyers to Rural, Regional and Remote Areas; Sept 25, 2009; Law Council of Australia submission to Attorney General, Robert McClelland