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1. You have requested advice in relation to the following question regarding the Water Act 2007 (Cth) ("Water Act") and the development of the Murray Darling Basin Plan ("Basin Plan"):

What is the Basin Plan required to address to meet the objects of the Act, the purpose, and basis of the Basin Plan, and in particular, the Sustainable Diversion Limit, Water Quality and Salinity Management, and Environmental Watering Plan?

2. This advice is divided into three parts:
 - A summary of the central arguments in the advice
 - An analysis of the purposes of the Basin Plan
 - A discussion of how the Basin Plan should achieve those purposes in light of the Water Act. This part sets out the elements that are needed in the Basin Plan to meet its purposes.

SUMMARY OF CENTRAL ARGUMENTS

3. The central purpose of the Water Act and the Basin Plan is to return the use of Basin water resources to sustainable levels. This purpose is clearly established from the basis for the Act, the provisions of the Act and the requirements for the Basin Plan.
4. A core objective of the Water Act and the Basin Plan is to 'give effect to relevant international agreements'. In the context of the Water Act this should be interpreted as a requirement to *implement* or to *act on* or to *carry out* those agreements. Matters in the international agreements that are relevant to the Basin water resources and should be given effect to through the Basin Plan include sustainable use of resources, biodiversity, water quality, salinity, indigenous water use, resource and environmental monitoring, wetlands, principles of ecologically sustainable development and environmental asset protection. A Basin Plan

that did not implement the relevant international agreements would not accord with its legal basis in the Act.

5. The environmentally sustainable level of take is defined in terms of 'key' assets, 'key' functions, and 'key' outcomes and the productive base. The SDL is concerned with what can be taken on a sustainable basis. This is a broader consideration than just the 'key' environmentally sustainable level of take characteristics. The overarching purpose of the Act and the overarching purpose of the Basin Plan are to return the use of Basin water resources to a sustainable level. This will not be done by purely focusing on 'key' environmental characteristics.
6. The environmental watering plan (EWP) is the mechanism through which the environmental objectives and environmental assets will be identified. In particular it will determine how much water is needed to meet those objectives and protect and restore the identified assets. It is therefore necessarily linked with the sustainable diversion limit which also seeks to provide for and protect those things. A calculation of how much water can be taken on a sustainable basis cannot be calculated without knowing how much water is needed for the environment. It is necessary, therefore, for the SDL, including the requisite environmentally sustainable level of take, to be developed in conjunction with the environmental watering plan.
7. One of the important international agreements that the Water Act requires the Basin Plan to give effect to is the Biodiversity Convention. Articles 7, 8 and 10 in particular are relevant to the Water Act and capable of implementation through the Basin Plan. Article 7 requires identification and monitoring of biodiversity and activities which have a negative impact on biodiversity, Article 8 requires in situ conservation of biodiversity and Article 10 requires sustainable use of biodiversity.
8. The Biodiversity Convention and the relevant provisions in the Water Act provide a legal basis for the Basin Plan to manage water in such a way that indigenous cultural use of Basin water resources and biodiversity dependent on Basin water resources is protected. This could include delivering cultural flows to sustain biodiversity for cultural purposes.
9. The Act provides for the Basin Plan to identify the Basin water resources needing "special measures" to conserve biodiversity. "Special measures" has a particular meaning under the Biodiversity Convention, which in the context of the Basin Plan establishes a requirement to establish laws, policies, programs and regimes within the Basin water resource area over and above the usual measures (i.e. practice to date) to conserve biodiversity. The objects of the Act in particular note the need for special measures to address threats to the water resources of the Basin (including rivers, lakes, wetlands and aquifers).
10. The Water Act contains a specific requirement to promote the conservation of Ramsar wetlands through the Basin Plan.
11. To accord with the Water Act the Basin Plan must be developed in a way that will return the use of Basin water resources to a sustainable level. The Basin Plan's purpose is more than just establishing a sustainable diversion limit and the sustainable diversion limit is more than just protecting 'key' environmentally sustainable level of take characteristics. All elements of

the Basin Plan, not just the sustainable diversion limit, should be aimed at returning the use of Basin water resources to sustainable levels.

WHAT IS THE BASIN PLAN INTENDED TO ACHIEVE?

12. The following is an analysis of the purpose of the Basin Plan in light of the provisions of the Water Act. Our analysis concludes that the central purpose of the Water Act and the Basin Plan is to return the use of Basin water resources to sustainable levels. This purpose is clearly established from the basis for the Act, the provisions of the Act and the requirements for the Basin Plan as outlined below.

Commonwealth involvement in water management

13. The Water Act provides the Commonwealth Government with a legal basis for its involvement in the management of water resources in the Murray Darling Basin. Prior to the commencement of the Water Act the Commonwealth relied on a consensual model for multi-jurisdictional action on water. It did this through COAG agreements such as the National Water Initiative which are politically but not legally binding on parties.
14. The Water Act dramatically alters these multi-jurisdictional water management arrangements by imposing legal requirements at a federal level that Basin States and the ACT must adhere to in their State and Territory legal prescriptions and management arrangements.
15. The Water Act primarily achieves its aims through the development and implementation of the Basin Plan. The Basin plan is to provide for the integrated management of the Basin water resources across all Basin jurisdictions.
16. The Basin Plan is legally binding on the Commonwealth and the States. The Murray Darling Basin Authority (MDBA) and Commonwealth agencies must act consistently with and in a manner that gives effect to the Basin Plan.¹ State agencies, infrastructure operators and holders of water access rights must not act inconsistently with the Plan.²
17. The way the Basin Plan will be implemented at a practical level in each of the Basin States is through water resource plans that are developed by each State for a particular area and accredited by the Federal Water Minister. Water resource plans must be consistent with the Basin Plan including the sustainable diversion limit.³
18. The Water Act requires the MDBA to prepare a Basin Plan as soon as practicable. The MDBA has commenced preparing the plan and will release a draft for public comment in mid 2010. It is expected to be in force by mid 2011.
19. There are a number of provisions in the Water Act that direct the development of the Basin Plan. These are:
 - The objects of the Act in s 3;

¹ S 34(1) Water Act

² s 35 Water Act

³ s 54 & 55 Water Act

- The purpose of the Basin Plan in s 20
- The basis on which the Basin Plan is to be developed in s 21
- Critical human water needs considerations in s 86A
- The mandatory contents of the Basin Plan in s 22 including:
 - The sustainable diversion limit in ss 22 & 23
 - The water quality and salinity management plan in ss 22 and 25
 - The environmental watering plan in ss 22 & 26

What does the requirement to 'give effect to international agreements' mean for the Basin Plan?

20. A key object in s 3 is the requirement to "give effect to relevant international agreements":

The objects of this Act are:

...

(b) to give effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources)

21. This requirement is restated with similar wording in both the s 20 Basin Plan purpose and the s 21 Basin Plan basis provisions. It is clear from the inclusion of these provisions that giving effect to the relevant international environmental agreements is a central requirement of the Act and the Plan. The requirement is confined to 'the extent to which those agreements are relevant to the use and management of the Basin water resources'.
22. There are three stages in determining the meaning of these provisions – what are the relevant international agreements that must be given effect to; to what extent are they relevant to the use and management of the Basin water resources; and what must the Basin Plan do to give effect to those agreements? These elements are discussed in turn.

Which international agreements?

23. The 'relevant international agreements' are limited to the eight environment agreements listed in s 4 of the Water Act:
- The Ramsar Convention (wetlands of international importance)
 - The Biodiversity Convention
 - The Desertification Convention
 - The Bonn Convention (conservation of migratory species of wild animals)
 - CAMBA (China-Australia migratory bird agreement)

- JAMBA (Japan-Australia migratory bird agreement)
 - ROKAMBA (Korea-Australia migratory bird agreement)
 - The Climate Change Convention
24. The Act makes provision for other relevant conventions to be added to this list by prescribing them in the regulations, however there are presently none prescribed.

What parts are relevant to Basin water resources?

25. Not all of each of the international agreements will be relevant to the use and management of Basin water resources. What is relevant must be assessed in the context of the Basin Plan and other mechanisms under the Act. Parts of the international agreements that accord with the purposes of the Act or the operative requirement of the Act are clearly relevant. For example articles in the international agreements referring to protection of Ramsar wetlands or to protection of biodiversity are clearly relevant as they align closely with operative provisions in the Act. Relevant matters in the international agreements include sustainable use of resources, biodiversity, water quality, salinity, indigenous water use, resource and environmental monitoring, wetlands, principles of ecologically sustainable development and environmental asset protection.

What does 'give effect to' mean?

26. The term 'give effect to' is not a legal term as such, although it is often used in reference to implementing international agreements in Australian law. It is not defined in the Water Act and is rarely defined in other Commonwealth Acts.
27. An exception is the Trade Practices Act 1974 (Cth) which defines it as:
- give effect to* in relation to a provision of a contract, arrangement or understanding, includes *do an act or thing in pursuance of or in accordance with* or enforce or purport to enforce⁴
(emphasis added)
28. Using its ordinary meaning it can be defined as to implement, or to carry out in practice.
29. In light of the above and in the context of the Water Act, 'give effect to relevant international agreements' should be interpreted as a requirement to *implement* or to *act on* or to *carry out*⁵ those agreements. This involves more than mere references to the aims of those agreements, or mere consistency with those agreements. It requires the Government to implement those parts of the international agreements that can practically be implemented. A Basin Plan that did not implement the relevant international agreements would not accord with its legal basis in the Act.

⁴ *Trade Practices Act 1974* s 4 definition of 'give effect to'. Note that although a definition of a term in another Act can be used to assist the interpretation of the term in the present Act, it must be done with caution as there may have been an intention for them to have different meanings.

⁵ The term 'carrying out' was used in this context in *R v Burgess; Ex parte Henry* (1936) 55C LR 608 Per Dixon J at 549

30. The eight relevant international agreements listed in the Water Act vary widely as to the nature of their provisions. Some articles are specific in nature and others are more generally expressed. There will therefore be a divergence in what must be and can be done to 'give effect to' each agreement in relation to Basin water resources.
31. To answer this question we have conducted a preliminary review of the relevant international agreements to identify what should be included in the Basin Plan in order to give effect to those agreements.⁶ Attachment A sets out the parts of each agreement that we believe must be acted on through the Basin Plan in order to comply with the ss 3, 20 and 21 requirements to give effect to the relevant international agreements.
32. It is clear that the international agreements require water resources to be managed in such a way that biodiversity, environmental assets and ecosystems are protected.⁷ They also require risks to water resources such as climate change and drought to be factored in to planning and decision-making to minimise the impacts of those risks on the resource and on the environment.⁸ In other words, they require water resources to be managed sustainably for environmental outcomes.

Additional provisions relevant to the Basin Plan

Objects clauses

33. Section 3 of the Water Act sets out its objects. The objects are wide ranging, including managing water resources in the national interest, maximising net economic returns to the Australian community, improving water security and achieving efficient and effective water management. The objects contain a number of provisions directly related to sustainability and the environment.
34. Objects clauses set out the intention and purpose of an Act. They assist in the interpretation of provisions of an Act. The objects of the Water Act are relevant to the development and contents of the Basin Plan for two reasons. The first is that as the Basin Plan is the primary mechanism for implementing the Act, as a matter of interpretation the objects of the Act flow through to the Basin Plan. The second is that s 20 of the Water Act states that "the purpose of the Basin Plan is to provide for the integrated management of the Basin water resources in a way that promotes the objects of this Act..." This is a direct requirement to advance the objects of the Act in the Basin Plan.
35. Two of the objects clauses that are particularly relevant to this analysis are:
- (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 (taking into account, in particular, the impact that the taking of water has on

⁶ As noted this is a preliminary review and further analysis at a later stage would be valuable.

⁷ For example through the Biodiversity Convention, the Ramsar Convention, and the migratory birds conventions.

⁸ For example through the Climate Change Convention and the Desertification Convention.

the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity);

36. Section 3(d)(i) requires a return to environmentally sustainable levels of extraction for water resources that are over-allocated or overused. The use of 'ensure' in this provision indicates a strong intention to achieve this goal (while noting that this is an objects provision, rather than an operative provision).
37. Section 3(d)(ii) establishes the protection and restoration of environmental values and environmental services as an object of the Act. The terms 'ecological values' and 'ecosystem services' are not defined in the Act and so are to be given their ordinary meaning in the context of the legislation. The requirement to 'protect' and 'restore' ecosystems and environmental assets appears a number of times throughout the Act. This is a positive obligation to take action that will improve ecosystems and ecological values of the Basin.

Other objects

38. These environmentally focused objects are accompanied by objects which do not have an environmental focus such as security for users and information gathering and dissemination. All objects of the Act must be considered when implementing the Act, however those objects should be interpreted in a way that is consistent with the environmental objectives so that the objects can be read together as a whole. The structure of s 3 does indicate some priority amongst the objects. For example, the objective to maximise net economic returns to the Australian community from the use of Basin water resources is expressed to be *subject to* the objectives to return to environmentally sustainable levels of extraction and protect and restore ecological values.
39. None of the other objects are in conflict with the environmental objectives of the Act and can be implemented in conjunction with the environmental objectives. For example 'improving water security for all uses of Basin Water resources'⁹ can be achieved by returning the Basin to environmentally sustainable levels of extraction.

Purpose of the Basin Plan

40. Section 20 of the Water Act sets out the purposes of the Basin Plan. The section is reproduced in full below. The parts particularly relevant to this analysis are italicised.

Purpose of Basin Plan

The purpose of the Basin Plan is to provide for the integrated management of the Basin water resources in a way that promotes the objects of this Act, in particular by providing for:

(a) giving effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources); and

(b) the establishment and enforcement of environmentally sustainable limits on the quantities of surface water and ground water that may be taken from the Basin water resources (including by interception activities); and

⁹ Water Act s 3(e)

(c) Basin-wide environmental objectives for water-dependent ecosystems of the Murray-Darling Basin and water quality and salinity objectives; and

(d) the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes; and

(e) water to reach its most productive use through the development of an efficient water trading regime across the Murray-Darling Basin; and

(f) requirements that a water resource plan for a water resource plan area must meet if it is to be accredited or adopted under Division 2; and

(g) improved water security for all uses of Basin water resources.

(emphasis added)

41. Section 20 is the first of three provisions – the purpose of the Plan, the basis of the Plan and the contents of the Plan – which provide direct guidance as to the way in which the Basin Plan should be developed and what it should contain. It is clear from the purpose section that environmental considerations and in particular sustainable management of the water resource should be a major focus for the Plan.
42. Section 20(b) refers to the requirement to include a sustainable diversion limit in the Basin Plan. The requirements of the sustainable diversion limit are discussed in detail below. The provision also states that a purpose of the Plan is to *enforce* environmentally sustainable limits.

How does Basin Plan deal with social and economic impacts?

43. The Act includes mechanisms to lessen any social and economic impacts of returning Basin water resources to sustainable levels. The Basin Plan must include a temporary diversion limit which will provide for a transition period “to minimise social and economic impacts” if the sustainable diversion limit is lower than the amount of water that has historically been taken from a particular resource.¹⁰ If the difference is less than 5% the transition period lasts for five years after the sustainable diversion limit takes effect. If the difference is more than 5% another five year transition period is allowed. The Act therefore provides a significant lead-in time for States to prepare for economic and social impacts from changes to water allocations, particularly considering the current state of Basin water resources and the recognised need for rapid action to maintain the resource.

Conclusions on the purpose of the Basin Plan

44. It is clear from the provisions of the Water Act that the overarching purpose of the Act and the Basin Plan is to return the use of Basin water resources to a sustainable level. The requirement to give effect to the relevant international agreements, the focus on biodiversity and ecosystem protection, and the explicit requirements to return Basin resources to environmentally sustainable levels of extraction support this conclusion.

¹⁰ Water Act s 22 item 7 and s 24

HOW SHOULD THE BASIN PLAN ACHIEVE A RETURN TO A SUSTAINABLE USE OF WATER RESOURCES?

45. The following analysis identifies the main elements that must be included in the Basin Plan, or that must guide its development, in order to achieve its purpose of a returning the use of Basin water resources to a sustainable level.

Use best available science

46. An overarching requirement of the s 21 basis for the Basin Plan is the requirement for the Minister and the MDBA to 'act on the basis of the best available scientific knowledge and socio-economic analysis' when developing and implementing the Basin Plan. This is a mandatory requirement. This implies a requirement to actively seek out the best available science at the time the function is being performed. 'Best available' is intended to establish a positive requirement to seek out the best available scientific information and for the Plan to be responsive to this information. An alternative interpretation that 'best available' justifies inaction on the basis that scientific information is lacking, is inconsistent with the objects and purpose of the Act.
47. It is also important to note that the Minister and MDBA are also required to take into account the precautionary principle in performing their functions. The precautionary principle states that:

if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;¹¹

Have regard to ESD principles

48. Section 21 requires the MDBA and the Minister to take into account ESD principles in exercising their powers. The ESD principles are listed in s 3(2). Although s 21 only requires the principles to be 'taken into account' there is ample evidence throughout the Act that these principles should feature as a high priority in any decision-making and implementation processes. The requirement to 'optimise' or 'integrate' economic, social and environmental outcomes and considerations is found in many provisions of the Act.¹² The need to apply ESD principles in decision-making regarding land use and natural resource management is now well established by the courts and not doing so would in many cases invalidate a decision.¹³

Establish an environmental watering plan and water quality and salinity plan

Water Quality and Salinity management Plan

¹¹ This requirement is in s 21(4)(a) via the definition of 'principles of ecologically sustainable development' in s 3(2)

¹² For example, s 3(c), s 10, s 20, s 21, s 22, s 86C

¹³ There is an extensive body of law on the application of ESD principles in decision-making which we have not elaborated on here, but which we can provide advice on if desirable.

49. Section 22 of the Act lists the mandatory contents of the Basin Plan. A water quality and salinity management plan (WQSMP) is included in that section as a mandatory content of the Basin Plan. Section 25 further outlines the requirements of the WQSMP. The Act states:

(1) The water quality and salinity management plan must:

- (a) identify the key causes of water quality degradation in the Murray-Darling Basin; and
- (b) include water quality and salinity objectives and targets for the Basin water resources.

...

50. The WQSMP will identify the water quality and salinity objectives and targets for the Basin.

Environmental Watering Plan

51. An environmental watering plan (EWP) is also a mandatory item in the Basin Plan. The Basin Plan must contain a EWP and the EWP must comply with the requirements in s 28.

52. Section 28 relevantly provides:

(1) The purposes of the environmental watering plan are:

- (a) to safeguard existing environmental water; and
- (b) to plan for the recovery of additional environmental water; and
- (c) to coordinate the management of:
 - (i) existing environmental water; and
 - (ii) the additional environmental water that is recovered;

in order to:

- (d) protect and restore the wetlands and other environmental assets of the Murray-Darling Basin; and
- (e) protect biodiversity dependent on the Basin water resources and achieve other environmental outcomes for the Murray-Darling Basin.

(2) The environmental watering plan must specify:

- (a) the overall environmental objectives for the water-dependent ecosystems of the Murray-Darling Basin; and
- (b) targets by which to measure progress towards achieving the environmental objectives specified in accordance with paragraph (a); and
- (c) an environmental management framework for planned environmental water and held environmental water; and

(d) the methods to be used to identify environmental assets in the Murray-Darling Basin that will require environmental watering; and

(e) the principles to be applied, and methods to be used, to determine the priorities for applying environmental water (including applying that water to environmental assets that are identified using the methods specified under paragraph (d)); and

(f) the principles to be applied in environmental watering.

...

53. The definition section in s 4 states that:

"environmental watering means the delivery or use of environmental water to achieve environmental outcomes."

54. The EWP has three aims – to protect existing environmental water; to plan for additional environmental water and to manage both existing and new environmental water. The EWP is the key mechanism in the Water Act to ensure that there is enough environmental water to meet the environmental objectives of the Basin and to ensure that the water is actually applied in a way that meets those environmental objectives.

55. Section 28 contains clear language on the level of environmental protection the EWP should set out to achieve. Section 28 requires the MDBA to develop a plan which will not only protect environmental assets in the Basin, but restore them as healthy functioning ecosystems. Although the specific environmental objectives of the plan are to be set out in the plan, in order to comply with s 28 the objectives would need to align with the purpose of protecting and restoring environmental assets and protecting water dependent biodiversity.

56. The EWP is a component of the Basin Plan and is therefore legally binding on the Commonwealth and the States. The Commonwealth must act consistently with and in a manner that gives effect to the EWP. The States and their agents and holders of water access rights cannot act inconsistently with the EWP.

Establish a sustainable diversion limit

57. Section 22 requires the Basin Plan to include a sustainable diversion limit (SDL). The SDL is described as:

*"The maximum long-term annual average quantities of water that can be taken on a sustainable basis, from the basin water resources as a whole, and 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."*¹⁴ (emphasis added)

58. The SDL is not simply a basin wide cap. SDLs are to be developed and applied to each water resource plan area as well as the Basin water resources as a whole.

¹⁴ Water Act s 22 item 6

59. Section 23 further outlines the requirements of the sustainable diversion limits (SDL) in the Basin Plan. Section 23(1) provides:

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*. (emphasis added)

60. The definition section in s 4 states that:

environmentally sustainable level of take for a water resource means the level at which water can be taken from that 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.

61. Further, s 4 states:

environmental assets includes:

- (a) water-dependent ecosystems; and
- (b) ecosystem services; and
- (c) sites with ecological significance.

environmental outcomes includes:

- (a) ecosystem function; and
- (b) biodiversity; and
- (c) water quality; and
- (d) water resource health.

Note 1: Paragraph (a) would cover, for example, maintaining ecosystem function by the periodic flooding of floodplain wetlands.

Note 2: Paragraph (d) would cover, for example, mitigating pollution and limiting noxious algal blooms.

62. To 'take' water from a water resource does not just refer to the removal of water from the resource, it includes reducing the flow into the resource by stopping it from reaching the resource:

take water from a water resource means to remove water from, or to reduce the flow of water in or into, the water resource including by any of the following means:

- (a) pumping or siphoning water from the water resource;

- (b) stopping, impeding or diverting the flow of water in or into the water resource;
- (c) releasing water from the water resource if the water resource is a wetland or lake;
- (d) permitting water to flow from the water resource if the water resource is a well or watercourse;

and includes storing water as part of, or in a way that is ancillary to, any of the processes or activities referred to in paragraphs (a) to (d).

63. The result of these somewhat convoluted definitions is the basis for a cap on diversions which if thoroughly implemented would require significant action to address the over-allocation of water resources in the Murray-Darling Basin. There is ample support for this interpretation in the objects of the Act and the objectives set out for the Basin Plan.

64. The explanatory memorandum for the Water Bill notes in relation to the SDL that:

The intention is to ensure that water is taken from Basin water resources on an environmentally sustainable basis rather than based on historical levels of surface water use as is the case for current long-term diversion caps set under Schedule F of the Murray-Darling Basin Agreement.¹⁵

How should the sustainable diversion limit be developed?

65. The actual requirement of what must be included in the Basin Plan for SDLs is in s 22. The Plan must include *the maximum long-term annual average quantities of water that can be taken on a sustainable basis from the Basin as a whole, the water resources or parts thereof of each water resource plan area* (ie the sustainable diversion limit). In other words, s 22 requires the MDBA to determine the quantities of water that can be taken on a *sustainable basis* from the Basin. This can be specified using an annual quantity of water, a formula or any other method the MDBA determines appropriate.

66. Section 23 then gives an additional requirement - the sustainable diversion limit must reflect 'an environmentally sustainable level of take'. The use of the word 'must' in s 23(1) establishes this as a mandatory requirement of the SDL. The Act defines what an 'environmentally sustainable level of take' is. Essentially it mandates that water cannot be removed from or diverted from Basin water resources at a level which would degrade the resource or have a negative impact on key environmental assets; key ecosystem functions; the productive base of the water resource; or key environmental outcomes. A SDL that did not reflect an environmentally sustainable level of take, and all that that term encompasses, would not comply with the Water Act.

67. Environmentally sustainable level of take is limited to 'key' assets, 'key' functions, and 'key' outcomes and the productive base. (In the MDBA's sustainable diversion limits paper these are termed 'environmentally sustainable level of take characteristics'.) What can be taken on a sustainable basis - in other words what the SDL should be - is a larger consideration than just these environmentally sustainable level of take characteristics.

¹⁵ Water Bill 2007 explanatory memorandum paragraph 54. Explanatory memorandums can be used to assist in the interpretation of provisions of an Act - s 15AB *Acts Interpretation Act 1901* (Cth).

68. Assessing what must be included in the sustainable diversion limit should therefore be considered in two stages. The overall requirement is what amount of water can be taken on a sustainable basis from each water resource plan area, and therefore the Basin. A sub-requirement is what is an environmentally sustainable level of take.
69. This interpretation is not only supported by the wording of sections 22 and 23, it is supported by the wording in the context of the Act as a whole and the purposes of the Act and the Basin Plan. The overarching purpose of the Act and the overarching purpose of the Basin Plan is to return the use of Basin water resources to a sustainable level. This will not be done by purely focusing on 'key' environmental characteristics.

Sustainable diversion limit and the international agreements

70. As noted above the requirement to give effect to relevant international agreements is a core requirement of the Act and for the Basin Plan. The international agreements therefore strongly influence the development of SDLs. The requirements in those agreements to protect Ramsar wetlands, protect biodiversity, protect migratory species especially water birds, manage the risks of climate change, drought and desertification must be reflected in the SDLs.
71. This adds weight to the interpretation stated above that the SDLs must be set at a level which does not just protect the 'key' environmentally sustainable level of take characteristics, but which protects a much broader range of environmental assets, ecosystem functions, environmental outcomes and biodiversity.
72. The MDBA issues paper on sustainable diversion limits does not mention the impact of these international agreements on the development of SDLs and it is a critical omission.

What is a sustainable basis?

73. The key question then is what is 'sustainable'. The Water Act does not define sustainable however it does include a definition of the principles of ecologically sustainable development (ESD). One of those principles of ESD is generally considered to be a key component of sustainability (as opposed to the broader concept of ESD):

The present generation should ensure that the health, biodiversity and productivity of the environment is maintained or enhanced for the benefit of future generation.

74. In other words, in relation to the Basin Plan, ensuring that actions done now do not degrade the resource or the ecosystems that depend on it.
75. There are no other Commonwealth Acts that define 'sustainable' or 'environmentally sustainable', however 'ecologically sustainable' is defined in the QLD *Nature Conservation Act 1992* in relation to land:

ecologically sustainable, for use of the land, means use within the capacity of the land to sustain natural processes while-

- (a) maintaining the life support systems of nature; and

(b) ensuring the benefit of the use to present generations does not diminish the potential to meet the needs and aspirations of future generations.

76. This definition, while not directly influential on the interpretation of the Water Act, is useful in understanding how the term is used in Australian legislation.

Sustainable diversion limit and the environmental watering plan

77. As noted above, the sustainable diversion limits must set the quantities of water that can be taken on a *sustainable basis* from the Basin.
78. A component of this will be to identify (using best available science) the environmental assets, ecosystem functions and productive base of the water resource, as well as mapping of ecosystem functions, biodiversity, water quality and water resource health of the Basin. It then requires an analysis (using best available science) of how much water is needed to maintain these features.
79. The environmental watering plan (EWP) is the mechanism through which the environmental objectives and environmental assets will be identified. In particular it will determine how much water is needed to protect and restore those objectives and assets. It is therefore necessarily linked with the sustainable diversion limit which also seeks to provide for and protect those things. Indeed a SDL that was set at a level that did not protect those things is likely to be invalid as it would not reflect an environmentally sustainable level of take.
80. A calculation of how much water can be taken on a sustainable basis cannot be calculated without knowing how much water is needed for the environment. It is necessary, therefore, for the SDL, including the requisite environmentally sustainable level of take, to be developed in conjunction with the environmental watering plan. The MDBA is currently embarking on an analysis of how it will set SDLs for the Basin Plan, however it appears that it has not yet considered the EWP. If this method continues there is a risk the SDLs will not be set at a sustainable level, and will not reflect an environmentally sustainable level of take.
81. Similarly, to establish the environmentally sustainable level of take the MDBA must determine what the water quality outcomes are for the Basin (through the definition of 'environmental outcomes'). This should be done in conjunction with the development of the water quality and salinity management plan (WQSMP) which is the document which will determine the water quality and salinity objectives and targets for the Basin.

Protect biodiversity

82. Section 21 contains the basis on which the Basin Plan must be developed. In relation to biodiversity it states:

(1) The Basin Plan (including any environmental watering plan or water quality and salinity management plan included in the Basin Plan) must be prepared so as to provide for giving effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources).

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

- (a) be prepared having regard to:
 - (i) the fact that the use of the Basin water resources has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity; and
 - (ii) the fact that the Basin water resources require, as a result, special measures to manage their use to conserve biodiversity; and
- (b) promote sustainable use of the Basin water resources to protect and restore the ecosystems, natural habitats and species that are reliant on the Basin water resources and to conserve biodiversity.

Note 1: See Articles 7 and 8 of the Biodiversity Convention.

Note 2: The Basin Plan must also be prepared having regard to critical human water needs (see Part 2A).

83. Section 21(2) recognises the 'significant adverse impacts' of past and future water use on biodiversity and the resulting need for 'special measures' to conserve biodiversity. Section 21(2) also contains a clear requirement for the Basin Plan to promote sustainable use of basin water resources to protect and restore ecosystems, natural habitats and species and conserve biodiversity. The Act then specifically notes articles 7 and 8 of the Biodiversity Convention. Articles 7 & 8 are reproduced at Attachment A.

Convention on Biodiversity

84. Much of the language of s 21(2) reflects the language used in the Biodiversity Convention. In particular, the Biodiversity Convention requires parties to identify processes and activities which have 'significant adverse impacts' on biodiversity. Section 21(2)(a)(i) identifies the use of Basin water resources as one of those activities. For any such activities, the Biodiversity Convention then requires parties to monitor the effects of those activities, and *regulate or manage* the relevant activities.¹⁶
85. The Biodiversity Convention contains a number of operative provisions that are capable of being implemented through domestic legislation. The main instrument implementing the Biodiversity Convention in Australia is the *Environment Protection Biodiversity Conservation Act 1999* (Cth) (EPBC Act). As noted above, the Water Act requires implementation or carrying out of parts of the Biodiversity Convention relevant to the management of Basin Water Resources. Articles 7, 8 and 10 in particular are relevant to the Water Act and capable of implementation through the Basin Plan. Article 7 requires identification and monitoring of biodiversity and activities which have a negative impact on biodiversity, Article 8 requires in situ conservation of biodiversity and Article 10 requires sustainable use of biodiversity.
86. Article 10(e) requires parties to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. Article 8(j) requires parties to respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles for the conservation and sustainable use of biodiversity. These articles are relevant to the Water Act and capable of being implemented through the Basin Plan. They provide a legal basis for the Basin Plan to manage water in such a way that indigenous cultural use of Basin water resources and biodiversity dependent on Basin water resources is

¹⁶ Articles 7(c) and 8(l), Biodiversity Convention

protected. This could include delivering cultural flows to sustain biodiversity for cultural purposes.

'Special measures' to conserve biodiversity

87. The requirement to implement 'special measures' in order to give effect to international agreements appears in two places in the Water Act – the s 3 objects clause and the s 21 basis of the Basin Plan. The Act identifies the Basin water resources as needing special measures to conserve biodiversity. In the objects clause it refers specifically to the need to implement special measures in accordance with the international agreements to address threats to the Basin water resources.
88. The term special measures is not defined or elaborated on in the Water Act. The main context in which the term has been used in other Commonwealth legislation is in legislation which implements the Racial Discrimination Convention such as the Racial *Discrimination Act 1975* (Cth). The term is not defined in that Act however the Australian Human Rights Commission, the Government body who administers the Racial Discrimination Act, has stated in that context that 'special measures are *positive actions to assist or protect* disadvantaged racial groups. Some groups do not enjoy human rights equally with others and special measures allow them to be assisted' (emphasis added).¹⁷
89. It is an accepted rule of statutory interpretation that when interpreting legislation that is designed to implement international treaties, the treaties themselves can be used to assist in the interpretation of the Act, so that Australian legislation is interpreted consistently with international law.¹⁸ This is the case for the interpretation of 'special measures' in the Racial Discrimination Act - the term is used in the Racial Discrimination Convention and it has been accorded the same meaning in the Racial Discrimination Act.
90. In relation to the relevant international agreements in the Water Act, the term is used in Article 8 of the Biodiversity Convention but does not appear in the other agreements.
91. Article 8 of the Biodiversity Convention states:

Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas or areas where *special measures* need to be taken to conserve biological diversity;

(b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where *special measures* need to be taken to conserve biological diversity;

(emphasis added)

92. It is clear from the way the term is used in the Water Act and from Note 1 under s 21 that 'special measures' correlates with the use of that term in the Biodiversity Convention and therefore it should be interpreted consistently with the Biodiversity Convention.

¹⁷ For example *Racial Discrimination Act 1975* (Cth) s 8

¹⁸ Pearce and Geddes, *Statutory Interpretation in Australia*, 6th Ed, 2006 at 1.13, 2.16, 3.10

93. The term is not specifically defined in the Biodiversity Convention and explanatory materials for that convention do not provide much assistance in defining the term.¹⁹ Although the use of the term in the Racial Discrimination Convention does not completely align with the use of the term in the Biodiversity Convention, it is a useful guide.

94. A general recommendation from the committee on the Racial Discrimination Convention states that special measures are needed because the laws, policies and practices adopted by countries to implement the convention require additional action in some circumstances to achieve the full aims of the convention. The committee states that:

'Measures' includes the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments. States parties should include as required in order to fulfil their obligations under the Convention, provisions on special measures in their legal systems, whether through general legislation or legislation directed to specific sectors in light of the range of human rights referred to in Article 5 of the Convention, as well as through plans, programmes and other policy initiatives referred to above at national, regional and local levels.²⁰

95. In the context of the Biodiversity Convention, it is likely that special measures includes the establishment of laws, policies, programs and regimes in certain key areas which provide additional assistance above and beyond the usual measures, to conserve biodiversity.

96. In the context of the Water Act, 'special measures' should be interpreted as a requirement to establish laws, policies, programs and regimes within the Basin water resource area over and above the usual measures (i.e. practice to date) to conserve biodiversity. The objects clause in particular notes the need for special measures to address threats to the water resources of the Basin (including rivers, lakes, wetlands and aquifers).

Conserve Ramsar wetlands

97. The s 21 basis on which the Basin Plan must be developed also requires the Basin Plan to conserve Ramsar wetlands in accordance with the Ramsar Convention. It states:

- (3) Without limiting subsection (1), the Basin Plan must also:
- (a) promote the wise use of all the Basin water resources; and
 - (b) promote the conservation of declared Ramsar wetlands in the Murray-Darling Basin; and
 - (c) take account of the ecological character descriptions of:
 - (i) all declared Ramsar wetlands within the Murray-Darling Basin; and
 - (ii) all other key environmental sites within the Murray-Darling Basin;prepared in accordance with the National Framework and Guidance for Describing the Ecological Character of Australia's Ramsar Wetlands endorsed by the Natural Resource Management Ministerial Council.

Note 1: See Article 3 of the Ramsar Convention.

¹⁹ In international law, certain materials that were produced when the treaty was being negotiated (*travaux préparatoires*) can be used to assist interpretation.

²⁰ Committee on the Elimination of Racial Discrimination, Seventy-fifth session, August 2009, General Recommendation No. 32 accessed at www2.ohchr.org/english/bodies/cerd/docs/GC32.doc

Note 2: A copy of the National Framework and Guidance for Describing the Ecological Character of Australia's Ramsar Wetlands may be found on the Department's website.

98. Section 21(3) therefore contains a specific requirement to promote the conservation of Ramsar wetlands through the Basin Plan. Note 1 of this section refers to Article 3 of the Ramsar Convention which states:

The contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the list and as far as possible the wise use of wetlands in their territory.

Ramsar Convention requirements

99. The Ramsar Convention contains a number of operative provisions that are capable of being implemented through domestic legislation. The Ramsar Convention is partially implemented in Australia through the EPBC Act which requires environmental impact assessment of all actions likely to have a significant impact on Ramsar wetlands. However the EPBC Act does not provide the level of protection of Ramsar wetlands envisaged in the Ramsar Convention. There are other State based laws and policies that provide piecemeal protection of Ramsar wetlands.
100. Articles 3 and 4 in particular are relevant to the Water Act and capable of implementation through the Basin Plan. Article 3(1) requires parties to design and implement their planning to promote the conservation of Ramsar wetlands and as far as possible the wise use of wetlands in their territory. Article 4 requires parties to promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands (Ramsar or not) and provide adequately for their care and management. It also requires parties to endeavour to increase waterfowl populations on wetlands.

Strategies to address climate change

101. Climate change is identified in the Water Act as a risk to the Basin water resources. Section 22 states that the Plan must include 'an identification of the risks to the condition or continued availability of the Basin water resources' including risks that arise from 'the effects of climate change'.²¹
102. Section 22 further requires the Plan to include strategies to be adopted to manage, or address, the identified risks including climate change.²²
103. Climate change is also relevant to the development of the Basin Plan through the requirement to give effect to the Climate Change Convention. Article 3 of the Convention states that in implementing the Convention parties should be guided by the need to take precautionary measures to mitigate the adverse effects of climate change even if there is a lack of full scientific certainty.²³ Article 4 states that parties shall develop and elaborate

²¹ *Water Act 2007* section 22 item 3

²² *Water Act 2007* section 22 item 5

²³ Climate Change Convention Article 3(3)

integrated plans for water resources for the protection and rehabilitation of areas affected by droughts and desertification.

Critical human needs requirement

104. Section 86A inserts an additional requirement that the Basin Plan must be prepared with regard to – ‘critical human water needs’.
- (1) Without limiting section 21, 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.
 - (2) *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.
 - ...
 - (4) *Conveyance water* is water in the River Murray System required to deliver water to meet critical human water needs as far downstream as Wellington in South Australia.
105. Section 86B states that the Basin Plan must include a statement of the amount of water required in each State to meet critical human water needs of the communities that are dependent on the waters of the Murray system and the amount of conveyance water required to deliver that water.
106. This statement is part of the Basin Plan and is therefore binding on the Commonwealth and State agencies. Water resource plans must be consistent with the critical human need provisions in the Basin Plan.
107. These amendment provisions were included in the Water Act as a result of the 2008 COAG Agreement on Murray Darling Basin Reform and the definitions are based on wording set out in that agreement. The inclusion of these provisions at a later date than the original Act contributes to the uncertainty around how they should be interpreted in light of the other considerations of the Act and how they will interact with the SDLs.
108. Section 86A shows an intention that critical human water needs, and conveyance water to achieve that, are to be the highest priority for *communities who are dependent on Basin water resources*.
109. Critical human water needs in relation to non-human consumption is not clearly defined. The Act does not give any further explanation of what ‘prohibitively high social, economic or national security costs’ might mean. In Parliamentary debates during the introduction of the Bill Senator Wong stated:

One of the examples given to me in relation to the second part of the definition is to enable water to be supplied in those circumstances to an ammunition factory, and there are obviously security implications with that. OneSteel at Whyalla is another example of an operation which at this stage

also sources water from the Murray, so there are very significant economic and social considerations.²⁴

110. As the meaning of this provision is uncertain, consideration must be given to the context of the provision in its interpretation. It is clear that the key purpose of the Act is to return the use of Basin water resources to environmentally sustainable levels to protect and restore biodiversity and environmental assets. Therefore a determination of what is a 'prohibitively high social, economic or national security cost' must be considered in light of the primary objective of returning the use of Basin water resources to a sustainable level. Consideration would also need to be given to the social, economic or national security cost of not returning the use of Basin water resources to sustainable levels, should non-human consumption requirements be found to be more than what is sustainable.

Matters that cannot be dealt with by the Basin Plan

111. The Water Act places some limits on matters that may be regulated through the Basin Plan. It must only include provisions that relate to a matter relevant to the use or management of Basin water resources. In particular, the Act specifically states that the Basin Plan must not include provisions which *directly* regulate:
- land use or planning in relation to land use; or
 - the management of natural resources other than water; or
 - the control of pollution.
112. The Act goes on to give examples of the kinds of activity the Basin Plan cannot regulate in relation to the above three matters. For example it cannot prohibit a person, including a State Government, from doing an activity in relation to land use or land use planning or natural resource management (eg mining) or pollution. It cannot require a person to do an activity in relation to land use, natural resource management or pollution in a certain way. It cannot impose requirements on any person to get approval before doing any land use activity.
113. The main exception to this is that the Basin Plan can directly regulate interception activities such as forestry that may have a significant impact on the water resource.
114. Despite the above, the Basin Plan can set *targets* and *objectives* in relation to land use or land use planning or management of natural resources or pollution via the EWP and WQSMP.²⁵
115. The reason for this prohibition is that legally, the matters listed above are State matters. The States were reluctant to give up their powers in relation to these matters. However, land use, natural resource management and pollution within the Basin are activities which directly impact on the health, availability and function of the Basin water resources and its dependent

²⁴ Senate Hansard, Tuesday 25 November 2008 page 7223

²⁵ The Act specifically acknowledges the ability to set pollution targets through the EWP via 'water resource health' which at s 3 is noted to include pollution and algal blooms.

ecosystems. The Basin Plan will not be able to meet its objectives if it ignores those matters entirely. The prohibition in s 22(10) does not require the Basin Plan to ignore those matters, it prevents it from directly regulating those matters. It does not mean that the Basin Plan cannot strongly influence those matters.

116. There will be a fine balance at times between what is seen as a valid matter that is relevant to the use or management of Basin water resources and what is instead an invalid direct regulation of land use or pollution. The aim of the Basin Plan should be to set objectives and targets through the Plan's provisions and the EWP and WQSMP that then require the Basin States to directly regulate those matters listed above in order to achieve those targets and objectives.

CONCLUSIONS

117. To accord with the Water Act the Basin Plan must be developed in a way that will return the use of Basin water resources to a sustainable level. The Basin Plan's purpose is more than just establishing a sustainable diversion limit and the sustainable diversion limit is more than just protecting 'key' environmentally sustainable level of take characteristics. All elements of the Basin Plan, not just the sustainable diversion limit, should be aimed at returning the use of Basin water resources to sustainable levels.
118. Returning Basin water resources to sustainable levels must include providing enough water to protect and restore water dependent ecosystems, protect biodiversity, and provide for environmental assets.
119. The sustainable diversion limit is an important tools that will be used to do this, however the EWP, the WQSMP, and the entirety of the Plan should seek to give effect to this purpose also. As shown above there is ample evidence throughout the Water Act that the Basin Plan should be developed and implemented in this way.

Please do not hesitate to contact us if you have any queries in relation to this advice.

Yours faithfully,


Brendan Sydes
Principal Solicitor


Nicola Rivers
Solicitor

Attachment A – Summary of sustainability and environmental legal requirements of the Basin Plan

Note – the following table is necessarily brief and should be read with the more detailed legal discussion

LEGAL REQUIREMENT (WATER ACT / INTERNATIONAL AGREEMENT)	EFFECT ON BASIN PLAN
<p><i>Overarching requirements</i></p> <p>Give effect to relevant international agreements, including providing for special measures to address threats to basin water resources (see details of international agreements below) (s3)</p>	<p>Government must interpret obligations and responsibilities in the Act in a way which promotes the implementation of the international agreement and provides for special measures.</p> <p>Special measures are laws, policies, programs and regimes within the Basin water resource area, over and above the usual measures (i.e. practice to date), to conserve biodiversity and address threats to the water resources of the Basin (including rivers, lakes, wetlands and aquifers).</p>
<p>Take into account principles of ecologically sustainable development (s21(4)(a))</p>	<p>Minister and MDBA <u>must</u> take into account ESD principles at all times when developing and implementing the Basin Plan including the EWP, WQSMP and SDL.</p>
<p>Act on the basis of best available scientific knowledge and socio economic analysis (s21(4)(b) and s21(4) note 1)</p>	<p>Minister and MDBA <u>must</u> act on the basis of best available scientific knowledge at all times when developing and implementing the Basin Plan including the EWP, WQSMP and SDL. This includes the best available systems for accounting for water resources.</p>
<p>Have regard to social, cultural, indigenous and other public benefit issues (s21(4)(c)(v))</p>	<p>Minister and MDBA <u>must</u> act on the basis of best available socio economic analysis at all times when developing and implementing the Basin Plan including the EWP, WQSMP and SDL</p> <p>Minister and MDBA <u>must</u> have regard to social, cultural, indigenous issues.</p>

Specific requirements	
Give effect to relevant international agreements (see details of international agreements below) (s20(a))	Government must develop the Basin Plan in a way which implements the relevant international agreements (see details of international agreements below).
Establishment and enforcement of environmentally sustainable limits on the quantities of surface water and groundwater that may be taken from Basin water resources (including interceptions) (s20(b))	Include in the Basin Plan environmentally sustainable limits on surface and groundwater take. (see also SDL requirement below). Include in the Basin Plan methods to enforce those limits.
Basin wide environmental objectives for water-dependent ecosystems of the Basin and water quality and salinity objectives (s20(c))	Include in the Basin Plan basin-wide environmental objectives for water dependent ecosystems. (see also EWP requirement below) Include in the Basin Plan water quality and salinity objectives (see also WQSMP requirement below).
Give effect to relevant international agreements (see details of international agreements below) (s21(1))	Government must prepare the Basin Plan, including any EWP or WQSMP, in a way which implements the relevant international agreements (see details of international agreements below).
Prepare the Basin Plan having regard to the fact that the use of Basin water resources has had and will likely have significant adverse impacts on conservation and sustainable use of biodiversity. (s21(2)(a)(i))	In developing the Basin Plan, recognise the fact that the use of water resources has had and will continue to have significant adverse impacts on conservation and biodiversity. As a result, include special measures in the Basin Plan to manage the water resources in a way that conserves biodiversity.
Prepare the Basin Plan having regard to the fact that special measures are required to manage the use of the Basin water resources to conserve biodiversity (s21(2)(a)(ii))	Special measures are laws, policies, programs and regimes within the Basin water resource area, over and above the usual measures, to conserve biodiversity.
Promote sustainable use of the Basin water resources to protect and restore ecosystems, natural habitats and species reliant on the basin, and conserve biodiversity (s21(2)(b))	Basin Plan must include objectives to protect and restore ecosystems, natural habitats and species and conserve biodiversity.
The Basin Plan must promote the wise use of all the Basin	Basin Plan must be developed in a way which will conserve Ramsar

<p>water resources; and promote the conservation of declared Ramsar wetlands in the Murray-Darling Basin. (s21(3) and s21(3) note 1)</p> <p>The Basin Plan must include the long term sustainable diversion limit for the Basin water resource, the water resources or particular parts of the water resources of each water resource plan area. (s22 Item 6)</p> <p>The long-term sustainable diversion limits must reflect an environmentally sustainable level of take. (s23)</p> <p>The Basin Plan must include an environmental watering plan. (s22 item 9 and s28)</p>	<p>wetlands and give effect to the Ramsar Convention (see details of Ramsar Convention below).</p> <p>The Basin Plan must include a sustainable diversion limit which prevents water from being removed from or diverted from Basin water resources over a level that is sustainable.</p> <p>At a minimum the sustainable diversion limit must be set at a level which does not degrade the resource or have a negative impact on key environmental assets; key ecosystem functions; the productive base of the water resource; or key environmental outcomes. The SDL must also give effect to relevant international agreements.</p> <p>The EWP must contain provisions which will protect environmental assets in the Basin and restore them to healthy functioning ecosystems.</p>
<p>The Basin Plan must include a water quality and salinity management plan. (s22 item 10 and s25)</p> <p>Negative requirement – A provision of the Basin Plan has no effect to the extent to which it directly regulates land use or planning in relation to land use; or the management of natural resources (other than water); or the control of pollution. (s22(10))</p>	<p>The Basin Plan must include a water quality and salinity management plan which identifies causes of water quality degradation and objectives and targets for water quality and salinity improvement.</p> <p>The Basin Plan must not include provisions which <i>directly</i> regulate land use or planning in relation to land use; the management of natural resources other than water; or the control of pollution. For example it cannot prohibit a person from doing something in relation to land use or planning or pollution or require a person to get approval to do a land use activity.</p> <p>The Basin Plan can directly regulate interception activities.</p> <p>The Basin Plan should set targets and objectives in relation to land use or land use planning or management of natural resources or</p>

		pollution via the EWP and WQSMP which will then require States to regulate those matters directly to meet those targets and objectives.
International requirements		
<i>RAMSAR Convention</i>		
Article 3		
1. The contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the list and as far as possible the wise use of wetlands in their territory.		
2. Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8.		
Article 4		
1. Each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening.		
2. Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in		

<p>the same area or elsewhere, of an adequate portion of the original habitat.</p> <p>3. The Contracting Parties shall encourage research and the exchange of data and publications regarding wetlands and their flora and fauna.</p> <p>4. The Contracting Parties shall endeavour through management to increase waterfowl populations on appropriate wetlands.</p> <p>5. The Contracting Parties shall promote the training of personnel competent in the fields of wetland research, management and wardening.</p>	
<p>Article 6</p> <p>3. The Contracting Parties shall ensure that those responsible at all levels for wetlands management shall be informed of, and take into consideration, recommendations of such Conferences concerning the conservation, management and wise use of wetlands and their flora and fauna.</p>	
<p><i>Convention on Biodiversity</i></p>	
<p>Article 7: Identification and monitoring</p> <p>Each Contracting Party shall, as far as possible and as appropriate, in particular for the purposes of Articles 8 to 10:</p> <p>(a) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I;</p> <p>(b) Monitor through sampling and other techniques, the components of biological diversity identified pursuant to</p>	

<p>subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use;</p> <p>(c) Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques; and</p> <p>(d) Maintain and organize by any mechanism data derived from identification and monitoring activities pursuant to subparagraphs (a), (b) and (c) above.</p>	<p>The Act already identifies the current and future use of Basin water resources as an activity which has significant adverse impacts on biodiversity. This article plus article 8(1) requires monitoring of those effects and regulation and management of those effects to minimize those effects.</p>
<p>Article 8: <i>In-situ</i> conservation</p> <p>Each Contracting Party shall, as far as possible and as appropriate:</p> <p>(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;</p> <p>(b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;</p> <p>(c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas with a view to ensuring their conservation and sustainable use;</p> <p>(d) <u>Promote the protection of ecosystems, natural habitats</u></p>	

	<p>and the maintenance of viable populations of species in natural surroundings;</p> <p>(e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;</p> <p>(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, <i>inter alia</i>, through the development and implementation of plans or other management</p> <p>(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;</p> <p>(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;</p> <p>(l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities;</p> <p>Article 10: Sustainable use of components of biological diversity</p> <p>Each Contracting Party shall, as far as possible and as</p>
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<p>appropriate:</p> <p>(a) Integrate consideration of the conservation and sustainable use of biological resources into national decision-making;</p> <p>(b) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity;</p> <p>(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;</p> <p>(d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and</p> <p>(e) Encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.</p> <p>Article 11: Incentive measures</p> <p>Each Contracting Party shall, as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.</p> <p>Article 12: Research and training</p> <p>The Contracting Parties, taking into account the special needs of developing countries, shall:</p>	
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	<p>(b) Promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, <i>inter alia</i> accordance with decisions of the Conference of the Parties taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice; and</p>
	<p>Article 13: Public education and awareness</p> <p>The Contracting Parties shall:</p> <p>(a) Promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes;</p>
	<p>Article 14: Impact assessment and minimizing adverse impacts</p> <p>1. Each Contracting Party, as far as possible and as appropriate, shall:</p> <p>(b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account;</p> <p>(e) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.</p>
	<p>Article 20: Financial resources</p>

<p>1. Each Contracting Party undertakes to provide, in accordance with its capabilities, financial support and incentives in respect of those national activities which are intended to achieve the objectives of this Convention, in accordance with its national plans, priorities and programmes.</p>	
<p><i>Desertification Convention</i></p>	
<p>Article 3: Principles In order to achieve the objective of this Convention and to implement its provisions, the Parties shall be guided, <i>inter alia</i>, by the following:</p>	
<p>(a) the Parties should ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities and that an enabling environment is created at higher levels to facilitate action at national and local levels;</p>	
<p>(c) the Parties should develop, in a spirit of partnership, cooperation among all levels of government, communities, non-governmental organizations and landholders to establish a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use;</p>	
<p>Article 5: Obligations of affected country parties In addition to their obligations pursuant to Article 4, affected country Parties undertake to:</p>	
<p>(a) give due priority to combating desertification and</p>	

<p>mitigating the effects of drought, and allocate adequate resources in accordance with their circumstances and capabilities;</p> <p>(b) establish strategies and priorities, within the framework of sustainable development plans and/or policies, to combat desertification and mitigate the effects of drought;</p> <p>(c) address the underlying causes of desertification and pay special attention to the socio-economic factors contributing to desertification processes;</p> <p>(d) promote awareness and facilitate the participation of local populations, particularly women and youth, with the support of non-governmental organizations, in efforts to combat desertification and mitigate the effects of drought; and</p> <p>(e) provide an enabling environment by strengthening, as appropriate, relevant existing legislation and, where they do not exist, enacting new laws and establishing long-term policies and action programmes.</p>	
<p>Article 20: Financial resources</p> <p>Given the central importance of financing to the achievement of the objective of the Convention, the Parties, taking into account their capabilities, shall make every effort to ensure that adequate financial resources are available for programmes to combat desertification and mitigate the effects of drought.</p>	
<p><i>Bonn Convention</i></p> <p>Article II: Fundamental principles</p>	

<p>3. In particular, the Parties:</p> <p>(a) should promote, cooperate in and support research relating to migratory species;</p> <p>(b) shall endeavour to provide immediate protection for migratory species included in Appendix I;</p> <p>Article III: Endangered migratory species: Appendix I</p>	
<p>4. Parties that are Range States of a migratory species listed in Appendix I shall endeavour:</p> <p>(a) to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction;</p> <p>(b) to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species; and</p> <p>(c) to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating, already introduced exotic species.</p> <p>5. Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species. Exceptions may be made to this prohibition only if:</p>	
<p>Article XII: Effect on international conventions and other</p>	

<p>legislation</p> <p>3. The provisions of this Convention shall in no way affect the right of Parties to adopt stricter domestic measures concerning the conservation of migratory species listed in Appendices I and II or to adopt domestic measures concerning the conservation of species not listed in Appendices I and II.</p>	
<p>CAMBA</p>	
<p>Article IV</p> <p>Each Contracting Party shall endeavour, in accordance with its laws and regulations in force, to:</p> <p>(a) establish sanctuaries and other facilities for the management and protection of migratory birds and also of their environment; and</p> <p>(b) take appropriate measures to preserve and enhance the environment of migratory birds. In particular, each Contracting Party shall:</p> <p>(i) seek means to prevent damage to migratory birds and their environment, and</p> <p>(ii) endeavour to take such measures as may be necessary to restrict or prevent the importation and introduction of animals and plants which are hazardous to the preservation of migratory birds and their environment.</p>	
<p>JAMBA</p>	
<p>Article III</p>	

<p>1. Each Government shall take special protective measures, as appropriate, for the preservation of species or subspecies of birds which are in danger of extinction.</p> <p>2. Whenever either Government has determined the species or subspecies of birds which are in danger of extinction and taken special protective measures therefore, the Government shall inform the other Government of such determination and of any cancellation thereafter of such determination.</p>	
<p>Article IV 3. Each Government shall encourage the conservation of migratory birds and birds in danger of extinction.</p>	
<p>Article V Each Government shall endeavour to establish sanctuaries and other facilities for the management and protection of migratory birds and birds in danger of extinction and also of their environment.</p>	
<p>Article VI Each Government shall endeavour to take appropriate measures to preserve and enhance the environment of birds protected under the provisions of this Agreement. In particular, it shall:</p> <p>(a) seek means to prevent damage to such birds and their environment;</p> <p>(c) endeavour to take such measures as may be necessary to control the introduction of animals and plants which could disturb the ecosystems of unique island environments.</p>	

ROKAMBA	
ARTICLE 3	
3. Each Party shall encourage the conservation of migratory birds.	
ARTICLE 4	
Each Party shall endeavour to manage and conserve the habitat of migratory birds through activities such as the designation of conservation areas in its territory.	
ARTICLE 5	
Each Party shall endeavour to take the appropriate measures to conserve and improve the environment of birds protected under Article 1 of this Agreement. In particular, it shall:	
(a) seek means to prevent damage to such birds and their environment;	
(c) endeavour to participate in regional cooperative activities for the conservation of migratory birds in the Asia-Pacific region.	
<i>Climate Change Convention</i>	
Article 3: Principles	
In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, <i>inter alia</i> , by the following:	
3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change	

<p>and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.</p>	
<p>Article 4: Commitments</p> <p>1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:</p> <p>(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;</p> <p>(e) Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by</p>	

drought and desertification, as well as floods;

(f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;

