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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES
COMMITTEE

Water Act 2007

WEDNESDAY, 18 MAY 2011

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SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE
Wednesday, 18 May 2011

Senators in attendance: Senators Barnett, Birmingham, Crossin, Hanson-Young, Joyce and Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

The provisions of the Water Act 2007 (the Act), with particular reference to the direction it provides for the development of a Basin Plan, including:

- (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;
- (b) the differences in legal interpretations of the Act;
- (c) the constitutional power of the Commonwealth to legislate in the area of water;
- (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;
- (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; and
- (f) any other related matter.

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Evidence was taken via teleconference—

CHAIR (Senator Barnett): This public hearing is for the Senate Legal and Constitutional Affairs References Committee inquiry into the provisions of the Water Act 2007. It is a public hearing and a Hansard transcript of the proceeding is being made. The inquiry was referred to the committee by the Senate on 9 February for report by 11 May. This reporting date was subsequently extended by the Senate until 6 June. The terms of reference for the inquiry are on the committee's website.

The committee has received 98 submissions for the inquiry, the majority of which have been authorised for publication and are available on the committee website. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course be made at any other time.

I now welcome Professor John Briscoe who is to give evidence via teleconference. Professor Briscoe, do you wish to make any amendments or alterations to your submission which is submission No. 2?

Prof. Briscoe: No, I stand by that submission.

CHAIR: Thank you very much. We note that you are giving evidence from overseas. While parliamentary privilege protects overseas witnesses in Australia in respect of their evidence they cannot be protected by Australian law in another country. Do you understand that?

Prof. Briscoe: I do.

CHAIR: Thank you. I invite you to make a short opening statement, at the conclusion of which I invite other members of the committee to ask questions.

Prof. Briscoe: Thank you very much, and it is a privilege to be asked both to submit and then to appear before your committee. I assume my statement has been read by you all. It is clear that I have limitations in the knowledge that I have of water management in Australia. I have been engaged in part as an expert commenting on the draft of the guide to the Basin Plan, but also as an interested international water person who looks to Australia to continue the leadership that Australia has developed over the last 20 years in water management.

I believe that you are confronting a very fundamental issue, which is how to balance environmental needs and human needs in the Basin. The outcome of your process is of obvious great importance to Australia, but also of greater importance to the world beyond Australia. So it is in that capacity that I have engaged with this process, and I am very happy to take questions on my statement.

CHAIR: Thank you very much, professor, for that introduction.

Senator JOYCE: In your knowledge of acts, would you see this as a very prescriptive act?

Prof. Briscoe: I am not sure what you mean by 'very prescriptive'.

Senator JOYCE: That means not much latitude for a movement away. The ministerial power has been precluded; I can refer to you section 44 subsection 5 where it starts by saying 'The minister must not,' and giving a whole list of things which the minister cannot do—or the authority. Basically, if it is not within the act you are in trouble.

Prof. Briscoe: Yes, I would defer on that question because that sort of detail is not really the way in which I have looked at the act. But I would say that the act is, if not prescriptive, highly directing. And there it seemed to

me, and I think to the external peer review group of which I was part, that the act is extraordinarily specific in what is to be given primary importance, how science is to be deployed and how the act is to be translated into action. In that sense, indeed, I find it very prescriptive.

Senator JOYCE: So, would you say it is prescriptive in a form that puts environmental outcomes at a precedent and at the forefront over those of socio and economic outcomes?

Prof. Briscoe: Yes, if you look at both my own submission and the submission of the peer review panel of which I was part, this was very clear to us. This was an act where the assumption of powers by the Commonwealth, as we understood it, was based on the Ramsar convention, which is an environmental act. The spirit of the act—long as it is—to us was unequivocal in that it mandated that the environment be a first and overriding priority, that what the environment needs is to be determined by a process which is not political but which will take judgment into account that is determined, so the act says, by science, and that then socio-economic, human and social factors are to be taken into account once that primary process is done.

Senator JOYCE: So basically, the way you would have to look at it is that you might want to argue about the science, but you cannot argue about the fact that the environment comes first. You are left with arguing about the possible scientific interpretations of what an environmental outcome is. You certainly cannot argue that the environment comes first.

Prof. Briscoe: I would not argue that; it seems very clear to me.

Senator JOYCE: You would be very aware of the Ramsar convention, and I also know that when they talk about Ramsar they say that it also assists the social condition; but really it only does it in such a form that it says it looks after the environment and people feel happy in a happy environment. The Ramsar convention does not give any position on maintaining the economic fabric of a town or an area, does it? Or does it?

Prof. Briscoe: I think if you see the Ramsar convention is an environmental convention, and its focus is appropriately on environmental outcomes, it is then up to sovereign states to interpret their compliance with that convention, presumably in light of their own national laws and priorities.

Senator Joyce: Does the Ramsar convention give any capacity for someone to say, 'Well, on certain environmental assets you can reduce the amount of water because you have got to look after the economic or social fabric' or does it say, 'You must maintain the amount of water to maintain the environmental asset, and that is first and foremost'?

Prof. Briscoe: I do not believe that the Ramsar convention has been interpreted as a legally binding convention on which states have to then willy-nilly follow the dictates of the convention. My understanding is that where states have signed the convention it essentially is for those states to give particular attention to the maintenance of wetlands for migratory birds. But I have never seen another country take it as the convention itself dictates what sorts of balances you are to strike between environmental and human uses.

Senator Joyce: Just correct me if I am wrong so I do not put words in your mouth. Are you saying that Australia's reliance on the Ramsar convention as a crucial pillar to this act is way and beyond what is being used throughout the world in the reliance of other countries on the Ramsar convention—that we have basically taken this as the truth, the way and the light, and it sits at the cornerstone of this piece of legislation?

Prof. Briscoe: As I said in my deposition, Senator, my reading—and this is obviously from somebody who is not Australian and does not swim in your politics—is that the Ramsar convention, for the purposes of elevating the environment and elevating Commonwealth powers to a level that was perceived to be desirable for domestic purposes, was used as a justification for that. In my understanding, no other country has sort of taken the conveyor belt from the convention and said that therefore they have to do this in terms of balance between human and other uses. So this would be a very unusual interpretation of the convention—so unusual that I do not know of another country which has taken that very literal interpretation of the Ramsar convention.

Senator Joyce: Thank you. I want to go to a section in your submission, and it is the substance of the act, the role of science and politics. At the bottom of page 4 you say:

The Act is based on an extraordinary logic, namely that science will determine what the environment needs and that the task for government (including the MDBA), is then just to "do what the science tells it to do".

So therefore you are in that sense saying it is prescriptive, that basically what the science tells you to do is what you must do. There is no science of socio-economic conditions—there is the science of delivering an environmental outcome.

Prof. Briscoe: As I explain elsewhere there, to me this is indeed very, very unusual and a very unusual, if you will, aggregation of the authority of a government to make value judgments and then to make trade-offs. Science

in this particular case happens to be very imperfect and very rudimentary. But if the science were certain, this would essentially take away from a parliament and a government what has always seemed to me to be the ultimate responsibility of elected officials to make trade-offs. So this is very peculiar. And this struck us, when we were on the peer review panel, as very strange, because the instructions we got from the chairman and the chief executive of the authority was, 'All we want to know from you is: is it best science and does it tell us that?' If you have seen the submission, I and the three others on the panel said, 'We are not going to in fact come to any conclusion on that because we believe that this is not the role of science. Science is to provide input into political processes in which value judgments are transparently and explicitly made to come to conclusions.' So this is a very peculiar way of formulating public policy.

Senator CROSSIN: Professor Briscoe, thank you for joining us. Have you read the statements by Minister Burke in the parliament on 25 October?

Prof. Briscoe: The answer is no, Senator. I do not live in Australia and this matter is not my unique occupation. I follow it pretty closely in the press but I do not know that statement or what he said there.

Senator CROSSIN: The legal advice that he tabled that day from A-G's that is the essence of his ministerial statement is to not only talk about the international agreements that underpin the Water Act, but also refuting the idea that those agreements prevent socioeconomic factors being taken into account. He re-emphasises the fact that the act actually has to optimise economic, social and environmental outcomes. You are telling us that is a view you would dispute?

Prof. Briscoe: Yes, I would.

Senator CROSSIN: How then can you determine the environmental outcomes for a river, and the amount of water to flow in that river, if you do not make an assessment of not only the environmental surrounds of that river but the economic impact those surrounds would have? Surely you would look at environmental areas that might be in a sad and sorry state and also do an assessment of the economic impact of that as well.

Prof. Briscoe: If I understand your question, Senator, it does seem to me to be a very peculiar process. In fact it is so peculiar a process that it would never actually be done exactly like that, whereby you would simply say that the science will tell you what the environment needs and you would pay literally no attention to the other factors.

Senator CROSSIN: But it is not going to do that. Minister Burke is saying the act specifically does not do that, that if you are going to determine what environmental outcome you have it integrates quite closely with the social and economic outcomes and determinants.

Prof. Briscoe: I beg to differ. I do not think that follows logically. It seems to me perfectly conceivable that you might say whatever the environmental assets you have, be it the red gums or the quality of the lower lakes, or whatever it might be, you could well say, 'I want to know what water management policy I have to follow simply to produce the best possible outcome for those environmental assets.' That is logically conceivable. And to my mind that is largely what the act told you to do. Now, as a matter of reality, with human beings living there, of course that has to come into play at some level but, as I understand it, the question is whether that is something that is given equal weight, or it is something that comes along as a bit of an afterthought and in second place, as it were.

Senator CROSSIN: Just to follow up on that, Professor Briscoe, how could it come as an afterthought if in fact the environmental consideration is the amount of gigitalitres that are allocated but quite clearly that amount is not set unless you actually look at the economic and social conditions as well?

I think the act and the minister's tabled advice and ministerial statement quite clearly identify that the environmental issues have to optimise the social and economic issues as well. There would be no point in withholding water in a certain part of the Murray-Darling Basin if in fact the health and wellbeing of the farms and the agriculture in that area were not considered as well.

Prof. Briscoe: I understand what you are saying. I do not think that is what the act says to me. I sat for two weeks with the staff on the authority, understanding how they went about doing this. When they looked at the process—which I am sure you know better than I do—of identifying environmental assets and doing analyses which were entirely in the biological, chemical, hydrological realm of what water was required to maintain those assets, in none of those calculations did socioeconomic impacts of such an assignment come into play in determining those.

Should it be so? I agree with you. If I were the writer of the act, absolutely it would have been the case that you looked at those things together. Does the act say that you do those things simultaneously? It is a long act, and there are lots of places where they talk about triple bottom line, but the overriding sense of the act, in my view, is

not what you are describing; it is one in which you give primacy to environmental outcomes. Once those are determined, you then pay some attention to what the social and economic impacts of those are.

Senator XENOPHON: Mr Briscoe, you have a distinguished history as an environmental engineer and a background in civil engineering; is that correct?

Prof. Briscoe: That is correct.

Senator XENOPHON: And you worked in Bangladesh as an epidemiologist at the cholera research centre a number of years ago, so you understand—

Prof. Briscoe: I have a chequered background, as you would say.

Senator XENOPHON: Yes, but you understand the importance of water quality. Do you consider, from the information you have been provided about the Murray-Darling Basin, that there have been issues of overallocation in the past and also issues of water efficiency and the appropriate use of water allocations?

Prof. Briscoe: My understanding is that yes, there was overallocation in the basin but when the cap was put on, whenever that was—in 2000 or the late nineties; you will know better than me when that was—it was put on precisely because the commission, as it was at that time, with the states had determined that there was indeed overallocation and therefore they started the process of some buyback of water to bring the demands and the sustainability of the basin into balance. So yes, it is my understanding that there was.

Senator XENOPHON: Sure. I just want to touch on a couple of other issues. Do you believe that in the Murray-Darling Basin there has been less predictability—that is, that there is a greater variability in water flows in the basin? I will not get into a debate now about anthropogenic climate change, but do you have a view on whether the climate is more variable than it was, say, 30 or 40 years ago?

Prof. Briscoe: I do not have a view. What I do know is that if you look at the Colorado basin, for example, there is a very similar perception.

Senator XENOPHON: Is that perception based on fact, in your view?

Prof. Briscoe: It depends how long your record is. In the Colorado basin they have 100 years of records that show the last 40 years are much lower than the 60 years before, and therefore there has been a lot of speculation about climate change and its impact on the Colorado basin. They have 500 years of years of records reconstructed through tree rings, and what you see is that the first 60 years of record were in fact unusually wet years. So it is extremely difficult in a variable hydrology—and you in Australia have probably the world's most variable hydrology—to draw conclusions from relatively short time periods about underlying drivers.

Senator XENOPHON: So you are saying 100 years may be a relatively short time period?

Prof. Briscoe: Yes, it is a very short time period. So you have a very highly variable climate, that is for sure, and I think there is prima facie case evidence that you can expect that this may be a part of climate change—I do not think that is excluded—but from the hydrological record itself I think it is very difficult to make that conclusion.

Senator XENOPHON: Further to that, in relation to the CSIRO here in Australia, you may be familiar with their research where they say that in the next 30 or 40 years it is going to be hotter and drier with greater variability. Do you think that that is a reasonable conclusion on the part of the CSIRO?

Prof. Briscoe: I am not a hydrometeorologist. I have a very high regard for the CSIRO's work and for the tremendous Australian professionals who work in the water business, and there seems to be unanimity amongst them that this is an accurate assessment.

Senator XENOPHON: So on that basis of the CSIRO's assessment, and you have spoken about their reputation and expertise, from a risk-management point of view in terms of assessing the risk, and you do have an eminent background in environmental engineering, shouldn't we be looking at mitigating the risk by planning for appropriate allocations, given what the CSIRO has said about greater variability?

Prof. Briscoe: Yes, I do not only think that you should do that but, in my view, the adaptation that took place in the years from 2000 to 2008 during the drought in Australia showed the capability of making that adaptation, which is without peer anywhere in the world.

Senator Xenophon: I am conscious of time, Professor, because I think that others want to ask questions, but doesn't that mean both in terms of water efficiency measures and also being more prudent in allocations? For instance, you may be familiar with the managed investments schemes here, which were tax write-offs which gave huge tax incentives for forestry—they were tax minimisation schemes that spurred the demand for water—are they the sorts of things that ought to be looked at?

Prof. Briscoe: I do not know about those.

Senator Xenophon: No. Finally, there is an issue in my home state of South Australia, which is at the bottom end of the Murray-Darling system, where irrigators adapted earlier than others, in terms of water efficiency measures—they had to, because they were at the end of the system. Do you think that in terms of any prudent water policy, there ought to be an acknowledgement for early adopters of water efficiency measures?

Prof. Briscoe: It sounds like a loaded question, I think I will pass on that one!

Senator Xenophon: I will try and make it less loaded. Is it reasonable—we have a situation now where there is a \$5.9 billion fund for water infrastructure upgrades and that has been taken up in NSW, Victoria and in Queensland—but particularly NSW and Victoria. That is based on closing open channels, piping water, aligning channels—all things to reduce evaporation and to increase water efficiency. If you have a part of the river system that has previously undertaken those works, for a range of reasons, a number of years earlier, is that something from a policy perspective that ought to be taken into account when you are looking at any reductions in allocations overall?

Prof. Briscoe: I think that the application of those resources, the implication would be, from what you've said, is that you would probably not be putting those resources into places that have already made large investments because the marginal return would in principle be less in those areas.

Senator Xenophon: That is agreed, Professor, that is a given, because there is not as much to be done by way of water efficiency in those areas, where they have already got pipes and closed open channels, but do you think from a policy point of view—given your role and the advice you have given to the World Bank as their senior water adviser—should early adopters be acknowledged or considered in the context of any overall water allocation?

Prof. Briscoe: I am sorry to disappoint you, but I don't know the answer to that question. What I have said in my written statement and which I will repeat very briefly now, is that in my view, focusing on water saving is too narrow a focus. In my view you should be looking at production and the maximum amount of production you can get from a limited amount of water, and this requires a great strategic look at the future of agriculture in the basin. It should be, in my view, not for saving water but for increasing production, and that may lead in directions of saving water, but it may also lead to other forms of investment that increase the value of productivity from a limited amount of resources.

CHAIR: Senator Birmingham, do you have a final question?

Senator Birmingham: I was hoping for more than a final question. Very quickly then, Professor Briscoe, you have talked about the prescriptive nature of it and the act detailing what is to be given primary importance, yet is there not scope within the act, as some argue, to decide what are key environmental assets and what are not key environmental assets? How flexible is that, particularly in light of the international agreements, to which you referred, and their role in the act?

Prof. Briscoe: My understanding is that, yes, indeed there is a lot—and this is a very important question because the number of assets which are included in the guide to the Basin Plan is a relatively small subset of all the assets that you could imagine. I am sorry that I do not recall the numbers exactly, but it is of the order of 20 or so that were analysed where there are, if I recall correctly, something like 4,000 on the long list. Now, the argument was in the past that by attending to those 20 there were a lot of spillover effects and the other 3,980 will be taken care of to a degree. I think there is no way in which you do not exercise some judgment on what assets and, if these assets are large, what proportion of those assets you wish to maintain and what degree of certainty do you want about the maintenance of those assets. So despite this very prescriptive science, the reality is that scientists have to necessarily in that process make a whole series of judgments about how many, how much, how much reliability, and in my view that should not be the role of scientists to make those judgments. The scientists should be telling you about those response curves—and those judgments should be judgments that are made by policy makers in the public domain, taking into account environmental outcomes and, ideally, other outcomes as well.

Senator Birmingham: Thank you for that Professor Briscoe. Lastly, I think my colleague Senator Joyce was eager to get on the record who the members of the high-level review panel are, aside from yourself.

Prof. Briscoe: It was Professor Asit Biswas, Mr Per Bertilsson and Professor Gene Likens.

CHAIR: Perhaps if you could email the secretary of our committee with those full names, that would be appreciated.

Prof. Briscoe: Yes, it is on the website—a month ago the authority made that public—but I would be happy to do so.

CHAIR: Thank you very much and thank you again for being available to the committee from such a long way away.

Prof. Briscoe: You are very welcome and thank you for giving me this opportunity.

GREGSON, Mr Andrew, Chief Executive Officer, New South Wales Irrigators Council

O'BRIEN, Mr Daniel David, Chief Executive Officer, National Irrigators Council

[10:25]

CHAIR: We welcome Andrew Gregson from the New South Wales Irrigators Council and Danny O'Brien from the National Irrigators Council. We have received the New South Wales Irrigators Council submission, No. 12, and the National Irrigators Council submission, No. 19. Do you wish to make any amendments or alterations?

Mr O'Brien: No.

Mr Gregson: No.

CHAIR: We invite you to make an opening statement, after which we will have questions from the committee.

Mr O'Brien: Thank you. I will give a brief opening statement from the National Irrigators Council's perspective. We have long made our concerns known about the act. We have thought for a long time that the act did not give the equal consideration of economic, social and environmental outcomes that the National Water Initiative envisaged and that we think is only fair and reasonable as a policy position. Briefly, I guess it is clear from the guide to the Basin Plan that was released last year that our fears were well founded, because we do not think that it did deliver an equally balanced outcome.

In our submission it is the constitutional basis of the act that is the problem, in particular the reliance on the external affairs powers and the reference to the international treaties, in particular Ramsar. In saying that, we are not claiming that there is no consideration of social and economic outcomes or impacts through the act—they certainly are mentioned—but in our view the act does give primacy to the environment, and that is our fundamental concern. That view is backed up by a number of people with greater legal minds than mine and my organisation's—in particular, Professor Briscoe, who you've just heard from, and Mike Taylor, the former chairman of the authority, who as the interpreter of the act in developing the guide to the Basin Plan had a very clear view that they must focus on the environment first and foremost. The view is also backed up by a number of other legal minds that we have referenced in our submission, and perhaps if you do not believe us then you need to look at the submissions of many of the environment groups who made submissions to this inquiry, who made it clear that they see the act as placing primacy on the environment. If the government and the Commonwealth generally wants to do that, that is fine, but if the intention is in fact to equally balance the economic, social and environmental objectives then in our view the act does not deliver that.

Having said that, from a National Irrigators Council perspective, we acknowledge and welcome the assurances of Tony Burke and Craig Knowles that they can deliver a balanced basin plan. We are prepared to work with them to achieve that, but we maintain our position that we think the act is a problem and that there may need to be amendment or at least change, because the worst outcome for everyone involved in the Basin Plan would be a balanced plan getting up, going through the parliament and then being torpedoed in the High Court. None of us would like to see that because, as Craig Knowles often says, people want certainty and that would not deliver any certainty.

The other issue I would like to raise briefly that is our concern with the act is the focus of the act and therefore the whole reform process at the moment, on water and water alone. We have had 30 or 40 years now of integrated catchment management in this country, which has really been thrown out by this act because it effectively says that the solution is water and water alone. If you look at one of the key scientific bases that the authority used in developing the guide to the Basin Plan it was the sustainable rivers audit prepared by the MDBA between 2004 and 2007. It should be noted that was in the height of the worst drought in recorded history of Australia. But the overall results of the sustainable rivers audit indicated that only three of the 23 river valleys in the MDBA were assessed as being in good or moderate ecosystem health, with the rest in the poor or very poor category. The reality is, though, that on the hydrology measure, one of the three measures that they used as an example of environmental health, the result was almost exactly reversed. Only five valleys were in the poor to moderate category, while the remaining 18 were in moderate to good health. As the guide itself points out, more than two-thirds of sites were rated as being in moderate to good condition in terms of long-term hydrologic regimes. So in our view the SRA highlighted that water is not necessarily the only problem, and yet the only solution to the problem being put forward is water. We think there is a whole range of management activities that need to be pursued, including riparian vegetation, land management, invasive fish species, fish passage—all of those other

things that do not necessarily relate to increased volume of water. We think that is another failing of the act, because it specifically precludes the plan from addressing any of those issues. I will leave it at that and I am happy to answer questions on our particular views on other aspects of the act, and I will let Andrew enlighten you on his view.

Mr Gregson: Senator, can I take this opportunity at the outset to acknowledge the state that you represent, and my home state as well, as again contributing to the great democracy that is Australia. It would be extraordinarily conceited of me to attempt to add my voice to that of a professor of law at Harvard. I think from the submissions that this inquiry has seen, and the evidence that it has heard from Professor Briscoe this morning, it is pretty clear that the Water Act is not balanced between social, economic and environmental outcomes. It is in fact completely the opposite of that. It is unbalanced; it favours one above the other. As my colleague Danny has just pointed out, that also is the submission from environmental groups to this inquiry. So the question is not so much whether the act itself is unbalanced; it is more whether it should be unbalanced or whether the act has strayed from an agreed path that not only the Commonwealth and the states agreed to but that the parliament was led to believe was the case. Should it be unbalanced? I think that question is best answered by reference to the National Water Initiative, the agreement between the states and the Commonwealth, that clearly advocated that this should be a balanced outcome, and it in fact advocated that trade-offs would occur between social, economic and environmental outcomes. Given that the National Water Initiative advocated trade-offs, we would have anticipated that the Water Act itself would also have considered trade-offs. It does not, it has not, and in our submission it cannot and will not.

The New South Wales Irrigators Council has been around for 27 years. Prior to my appointment to the role, my predecessor spent quite some time working on the early drafts of the Water Bill. Version 61 of the Water Bill was the last one to which the industry had significant input. In our submission, version 61 did deliver that balance that the National Water Initiative advocated. We understand, however, that it was version 72 of the bill which eventually reached the parliament and which, pursuant to our written submission, is considerably different to what was contemplated in the first instance.

So I suppose other than should it be balanced, the secondary question is: will it be balanced? Obviously pursuant to the guide it was not going to be. That said, both the new chairman of the authority, Craig Knowles, and Minister Burke both say that balance can and will be delivered. We have no reason to doubt that. Our question is how one seemingly innocuous piece of legislation can be interpreted in such incredibly different ways to result in, frankly, what is a grotesque outcome of uncertainty. The rule of law, on which obviously the parliament is based and it attempts to advocate, we would submit is completely undermined by a piece of legislation that can be interpreted in such enormously different fashions as in the one instance to threaten to rip the heart out of regional and rural Australia and the communities and businesses that are there and on the other hand in the case of only six months later, can take into account equally those social and economic considerations. For that reason, we submit that the Water Act is fundamentally flawed and needs to be revised by the parliament.

Senator CROSSIN: Thank you, gentlemen, for your submission today. In considering the environmental considerations of the basin, why do you not believe that social and economic factors also need to be a part of that environmental calculation, or why do you believe that is not the case?

Senator O'BRIEN: I guess, Senator, from the National Irrigators Council's perspective, this comes back to the argument that is often put that you cannot have irrigation and healthy communities without a healthy river. We agree with that as a principle and I guess it is akin to the whole 'no jobs on a dead planet' argument. Our submission would be that the vast bulk of the problems confronting the Murray-Darling Basin, particularly in the last 10 years, have been as a result of the drought. That is not to say there is no need for reform, but we simply reject the notion that the river is dead or dying, and we think that a modicum of reform is needed—there has been reform over the last 10 or 15 years. There would be barely an irrigator in the basin who has not lost water to the environment, mostly uncompensated in that period of time, so we have made great strides towards improving the health of the basin, and I think we are getting to a point in the not-too-distant future, particularly with the amount of water delivered through buy-backs, and hopefully in future infrastructure investment, that we will return enough water to the river to make it a sustainable system that is healthy for the environment and healthy for communities. And just on that point I would add that the guide points out that there is 58 per cent of the inflows in the Murray Darling Basin available to the environment. The same figure for the Yarra River in Melbourne is 57 per cent. So if people are saying that the Murray-Darling Basin is dead or dying, then we need to start looking at some of the other rivers around the country as well.

Mr O'Brien: Are these some of the concerns you raised in 2007?

Mr O'Brien: I have to say from my perspective, Senator, unfortunately the National Irrigators Council was not formed until 2008, so I can't answer that question, from our perspective.

Senator Crossin: Are you aware of any concerns from irrigators when the act was put through the parliament in 2007?

Mr Gregson: The NSW Irrigators Council was certainly was around at that time, and in fact my predecessor had significant opportunities for input into the original drafts of the Water Bill, and as we pointed out in our written submission, the input that we had into the bill was effectively negated by the dramatic changes that occurred between version 61 and the final bill that came before parliament.

Senator Crossin: We have got a situation where the Murray-Darling Basin Authority, though, has been publicly reported as saying that the act requires a focus on environmental issues first, with limited attention to social and economic factors—that is their view, and it's well-known that's their view—the minister, however, in October of last year categorically refused that, and goes to great lengths to highlight how the Water Act actually does demand what's called a triple-bottom-line approach. Are you saying that that is not working practically, or that the act is not clear enough about how those three issues need to be integrated to work better?

Mr Gregson: We certainly appreciate that that is the minister's perspective, and we understand that the minister's perspective was predicated on advice from the Australian Government Solicitor, which unfortunately has not been released in full. I think in the interests of transparency and understanding around this issue it would be very useful if that advice were available in full, at the very least to this committee, if not publicly. And I have no reason to disagree with the advice that senior counsel for the Australian government provided to it. Nor do I have any reason to disagree with the advice that Professor Briscoe of Harvard University gave, nor of a number of barristers that have provided public commentary on this issue. I think it goes to the heart of why we believe that the Water Act is the problem. What we have ended up with is massively different interpretations of the outcome of one piece of legislation, which in our submission completely undermines what that legislation was designed to achieve in the first instance, and it is for that reason that we have asked this committee of inquiry to consider whether the act itself is the problem—and in our submission obviously it is.

Senator Crossin: It is well known, though, and it has been the practice of all governments, in fact even when Mr Ruddock was Attorney-General, legal advice to the government is not made public—is not given publicly. That is not just particularly the current government's view; it is the custom and practice about release of legal advice consistently across governments. It would be not uncommon to not get that legal advice; in fact, it is not possible to get that legal advice because it prejudices the position of the government.

I just want to turn to something that I understand Dr Sharman Stone said last October, and I am going to ask you whether you agree with this statement. She said:

In Part 2 of the legislation under Subdivision B section 20 it says that the purpose of the Basin Plan:

"is to provide for the integrated management of Basin water resources in a way that promotes the objects of this Act, in particular by providing for ... the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes ..."

That is her view about the act, so that would also be a view that you would disagree with?

Mr O'Brien: Yes. I think there are a number of excerpts of the act that you could take and say, 'Well, this says that all three must be optimised.' Very clearly in the objects of the act, object (c) says:

... to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes ...

Unfortunately, it is when you get to the detail of how the Basin Plan is to be developed that is our concern, and I give a particular example: section 21 in part 2, '*Basin Plan to implement international agreements*'. Subsections (1), (2) and (3) all talk about the environment and the international agreements, Ramsar wetlands, key environmental sites et cetera. Subsection (4), subject to subsections (1), (2) and (3), is the first subsection that actually mentions economic or consumptive uses or the National Water Initiative, all of which are subject to the above requirements. So, in our view, whilst it says, 'Yes, you need to look after the social and economic,' it is only after you have done the environment in the first place. That can be further backed up in section 23 of the act, which is the most explicit directive to the authority on the long-term sustainable diversion limits. It says:

A long-term average sustainable diversion limit for the Basin water resources ...—

et cetera et cetera—

must reflect an environmentally sustainable level of take.

There is nothing in that that suggests that this must be balanced by economic or social considerations, so that is our concern: whilst the act has some positive words about balance at the front, the implementation of the Basin Plan itself does not reflect that.

Senator CROSSIN: All right.

CHAIR: Mr Gregson, do you want to add to that?

Mr Gregson: Just briefly, if I may. Senator Crossin, I think your question goes to the very heart of the issue, and quite cleverly so. Interpretation of the act is like an enormous game of a pea under a coconut: it depends which coconut you pick up as to what definition you get from which section of the act. I think that there is furious agreement from all sides that the Basin Plan should equally treat social, economic and environmental outcomes. I think the question is whether the act (a) allows and (b) requires that to be the case. The 'allows' question is probably answered by which coconut you pick up. There are various sections that do point to equal treatment of social, economic and environmental outcomes. Equally, as my colleague Danny has just pointed out, there are sections that do not require that to occur, and in our submission that results in a very convoluted piece of legislation that does not give any long-term certainty that the outcome that we all agreed and sought, equivalent treatment, is to be delivered at each iteration of the Basin Plan. It is for that reason, we submit, that the parliament needs to reconsider the act.

Senator JOYCE: Do you believe that the people who—whether we agree with their outcome or not—came up with the draft in the first instance were competent in their capacity to understand an act?

Mr Gregson: I certainly have no reason to believe otherwise. We are also aware, obviously, that the Murray-Darling Basin Authority took legal advice from the Australian Government Solicitor.

Senator JOYCE: So, their being competent to understand an act and, as you state, having taken advice from the Australian Government Solicitor, do you think that the outcome they came to in their draft was one that complied with the act?

Mr O'Brien: Complied with the act or complied with the intention of what the government was trying to do?

Senator JOYCE: Complied with the act.

Mr Gregson: I will answer the question directly. Did it comply with the act? Yes, I believe it did.

Senator JOYCE: Do you believe that the act is very prescriptive in what you can and cannot do?

Mr O'Brien: It is certainly prescriptive on one interpretation of it, but again potentially—particularly given what has happened in the last six months—there are certain people in decision-making capacities who do not believe it is so prescriptive, and to our way of thinking that is part of the problem.

Senator JOYCE: I want to direct you to one thing in the definitions section, section (4), where it says: *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.

Can you please direct me to what section of that actually talks about socioeconomic circumstances?

Mr O'Brien: In our view there is none. Even in the interpretation of the authority of 'c) the productive base of the water resource', they do not refer to that as the productive base as you and I might think of the productive base of an economic region—it is the capacity of the water resource to actually deliver productive outcomes. So I would suggest that there is no social economic impact in there.

Senator JOYCE: I have just been looking at the Australian Government Solicitor's advice which has been tabled and it talks about how the international agreements themselves, which this whole act hangs over, recognise economic and social factors and their relevance in decision making. I imagine this hangs off, I think, the Ramsar convention, a migratory bird convention and then some other international biodiversity convention. Can you please direct me to any section in the Ramsar convention which talks about the socioeconomic fabric of towns as we would perceive them—that is, to maintain their economic base—or is does it understand human needs merely as, 'If the river runs then the people feel good?'

Mr Gregson: I certainly cannot. I will refer to the advice of the Australian Government Solicitor at paragraph 23:

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

Senator JOYCE: You just heard Professor John Briscoe say that this act, more than any one that he has seen, seems to almost have this sort of pathological devotion to the Ramsar convention more than other nations have attached to it. Are you aware of any other act throughout the world where a government has absolutely sworn their soul to the Ramsar convention?

Mr O'Brien: Not that I'm aware of.

Mr Gregson: No, we are certainly not. In fact, as part of our written submission we did include as appendix 3, our briefing note on the Ramsar convention which points out that Australia has been far more strident in approaching the Ramsar convention, particularly in respect of this act, than any other country.

Senator JOYCE: Do you envisage that there is a capacity for an amendment to the act to clearly spell out a promise that was delivered by both Labor and the coalition for a genuine triple bottom line?

Mr O'Brien: Yes, I think there is. I think it can be done relatively simply, although there would be the constitutional capacity of the Commonwealth to do this. I guess I would make the point that all past reform of the Murray-Darling Basin, much of it successful, was done without the need for legislation or a legislative instrument of any sort; it was done by cooperation.

Senator JOYCE: Did the National Water Initiative receive the sort of opprobrium that this has received?

Mr O'Brien: Sorry, I misheard the—

Senator JOYCE: The National Water Initiative or water initiatives prior to this draft. Has it been possible in this nation to bring about water reform without basically burning down the show and almost having riots on the street?

Mr Gregson: Absolutely. Significant reform has occurred over the course of the past three decades, right across the Murray-Darling Basin, with the cooperation of the states, the Commonwealth and indeed with the cooperation of water users, of people that relied on those water users and of those who are concerned with the environment.

Senator JOYCE: Do you think that Mike Taylor would have had a fair understanding of the act?

Mr O'Brien: Yes, I think so. Whether he read it as carefully as he might otherwise have when he first took the job, I am not sure. One of the frustrations—going back to Senator Crossin's question earlier in relation to interpretation of the act—is that Mike Taylor had a directive interpretation of the act from the Australian Government Solicitor. Minister Burke released advice also from the Australian Government Solicitor that apparently came up with different solutions and different answers, and to our mind that confuses the hell out of irrigators and our members.

Senator JOYCE: Can you think of any reason, when the coalition that wrote the act are prepared to investigate it to see if amendments are made to deliver what we promised, that other parties have an almost zealot-like attachment to the act without any amendment?

Mr O'Brien: I cannot put words into the other parties' mouths. I would hope, though, that all parties have approached this in a bipartisan fashion to start with, and that they should be prepared to consider whether the starting point was right and whether we are on the right path to get to the journey that all parties envisaged. If there is a question over that then all parties should be prepared to reconsider it.

Mr Gregson: Water reform did not start out as an across party lines political issue. There were political parties of all persuasions that were signatories to the National Water Initiative. So it would be our submission that there should not be barriers of any sort—physical, political or otherwise—to a simple consideration of whether that National Water Initiative, which they all signed up to, has in fact been delivered by the Water Act.

Senator XENOPHON: Leaving aside issues of legal interpretation, which are obviously important, do you think it is important that we get the policy framework right in the first place as to—in terms of first principles—what we are trying to achieve and what we are trying to deal with?

Mr O'Brien: Certainly from our perspective and from the perspective of the National Irrigators Council we are not opposed to a basin plan. We are not opposed to reform; irrigators have been part of it for a long time. We just want to make sure that it is a balanced reform.

Senator XENOPHON: Sure. In his evidence, Professor Briscoe said that, in terms of outcomes, you need to look at what is most productive for food production. I think that is a fair summary of what he said.

Mr O'Brien: Yes.

Senator XENOPHON: You would agree with that. The *Guide to the proposed Basin Plan*, from the Murray-Darling Basin Authority, at page 95 makes reference to the average gross value of agricultural production per

hectare and the average gross value of irrigated agricultural production per hectare, by basin region. In the SA Murray, irrigated agricultural production was \$9,176 per hectare, compared to a basin average of \$3,295. Is that a relevant factor, do you think, in determining the outcome of any plan?

Mr O'Brien: From our perspective—bearing in mind that Mr Gregson and I might come at this from different perspectives given our different organisations—the gross value return per megalitre is fairly irrelevant to what a farmer will do. A farmer will grow a crop that is most suited to his or her particular area and soil type, but in particular the crop that will give him the most profit, not necessarily what will have the best return per megalitre.

Senator XENOPHON: I am talking about whether, in an overall basin plan for its precious resource, should there be some weight, some consideration, given to how productive a particular area is in terms of agriculture production per megalitre?

Mr O'Brien: In our view, no. That would be akin to picking winners, and we actually strongly advised the authority against that when they released an issues paper on sustainable diversion limits. One of the issues they were looking at was how to share out the downstream requirements—for instance, do you take all the water for end-of-system flows from the Murrumbidgee, or do you take it from the Goulburn, or otherwise? That is akin to picking winners, and I guess, on the basis of what is high-value return, that in itself fluctuates dramatically, as you would be aware. In particular, in the wine industry at the moment what was once a highly profitable per-megalitre return is currently causing enormous angst, frustration and pain for growers throughout the whole basin.

Senator XENOPHON: But isn't the logical extension of what you are saying that it does not matter how productive land is in determining the allocation of a resource?

Mr O'Brien: The question is not so much how productive the land is; it is what use it is put to. Our organisation is a strong supporter of the water market. The water market will decide what the best use for the water is. In many instances it will go to its highest value use, but that is not always the case.

Senator XENOPHON: I go to the issue because, Mr O'Brien, you represent irrigators across the country and you have a constituent body that you represent in South Australia—that is correct, isn't it?

Mr O'Brien: Yes, that is right.

Senator XENOPHON: Do you acknowledge, as head of the National Irrigators Council, that irrigators in South Australia were early adopters—they had to be—of water efficiency measures with respect to irrigation?

Mr O'Brien: Yes, I acknowledge that that is the case, with the capping of entitlements in South Australia from the early seventies—I hear so many different dates but I think the early seventies is the one that is most commonly quoted. Having said that, I think that we need to be careful with definitions of efficiency. There are many irrigators right throughout the country who have adopted the most up-to-date, high-tech systems and approaches to water. It is not just confined to South Australia.

Senator XENOPHON: You represent irrigators across the country. Are you concerned, in terms of a \$110 million fund set aside for infrastructure upgrades in South Australia, that of the vast majority of that money only a few per cent of it has actually been allocated because South Australian irrigators are already at a level of efficiency that precludes them from having access to that fund, compared to their colleagues interstate?

Mr O'Brien: Yes, Senator, I guess I am concerned with that, and it is certainly a frustration among members in South Australia that, I think the figure at the moment is about three million of that 110 million has been spent—

Senator Xenophon: That is right. Could that be taken into account in terms of any overall basin plan, in terms of any reductions of allocations, if an area has been early adopters—not necessarily in South Australia, but any part of the basin if you have a particular area that has adopted water efficiency measures early, have not drawn on the \$5.9 billion fund to the extent that the others have—is that something that you think, as head of a national body, should be taken into account?

Mr O'Brien: Senator, it is not something that we have a policy position on, and as I said, it is difficult to decide on what is efficient—I do not think you can do it in a blanket manner, per state or per region or per industry, because individual irrigators are different.

Senator Xenophon: If there was a way to measure it—if there were a way to measure regions being overall more efficient than others, and that have been early adopters, do you think it is reasonable that that should be given some consideration in terms of any basin plan?

Mr O'Brien: Again, I would highlight we do not have a formal policy position on this, but if you are asking my view, I do not think it is possible to measure that on a region basis.

Senator Xenophon: You are putting it in the too-hard basket?

Mr O'Brien: No, I think it would be very unfair to say to one region, 'Oh, you're inefficient,' to any of those irrigators who are using the most up-to-date technology and most efficient technology for irrigation. So I think you cannot simply brush one region or state or group or industry with that sort of comment.

Senator Xenophon: Finally on this, because I have another question to ask you—you will not acknowledge what South Australian irrigators have done previously in terms of water efficiency measures.

Mr O'Brien: I think I just did, Senator. I did say—

Senator Xenophon: But they should not get any credit or acknowledgement for that, in terms of any basin plan?

Mr O'Brien: Again, Senator, we do not have a formal policy position on credit for this sort of stuff.

Senator Xenophon: Well, hopefully, your South Australian members may insist on one. Can I just go to the issue of page 113 of the guide to the plan. It is headed 'Outcomes for the Murray mouth'. It says there that, while the Murray mouth is an iconic feature of the Murray-Darling Basin, it performs a far more important function in that an open mouth is essential to the environmental health of the basin for a range of reasons. It talks about the export of salt and nutrients from the basin, and it says that without salt export land will salinise and water quality will deteriorate with negative effects on both the environment and consumptive use for all irrigations human water needs throughout the basin. Do you agree with that comment?

Mr Gregson: Do we agree that the Murray mouth is important to—?

Senator Xenophon: I was asking Mr O'Brien, Mr Gregson.

Mr O'Brien: Oh, sorry—

Mr Gregson: You didn't make that clear.

Senator Xenophon: Sorry, I was asking Mr O'Brien as head of the National Irrigators Council.

Mr O'Brien: Do we agree that the Murray mouth should be open?

Senator Xenophon: No, do you agree with the comment that having an open Murray mouth has a key role, that if you do not keep the Murray mouth open you lead to issues. To quote from the guide:

... without salt export, land will salinise and water quality will deteriorate with negative effects on both the environment and consumptive use for all irrigations human water needs throughout the basin.

Mr O'Brien: I think it would be very hard for me to disagree with the statement, Senator, yes.

Senator Xenophon: Thank you. I do not have any further questions, Chair.

Senator Hanson-Young: I guess the point of this entire debate and why we are having this discussion about the interpretation of the act is that people would like to be able to interpret it the way that suits them, in fact, and in the context of this debate we have people saying that the draft guide, regardless of, perhaps, how it was managed, the different scenarios that have been set down are unworkable for the communities within the basin. Correct me if I am wrong, but it seems to be the essence of your submission. If that is the case, where is it that you actually would draw the line as to where you do strike the balance, where it would work both for the environment, both for the communities and ensure that there is sustainability of all users.

Mr Gregson: With respect, you asked me to correct you if the premise of the question was incorrect. To an extent, yes, it is incorrect because that is not the basis of our submission to this inquiry at all. The basis of our submission to this inquiry has nothing to do with what the guide said or what the draft might say in the next six or eight weeks. The basis of our submission to this inquiry is that the Water Act does not deliver on what the parliament was told would be delivered through the National Water Initiative.

Senator HANSON-YOUNG: Where was your criticism of the lack of clarity around the act 12 months ago?

Mr Gregson: I do not think we have all been reticent to criticise the Water Act during the course of the last three years.

Senator HANSON-YOUNG: For the information of the committee can you point us to where you have raised these specific concerns in relation to the inadequacies of the act, the lack of legal clarification in the act, as you are pointing out, prior to the release of the basin draft plan?

Mr Gregson: I most certainly can. I think you will find that it was referenced in our written submission where we referred you to a briefing paper that we had published quite some time ago that was called, *The Water Act: how did we end up with this?*

Mr O'Brien: From our perspective I can reasonably confidently say that if you have a look at the National Irrigators Council website you would find either media releases or submissions prior to the release of the guide that raised a concern.

Senator HANSON-YOUNG: If you believe that the act is not able to deliver a balance, is a balance what you are after?

Mr Gregson: Yes.

Mr O'Brien: Yes.

Senator HANSON-YOUNG: So if you believe that the act is not able to deliver a balance then where is your clarification for how you actually deliver that? If the act is not doing it, if it is not about the numbers delivered in the guide and you think it is about the way the act has been put together, where is your plan? You will not put any figures on the table. You will not say: 'The diversion limit should be set here. This is what we will cop in each community. This is the consistent approach across the board.' It is a lot of bagging but not a lot of solution.

Mr Gregson: I understand your question and to a certain extent I understand why you are asking it. We do not have the hundreds of millions of dollars of resources that the Murray-Darling Basin Authority did. We do not have the CSIRO scientists to provide us with the advice. What we have criticised, and I think quite fairly so, is not the outcome but the formula used to get to the outcome. The formula used to get the outcome is dictated by the Water Act and as we have advocated for the last three to four years as a minimum, the Water Act is what the problem is. You ask what our solution is. Our solution is pretty simple and it is contained within our submission to this inquiry. It advocates a return to the National Water Initiative and in particular in version 61 of the bill you will find the formula that gives capacity for a balanced outcome.

Senator HANSON-YOUNG: How do you guarantee that it will give a balanced outcome when that does not give weight to the environmental sustainability?

Mr O'Brien: I disagree. I think the National Water Initiative does give weight to the environmental sustainability.

Mr Gregson: In fact it gives equal weight.

Senator HANSON-YOUNG: Why do you think the act does not do that?

Mr Gregson: I think it has become pretty clear in particular in the last six months that it is nigh on impossible to provide a definitive interpretation of the act to give you a single outcome. In fact, one senior counsel has given seemingly two very different interpretations of what is required under the act. We obviously know what the interpretation of the then MDBA chairman, Mike Taylor, was and we have a fairly good indication of what we believe the interpretation of the new chairman, Craig Knowles, is and they are not consistent with one another at all. So again we tell you that is because the act does not provide a clear determinative way forward. What we have said in our submission is that whilst, particularly on the interpretation of Minister Burke and Mr Knowles, it may be possible to approach some kind of balance, it is not a requirement. The act is not clear and definitive on what the outcome should be and as a result we submit it is the problem.

Senator HANSON-YOUNG: That comes back to my original question where I said that this is about the differing opinion of how the act is to be interpreted to deliver the outcome that you want. Whether it is the irrigating communities, the federal government or the various state governments if that is absolutely true, how does that sit with the other submissions that have said that the act is so prescriptive, step-by-step, it clearly gives no ability for movement and yet you are saying it is totally open to interpretation.

Mr Gregson: Those are two different questions. You are asking if there is movement in the final number of sustainable diversion limits, and the second question is if the act is prescriptive in how you get to it. The answer to both of them is yes.

Senator HANSON-YOUNG: Yes, but the act is saying that we need to ensure that there is an environmental sustainability of the river system, that key environmental icons need to be protected, and that those need to be balanced with human needs and the ability for users to know the amounts of water they have to work with to give communities sustainability. This is all stuff that is in the act. It depends, from your opinion, on how you interpret it.

Mr Gregson: With respect, if it said it had to be balanced we would not be having this discussion.

Mr O'Brien: Our concern is that the act says 'fix the environment and, effectively, count the bodies later.'

Senator HANSON-YOUNG: And how do you suppose that a community can remain sustainable and water users can know what their future usage can be if you do not have a sustainable environment?

Mr O'Brien: We are not arguing for unsustainable practices. But I defy anyone in this room to agree on what is a sustainable diversion limit.

Senator HANSON-YOUNG: But is this not the point? The act is saying that the environment needs to be looked after so that there is a sustainable water resource. Why would you argue with that?

Mr Gregson: I am very happy to argue with that because in the first instance, the act does exactly what you have just done and treats the 'environment' as objective, when clearly it is not. In fact it was never occasioned to be in the National Water Initiative where it used the words 'trade-offs' between what environment, social and economic assets. The environment is not objective. As I am sure that you recognise from South Australia, this is a very highly modified system; it is nothing like a natural environment and there was never an opportunity to contemplate trade-offs pursuant to the National Water Initiative in the act that allowed a subjective definition of the environment, which is what it should have done to allow balance.

Mr O'Brien: Ultimately, in our view this is a judgment call. The science can tell us roughly what it thinks, because you will never get all the scientists to agree exactly on a level of sustainability, but ultimately—and this is in our view how it should be—the best available scientific evidence should be presented and then elected politicians should make a decision based on the best outcome for the entire community.

Senator HANSON-YOUNG: I still think that your argument is inconsistent. On what hand you want more flexibility; on the other hand you say that the act is far too prescriptive. If the act is saying that environment needs to be sustainable, that is your starting point.

Mr O'Brien: The act is saying fix the environment first and forget everything else.

Senator HANSON-YOUNG: How can you even have a discussion about the amounts of water that other users can use and rely on if you do not know where your base level is? That is just basic mathematics, isn't it?

Mr O'Brien: I think the principle we are trying to espouse here is that, as a policy position, governments generally should be looking at: 'Here is the resource. What is the best way for the community to make use of that resource and maintain a sustainable resource?' That is what the outcome should be. In our view, the act says, 'Just look after the environment and don't worry at all about any of those...'

Senator HANSON-YOUNG: That is because it is setting the base level.

CHAIR: We need to move on, Senator Hanson-Young.

Senator HANSON-YOUNG: Okay, thank you.

Senator BIRMINGHAM: I want to touch on two areas. Firstly, I want to try to untangle what the environment could or should be in this debate and sustainability. As a first principle, a sustainable system from the perspective of irrigator bodies would be a system where the water quality is reliably one that your members can use and extract from for the purposes of productive agriculture. Yes?

Mr O'Brien: Yes, absolutely.

Mr Gregson: I would certainly add something to that to say that the environment in which they reside and operate is also healthy.

Mr O'Brien: It is not just about water quality.

Senator BIRMINGHAM: That then moves onto the second issue of the environment there. How does one go about defining a healthy environment for the system? I suspect this is where your points around trade-offs come in. Ultimately, in your view, government needs to pick winners about what environment assets are worth saving. Parts of the act talk about key environmental assets. Why can the government not simply decide what those key assets are, work to save those, rather than what you are arguing is a whole too holistic approach?

Mr Gregson: One minor correction regarding the premise of the question of trade-offs is that it is not my words, my concept or even that of my organisation. It is the National Water Initiative. It is the states and Commonwealth who came up with that. In terms of whether there can be a subjective determination as to what environmental assets are, I think you will notice in our submission on page 5 that in the change from version 61 of the Water Bill to what eventually became the Water Act there was the addition of a large range of international treaties and conventions which were required to draw constitutional capacity under the external affairs powers. I have listed them there: the Bonn convention, the Australia and China bilateral agreement on the protection of migratory birds, the JAMBA treaty and the ROKAMBA treaty. All of a sudden the capacity for trade-off, the capacity for a subjective determination of the environment, was taken away on the basis of legal necessity to give constitutional capacity. We would say that that was a fundamental step away from the National Water Initiative that the parliament needs to re-examine.

Senator BIRMINGHAM: So in your mind there is no way that that part of the act that requires adherence to those environmental treaties can be honoured in a final basin plan if the government strips away large parts of the environmental assets of the basin and says that they are not key to its findings?

Mr Gregson: There is also some legal conjecture to add to that on the basis of whether the Water Act, and indeed the regulations drawn for the Basin Plan, must necessarily enforce to their greatest capacity all of those treaties. There seems to be some legal conjecture as to whether the regulation itself would be legitimate if it does not enforce all of those obligations that the act appears to make. So again it clouds things in something of a minefield of uncertainty.

Senator BIRMINGHAM: A good point to wrap up with, because I think it is important to get your concerns about this on the record, is that you have both acknowledged that Mr Knowles says he is going to deliver a balanced outcome and Minister Burke says he is going to deliver a fair and balanced outcome. If that is what they deliver, what is the problem that we are confronting here?

Mr Gregson: In the event that the regulation were perpetual it would not be a problem but it is not. The regulation is to be reviewed on a regular basis. The regularity of that review is not yet prescribed. It was to be prescribed in the regulation itself, but we understand that it will be around the three-year mark. And we cannot ask the good denizens of Griffith and Deniliquin to have to exert their political influence by getting out on the streets in front of a camera to get a reasonable result every three to five years. That makes absolutely no sense.

Mr O'Brien: I guess our concern is that whilst the current government and the current parliament might be prepared to deliver a balanced outcome, the act gives us no certainty that that will occur in five, 10 or 15 years time.

Senator BIRMINGHAM: I imagine there is one other area of concern there and that is the uncertainty of legal challenge, which I think you highlighted in your opening statement.

Mr O'Brien: Yes, and we acknowledge that that is always a risk with any piece of legislation and in fact is perhaps another good reason not to have to go the legislative path for this. But we certainly hope there is not going to be any legal challenge, particularly if we get a balanced basin plan, but our concern is that under the act as it stands that is a real risk.

Senator BIRMINGHAM: So obviously the time lines in the act as it currently stands are pretty tight. If the government proceeds and we have a draft basin plan on the table next month, as is apparently the timetable, and they push through the legislative time line from that and finalise it for early next year, if it is a fair plan you will live with it and hope that you do not live with the uncertainty of the courts. But you would still ask the parliament, regardless of that, to consider some certainty within the act to ensure that future plans build upon a starting point of a fair plan.

Mr Gregson: And that certainty is not that it would give the capacity for balance, but that it requires balance. As we see the Water Act at the moment the capacity for balance might be there based on competing interpretations of minds greater than ours, but we do not want capacity; we want the absolute need for balance to be expressed in the legislation itself, so whether the draft plan turns out to be something with which communities can exist and are happy to exist with, the act still needs to be considered by the parliament.

Senator BIRMINGHAM: If I can indulge just with one final bid, because you have reminded me of something there. In relation to that trade-off—and I am quite attracted to the term because the act, in talking about optimising, is all nice and positive—the reality is that everybody is going to have to sacrifice a little bit of something to get a so-called fair outcome from this. But in relation to that trade-off, and that balancing approach, is it really possible to provide that certainty of balance when you are not really comparing apples with apples? Trying to make a subjective call of what the environmental requirements are and the impacts of those environmental decisions against a subjective decision of what the economic impact of reduced water allocations is, against another subjective set of decisions as to what the impact of those reduced water allocations will have on the future of towns and communities. Three very disparate and subjective things.

Mr Gregson: Absolutely, and they will be very, very difficult to make those subjective trade-offs, but in our submission those subjective trade-offs should be determined by the Australian parliament, rather than by the signatories to treaties stretching back 40 years.

Mr O'Brien: But, Senator, I suspect that if the government and the parliament gets this right, everyone will walk away a little bit unhappy.

Senator BIRMINGHAM: That is where I was getting to.

Mr O'Brien: To partly answer your question, my members would not like to see any water go from their systems if they had their druthers, but we acknowledge that it needs to happen and it will happen—and we hope that it is done in a balanced fashion, and I think the environment movement and others also agree that there are going to have to be trade-offs.

Senator BIRMINGHAM: We should get the tax office in here—they live to make everyone a little bit unhappy.

Mr Gregson: And succeed very well!

CHAIR: Do you have a final comment?

Mr Gregson: With your indulgence, if I may, Senator—Senator Xenophon did not give me an opportunity to comment on the questions that he asked, if I could just have 10 seconds. The premise of Senator Xenophon's question was that irrigators in the state that he represents are efficient to the maximum extent possible. I do not have any argument with that, but the premise of his question is that efficiency does not exist to the same degree elsewhere in the system, and I am sure there are quite a number of irrigators who would be only too happy to disagree with that premise—and on their behalf I would say that there is efficient use of irrigation water right across the Murray-Darling Basin, particularly in NSW.

Senator XENOPHON: Per megalitre, Mr Gregson? Per megalitre in terms of the efficiency that South Australian irrigators have achieved?

Mr Gregson: I think I have made my point Senator Xenophon; I missed the start of your question, in any event.

Senator XENOPHON: All right, well—

CHAIR: I think we might have that debate perhaps in another—

Senator XENOPHON: Well, Chair, I do not think Mr Gregson can make assertions like that. I was referring to page 95 of the guide, which set out what the actual values were per—in terms of per hectare. If Mr Gregson says that that is wrong, then he should say so and provide the evidence to support his assertion.

CHAIR: Thanks, Senator Xenophon, for those comments. Do you have a concluding comment, Mr Gregson, before we have to close for a short break?

Mr Gregson: I recognise your time constraints, Senator, but at the same time what Senator Xenophon is relying on is the gross value of irrigated agricultural production, which has absolutely no correlation with profitability of agricultural production, and my point was merely that efficient irrigation practices exist on farms right across the Murray-Darling Basin; they are not limited to one state.

Senator XENOPHON: Show us the evidence, Mr Gregson.

Mr Gregson: I certainly shall, Senator; please feel free to join me on a tour of efficient irrigation practices in NSW as your time permits.

Senator XENOPHON: I look forward to seeing you in South Australia, Mr Gregson.

Mr Gregson: I was there last week.

Senator XENOPHON: Good.

CHAIR: Mr Gregson and Mr O'Brien, thanks for your evidence today.

RIVERS, Ms Nicola, Law Reform Director, Australian Network of Environmental Defender's Offices

SYDES, Mr Brendan, Chief Executive Officer, Australian Network of Environmental Defender's Offices

[11:27]

Evidence was taken via teleconference—

CHAIR: We welcome representatives from the Australian Network of Environmental Defender's Offices. We have your submission No.16. Do you wish to make any amendments or alterations?

Ms Rivers: No, we do not.

CHAIR: We invite you to make a short opening statement at the conclusion of which we will have questions from the committee.

Ms Rivers: Thank you, I will just make a short statement first. As indicated in our submission, in our view the key purpose of the Water Act is to return extraction in the basin to long-term sustainable levels to support both the ecosystems that depend on the basin as well as continued productive use of the basin. The act is really based on a recognition that long-term social and economic values depend on environmental health. The act is not just aimed at maintaining healthy ecosystems, although that is a very important part of the act; it is also about maintaining the system in a state where it can continue to support economic uses.

As we note in our submission, economic and social considerations are part of the decision of what the sustainable diversion limits should be, as the question of what is sustainable includes consideration of how much water is needed to maintain the productive base of the resource and resource health. The ultimate aims of the Water Act and the Basin Plan are to have a balance in the system and that the system function well. Current levels of the extraction do not allow that. The only way to achieve it is to have more water remaining in the system so that there is a healthy, productive base for ecosystems and for human use. That is the framework that we believe the act sets up and it is consistent with the NWI and the National Plan for Water Security.

CHAIR: Thanks very much for that. Mr Sydes, did you wish to add anything?

Mr Sydes: No.

Senator JOYCE: I want to refer you to paragraph 22 on page seven of your submission, where you say:

... the Authority's analysis found that 3000GL is the minimum level that could be considered sustainable and that 7600GL is what is actually required to meet environmental values.

Do you still hold the belief firmly that 7,600 gigalitres is what needs to be removed from the system?

Ms Rivers: We rely on scientific assessment for that. As you are aware, we are lawyers and it is outside our area of expertise to make comment on the actual amount of water that is needed for the system. So that figure is taken purely from the guide, the assessment that the Murray-Darling Basin Authority had done to determine what the environmental requirements were. We do not have an expert view on that either way, as lawyers. We are relying on the scientific evidence.

Senator JOYCE: So what would you do, as lawyers, and with the resources available, if the decision was made by the minister and Mr Knowles that all they were going to remove from the system was, say, 2,000 gigalitres? What would be your course of action then?

Mr Sydes: You mean if we were approached for advice about that? How would we go about that exercise?

Senator JOYCE: Yes. What would you do?

Mr Sydes: Sorry, is that what you mean?

Senator JOYCE: Yes, that is exactly what I mean. What is the legal process that you would follow, having a view towards the environment and having knowledge, as it says your submission, that 7,600 gigalitres is what is actually required and that only 2,000 gigalitres is what was offered? What would be your legal process?

Mr Sydes: It would be a matter of scrutinising the draft instrument, the actual Basin Plan—

Senator JOYCE: Yes, in the final plan.

Mr Sydes: as it would be published to guide interpretation of that. Looking at that from a lawyer's point of view you would be looking at whether the process of developing that and the substantive reasons put forward were consistent with the legal framework.

Senator JOYCE: So it is consistent with the legislative framework, but do you have the capacity to take it to court?

Ms Rivers: You cannot make a determination of that without actually seeing a plan, I suppose. You would have to look at all aspects of the plan to see if it did in fact comply with the act. So it is not something that we can comment on at this stage.

Mr Sydes: There is no facility in the legislation to seek, for instance, a merits review from the AAT of the decision or anything like that.

Senator JOYCE: But do you have the capacity, if you believe it does not comply with the act, to challenge it?

Mr Sydes: You are asking us to address hypothetical questions, I suppose, and I am not sure what you mean by the capacity. As I said, there is no appeal rights or merits review provisions built into the legislation itself, but that is not to say it is not the case, as with any other legislation, that there might not ultimately be some role for courts to ensure that decision making sticks within the parameters of—

Senator JOYCE: With your legal knowledge, can you just walk us through what that legal process is?

Mr Sydes: In the absence of any merits review opportunities set out in the legislation itself, it would be a matter of picturing something in the form of judicial review, which would largely be a fairly narrow sort of exercise of ensuring that the authority or the minister stuck within the parameters of the legal framework.

Senator JOYCE: And if they had not stuck within the parameters of the legal framework, where would you go? You are a competent solicitor. Tell me exactly what you would do.

Mr Sydes: The jurisdiction to deal with any issue to do with Commonwealth legislation would probably arise in the Federal Court, maybe the High Court if there were constitutional aspects to it. So it would be a matter of investigating that option, and if there was a viable action then someone could pursue proceedings in that sort of forum. There has been a bit of publicity around that, I think largely coming from those who are trying to generate concern that that is an inevitability or a likelihood with the publication of the Basin Plan. But the reality has been in the past that the challenges under, for instance, the New South Wales framework or under the Commonwealth decision making have been pursued by irrigators and so forth. So there are precedents for it.

Senator JOYCE: But you have the capacity to take it to the High Court and say, 'This is not compliant.' You are representing the environment, and no doubt if someone gave you the brief you would represent them, wouldn't you?

Mr Sydes: We would consider it, but there are a whole range of factors that would have to be taken into account to determine whether or not there was a viable course of action along the lines of what you have described.

Senator JOYCE: Tell me what those are.

Mr Sydes: For us, and for those in the environment movement, if I can purport to speak for them in very general terms, the emphasis has been on trying to get the best possible outcome through the process of developing the Basin Plan. Any legal challenge would certainly be a last resort.

Senator JOYCE: But it is a resort, isn't it?

Mr Sydes: Well, we live in a democratic system; we have a system where we have courts that supervise the exercise of executive decision making under legislation of all sorts. It is always there as an option.

Senator JOYCE: Of course. And as you have rightly said, it is determined by examination of the legislative instrument. That is what you would be using in the court, would you not?

Mr Sydes: I would not like to front up to the court and say, 'We are here to challenge decision making under a legal framework but we are not going to take you to that legal framework.'

Senator JOYCE: And what would be the sort of evidence you would take to support your case?

Mr Sydes: You are really talking hypotheticals. It is very difficult to say, and indeed if it were in the nature of a judicial review application it is not really a matter of evidence; it is a matter of interpretation.

Senator JOYCE: You seem to be very reticent to answer the question. Is there any reason for that?

Mr Sydes: I beg your pardon?

Senator JOYCE: You seem to be very reticent in your answer. Is there any reason for that? Do you feel inhibited at all in answering these questions?

Mr Sydes: I do not think I am being reticent at all, so I disagree with the premise of your question.

Senator JOYCE: I am just asking you a plain legal question: what would you take as part of your mechanisms of mounting a case? You keep on saying that it is a hypothetical. The legislation is before us, you have clearly said that 7,000 gegalitres is what is actually required, yet you do not seem to be willing at all to even entertain the idea of a court case. Do you rule out completely that you would ever—

Mr Sydes: I would like to give a response to the earlier question. Those figures come from the guide, and our expertise is legal expertise rather than determining whether or not those figures are appropriate. Secondly, it is hypothetical in that I understood your question to be about challenge to those figures or the plan if they are included in the plan when it is produced. The plan has not been produced yet.

Senator JOYCE: Were you happy with the draft? Were you happy with the outcome as was prescribed in the draft?

Mr Sydes: I have not seen the draft.

Senator JOYCE: Well, everyone else has—the guide to the draft.

Mr Sydes: The guide, if that is what you are referring to.

Ms Rivers: We had some concerns with the guide, like a lot of people did. There were some elements of it were sound and some elements that we had concerns with.

Senator JOYCE: What elements were you concerned with?

Ms Rivers: Some of the conclusions that the authority had made in relation to amounts of water and what conclusions they would have did not seem to accord with some elements of the legislation, so they made some assumptions that did not seem to be, for example, based on the best available science in some cases.

Senator JOYCE: Give me one or two examples of some of those conclusions and your belief of what actually should have been there.

Mr Sydes: The principal example is the one that is outlined in paragraph 22, I suppose. Their guide is not the draft of the Basin Plan; you need to understand that it is a preliminary step to that. The draft is yet to come. But they have said that the nominated figure is 7,600 gegalitres, and then they have nominated a lower range and then picked the figure at the bottom end of that range, I suppose, as an SDL. That raises questions around the consistency of that approach with the legal framework for setting the SDL.

Senator JOYCE: In your knowledge, do you believe the Australian Government Solicitor has a competent interpretation of federal government acts?

Mr Sydes: Yes.

Senator JOYCE: Obviously the conjecture is two different opinions, one that is on the record from before, which reflected that the advice that Mike Taylor was getting—and this was in the papers sometime back—was not the same as what seemed to be reflected in Minister Burke's. Whatever that reflection was from the Australian Government Solicitor, that would be a fairly competent analysis of the legislation, would it not?

Ms Rivers: Yes. We obviously saw the advice that was released by Minister Burke. We have not seen previous advice that the Australian Government Solicitor gave to the authority, but we agreed with the interpretation of the advice that was released by Minister Burke. And we believe that that advice seems to be consistent with advice that had been previously given to that authority. As I said, we have not seen that advice, but when we looked at the guide and had discussions with the authority on what the Australian Government Solicitor had advised, it did seem to us that the advice was consistent. I guess the understanding and interpretation of the advice may be what has differed. So different questions to AGS would produce a different focus in their advice, and the advice that was released by Minister Burke clearly focused on the social and economic considerations because that was the question that was asked. But we did think that that was sound advice and we did agree with it.

Senator JOYCE: Do you think that the authority was right in capping cuts at 4,000 gegalitres?

Ms Rivers: In terms of the actual numbers it is very hard for us to say because, as I said, that is outside our area of expertise; we would just rely on the science for that. What we could look at was what the act actually requires. Do the outcomes that that certain number achieve meet the requirements of the act? We could look at things like what is a sustainable diversion limit, what is required under the sustainable diversion limit, what may be required under international agreements, and what may be required around optimising the social, environmental and economic considerations. So we do not have a view about a particular number, I guess. We have a view about whether what will be achieved will meet the requirements of the act.

Senator JOYCE: Okay. Give me your interpretation of the sections of international agreements that you would utilise in determining whether there had been compliance in this piece of legislation with those international agreements—obviously the Ramsar one being the obvious one. What would you be looking for in the final guide to show congruence between the Ramsar agreement and the guide?

Ms Rivers: It is not a very straightforward question. The international agreements are not always written in a way that you can clearly say that this will comply and this will not comply. It is a difficult question. The act itself does give some guidance in relation to, for example, the Ramsar convention. What a court should be looking at is whether the guide appropriately attempted to implement those agreements and not so much the actual letter of the law there. So it is a difficult question. I do not think anyone can really say exactly what is or is not required to meet those international agreements.

Senator JOYCE: Is capping consistent with the act?

Ms Rivers: Sorry, what do you mean by capping?

Senator JOYCE: A cap—that you will not take more than 4,000 out. Is that consistent with the act?

Mr Sydes: Well, the act requires the setting of a sustainable diversion limit, so if that is what you are referring to the...

Senator JOYCE: Beg pardon?

Mr Sydes: It is part of the whole scheme of the act to set a sustainable diversion limit.

Senator JOYCE: Is capping consistent with the act, yes or no?

Mr Sydes: The act requires, as a central part of the basin planning process, the setting of sustainable diversion limit. If that is what referring to in your reference to a cap, then yes, it is a central part of the scheme of the legislation.

Senator CROSSIN: Thank you for your submission. I want to take you to your summary of key points in your submission on page two. You say here that the act is actually based on a recognition that the long-term social and economic values depend on environmental health. Would you subscribe to the view that by nature of the fact that you cannot have a healthy river without looking at the consequences, the economic and social values are interrelated with the determinants of the environmental needs?

Ms Rivers: Yes, that is our view. I think that the heart of the act and the basin plan will be the sustainable diversion limits. In our view, from a reading of the act that sustainable diversion limit does consider social and economic factors as well as environmental factors. The definition around the environmentally sustainable level of take specifically talks about the productive base of the water resource, which encompasses things like mitigating pollution, reducing the risk of algal blooms and removing salinity from the basin, which are all factors that are very important for continued productive human use of the basin—agriculture and tourism, and those kinds of things. **So, with the premise of the act and those considerations, it is actually difficult to separate what we would consider environmental considerations or maintaining ecosystems from other environmental services which maintain a productive base for human use as well.**

Senator CROSSIN: So can you perhaps just explain to me how that works in practice on a day-to-day basis, then?

Ms Rivers: Sorry, how which works?

Senator CROSSIN: How does it apply? We hear a lot of people say that the three are interrelated. You hear a lot of people say that they actually are not; they cannot find a link between them. But how does this actually work in terms of the way in which the plan would operate? If you are going to calculate the environmental health of the river, how do you, on a practical basis, include the economic and social outcomes as well?

Ms Rivers: I guess the act allows a reasonable amount of discretion for the decision maker—the Murray-Darling Basin Authority and the minister—to determine how to do that. The act, I guess, sets up a framework for trying to bring about sustainable extraction levels and obviously has the direction to optimise social, economic and environmental factors. But there is quite a lot of discretion, so obviously that is the process that the authority has been undertaking over the last few months. So, from a legal perspective, there is no one way to do that. Obviously the authority is looking at what are those key environmental assets in the basin that need to be maintained and protected, and also how much water is needed for things like reduction of salinity and algal blooms, and trying to put that in numbers for each basin to ensure that there is enough water in to do those things. But from a legal perspective, as I said, there is a lot of discretion for the authority to determine how best to do that.

Senator CROSSIN: So the environmental requirements actually cannot operate in isolation, you would say, without looking at the social or economic use of the basin. Is that right?

Ms Rivers: I guess they are linked.

Senator CROSSIN: Could you ever prescribe it in an act?

Ms Rivers: Ever prescribe?

Senator CROSSIN: Could you ever be that specific that you could prescribe it in an act? Surely it is a matter of assessment year in and year out, and varying—

Mr Sydes: Sure, so the act sets up a legislative framework for decision making as an ongoing process. I suppose that the key question really is: how do you go about operationalising sustainable development or sustainability, and how do you put that into a legal framework dealing with—

Senator CROSSIN: Yes, and how do you do that given climate variations, given economic use and given a healthy state of rivers? Can you ever be that specific other than what is currently outlined in the objects of the act?

Mr Sydes: As Nicola has already indicated, it typically requires a fair amount of discretion to be given to whatever agency, authority, institution or ministerial decision maker might be involved in administering and applying a legislative framework over a period of time. But you can, as the act does, set up a framework that sort of directs not so much a balancing process, I suppose, but a process of integrated consideration of those various factors. That is clear until about the starting point, I suppose, and the starting point here is to say that we need to set a sustainable diversion limit, which as Nicola has already indicated is a process of considering environmental considerations in the productive base of the basin and so forth. So it is not a simple exercise of mandating that you will do something in one particular moment in time; it is, as you have indicated, an ongoing process, but one that needs to be guided by high-level principles as well. The discretion that the likes of the authority or the minister has is then constrained or operates within the parameters of those guiding principles.

CHAIR: Senator Crossin, could we make this the last question before we go to other senators?

Senator CROSSIN: Sure. Given the history of the use of this area in our country for agricultural and economic purposes, I find it hard to think that you would just purely look at the SDLs based on only environmental factors and not look at the impact it would have on the economic and social outcomes up and down and around this basin. The two have always been inextricably linked in history in our country. When we look at the extraction of water, is consultation undertaken with people who use that water, through the authority?

Ms Rivers: I guess the NWI, A National Plan for Water Security and then the act are based on the premise that extraction is not currently sustainable, so at the starting point it does take into account the current uses of the basin and how the water is being used. I guess a decision was made by all the governments that it currently was unsustainable, and therefore the NWI and then the act were needed. It is not that it does not take into account those factors; I think it very much does. It is just that, having recognised that the extraction is not currently sustainable, this act tries to achieve the balance over the longer term to return it to sustainable extraction levels.

The other thing that needs to be remembered is that in other parts of the act there are provisions specifically around minimising economic and social impacts—for example, the transitional provisions. There are a number of provisions in there that allow time to bring in these limits. You also have to consider things outside the act—for example, the water buybacks and the investment in infrastructure, which are specifically aimed at minimising those impacts and looking at the basin as a whole and the historical use of the basin.

Focusing just on one particular aspect of the act does not give the complete picture. The whole picture is around the investment that is going into it as well the understanding of the historical use of the basin that has led to the need for this act.

CHAIR: Thanks for that.

Senator HANSON-YOUNG: I guess the debate we have been having this morning is around the ability for the authority to follow the act in order to achieve the objectives without the argument that people are suggesting that it is so self-interpretive that there is no clarity there. Your submission clearly says that it is quite clear—that we need to ensure that we have the sustainability of the diversion limits so that we can keep the river system going, but of course that has to, by consequence, also ensure that there is sustainable usage as well. I am with you on this. I believe that the act does do that. If the final plan were based on what the guide has set as the various different limits, do you think that the 3,000 to 4,000 gegalitres would indeed be a breach of the Water Act?

Ms Rivers: Again, it is hard to say without looking at the actual plan, because there are a lot of different elements of the plan. It is about a lot more than just the sustainable diversion limits—

Senator HANSON-YOUNG: Yes.

Ms Rivers: so you would have to look at it holistically. Really it is a hypothetical question at this stage. Our assessment of that would just be based on looking at the science, basically: does the science show that the requirements of the act are being met? It would depend on the science that was produced with the draft plan or the final plan. If you could see from the final plan that in fact the requirements of the act were not met through the particular number, that is when you would potentially have legal concerns.

Senator HANSON-YOUNG: What do you think would be the indicators of a plan that did not comply with the act? What would be the key indicators?

Mr Sydes: You would be looking at things like whether the authority in developing the plan had considered all the things that they are required to consider or have regard to under the legal framework, for instance.

Senator HANSON-YOUNG: And the process thus far, do you believe that that has happened?

Mr Sydes: In broad terms, yes.

Senator HANSON-YOUNG: Okay.

Mr Sydes: As Nicola has already pointed out—the question is not what the guide says, the question from the legal perspective will be what the legal instrument, or the draft of that legal instrument, the draft basin plan—says, rather than this documentation that we are working from now, or that you have referred to. It is really just an attempt to start the debate. The act itself envisages that the formal process of consultation will be around the draft of the basin plan, which will be drafted as a legal instrument. That is what, as lawyers, we would be particularly interested in scrutinising.

Senator HANSON-YOUNG: The terms of reference of this inquiry, specifically in relation to the legalities of the act in terms of its connection with what we have seen thus far in terms of the guide, I assume that you have both seen the publicly tabled legal advice from the government solicitor, and the minister's statement, in relation to the objectives of the act and whether there is clarity around the needs for the environmental balance. Have you seen it?

Ms Rivers: Yes, we have.

Senator HANSON-YOUNG: So, based on the minister's interpretation of that legal advice, do you think that the minister's interpretation is correct?

Ms Rivers: I guess it is difficult to know what the minister's interpretation is. I have seen the statement that the minister made, but I guess it is reasonably brief, so it is difficult—I cannot really say what his understanding of the interpretation, but the Australian Government Solicitor's interpretation was that social and economic considerations are important and are in the Act and can be considered by the authority. I understand that that is also the minister's understanding and that is our view as well.

Senator HANSON-YOUNG: So you agree with the Government Solicitor's advice?

Ms Rivers: Yes, we do. I think there has been a number of varied interpretations of that advice, and so I guess commentary on that advice has differed, but when we look at it from our legal perspective, yes, we think that is sound advice.

Senator HANSON-YOUNG: There was a question around points made in that advice about limits to the authority—limits on the authority, in certain aspects, to implement all of the things that the act is requiring. Are those limits obvious to you?

Ms Rivers: I am not exactly sure what you were referring to from that advice. I can go back and have a look at it and take the question on notice if you'd like.

Senator HANSON-YOUNG: Could you? The Government Solicitor's advice specifically points to limits on the authority. If you could take that on board and get back to us on notice, as to your interpretation of that—

Mr Sydes: Is it specifically in terms of those paragraphs of the advice that you are referring to?

Senator HANSON-YOUNG: Yes. Paragraph 25 and 26, I think, from memory.

Ms Rivers: Ok, that is fine. We will do that.

Senator HANSON-YOUNG: Thank you.

CHAIR: Thanks very much. Before I go to Senator Birmingham and Senator Xenophon can I just indicate that the committee is acting under certain time constraints in accordance with the program, but, happy for questions, noting that time constraint.

Senator BIRMINGHAM: Thank you for that reminder, Chair. Thank you both for your evidence today. The act lists certain international conventions. Is it your belief or understanding that there is capacity to meet

obligations under those conventions prescribed in the Act, and still balance, under those conventions, economic or social considerations?

Ms Rivers: Yes, I think so. Really, the requirement to give effect to those international obligations is not really something new; it something that we are required to do anyway. We have signed up to those conventions, and it is really, in our view, just restating our obligation in that area, and it is quite appropriate that an act such as this have regard to those international obligations. Those international conventions within themselves do recognise as well that there will be, I guess, human use of natural systems, so the Ramsar convention encompasses the concept of wise use of wetlands. Those conventions do not require that all natural systems be returned to their pre-European pristine state; it just requires in some cases that they be used sustainably or essential systems be maintained. So, yes, those international conventions are still consistent with the aim of having long-term sustainable use of resources.

Mr Sydes: If you have a look at those international agreements, you will see that they are a pretty broad canvas. That reflects their nature I suppose as international legal instruments. There is a fair bit of emphasis on sovereign nations entering into international agreements to then decide how they are going to operationalise them in a domestic context, which is what the Water Act does here. Any sort of argument that there is some sort of detailed prescription in the international agreements that they are going to drive the water resource management regime here and the Water Act in a certain direction I think misunderstands how those international agreements are framed and what they contain.

Senator BIRMINGHAM: On the operationalisation of those international agreements, what acts prior to the Water Act had the Commonwealth government undertaken to comply with those agreements or is this in fact the first real step to provide compliance in this space?

Mr Sydes: The principal legislative vehicle for implementing international environmental agreements in the Australian context was the EPBC Act introduced in 1999.

Senator BIRMINGHAM: However, in regards to—

Mr Sydes: The Environment Protection and Biodiversity Conservation Act.

Senator BIRMINGHAM: Yes, I am aware of the act. But, with regard to issues of water use and pre-existing water use, the EPBC Act has fairly limited capacity.

Ms Rivers: International agreements can be implemented through federal or state law. Legislation does not have to specifically refer to the international agreements necessarily, but there is an understanding when a country signs up to an international agreement that they are and will comply with the international convention through either federal or state law. There is implementation of those agreements through state law as well as federal law.

Mr Sydes: As you would understand, we have not previously had Commonwealth water legislation. I suppose to that extent this is new territory. Implementation of things like Ramsar and so forth is done through the EPBC Act but also at a more program level I suppose and through encouraging state based legislatures to do various things under their legislative regimes where historically natural resource management has been their responsibility.

Senator BIRMINGHAM: With regard to what areas of the environment are covered by the scope of this act and what areas of the environment must be considered under a sustainable diversion limit, do you agree there is capacity, as the Irrigators Council was arguing previously, for a trade-off in the act? Is there capacity, if the government decides that some environmental assets and some ecosystems are not able to be saved or preserved in a way that also achieves an economic or social balance, for that to be an acceptable outcome?

Mr Sydes: The framework of the legislation requires the determination of what are environmental assets but then what are the key environmental assets. As Nicola has already pointed out, there is a fair bit of discretion there to be exercised by the authority and by the minister in determining what those key environmental assets are, but it is not without limit.

Senator BIRMINGHAM: From your analysis of the released *Guide to the Basin Plan*, do you think the MDBA went through an effective process of determining what the key environmental assets were as against what environmental assets were?

Mr Sydes: That is a complicated question. I suppose it is something that would warrant further scrutiny because of some of the mechanisms used to determine what the key environmental assets are. As I said, it is not a straightforward question because I understand in the guide there are various criteria they have used. For instance, if it is something that is already internationally legally recognised as a Ramsar wetland it is relatively straightforward, but once you start to get down below that level it becomes a much more complicated exercise.

Senator XENOPHON: Thank you, Chair. I am conscious of time constraints. Ms Rivers and Mr Sydes, thank you for your submission and your evidence. I just want to focus on one particular part of your submission that is of particular concern to me. Page 4, paragraph 6 of your submission makes reference to SDLs and how they are defined. In a footnote you refer to section 22 of the Water Act and, in particular, item 6, which states that the matters to be included in the mandatory content of the Basin Plan include looking at:

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

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

Then it says:

The averages are the long-term average sustainable diversion limits ...

And it goes on to set that out.

I have a particular concern for those irrigators in South Australia that were early adopters of water efficiency measures who by and large cannot avail themselves of the \$5.9 billion fund set aside for water efficiency measures in other parts of the basin because they have already reached those water efficiency outcomes in terms of getting rid of open channels, having pipes and having pressurised systems and the like to reduce evaporation. My question to you is this: how do you read that part of the Water Act that I have referred to in the context of giving appropriate acknowledgement to early adopters of water efficiency measures in the context of determining an SDL? If you need to take that on notice, I am very happy for you to do so.

Mr Sydes: I am not sure I fully understand the question.

Senator XENOPHON: It is my fault if that is the case. You made reference in your submission to section 22 of the Water Act, which relates to the matters that must be considered in the Basin Plan; correct?

Ms Rivers: Yes.

Senator XENOPHON: Then you made reference in footnote 6 of page 40 of your submission to item 6, which talks about the matters to be included. Item 6 makes reference to:

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

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

In other words, it focuses on a particular area. I think there are 23 catchment areas that need to be considered; is that right?

Ms Rivers: Yes.

Senator XENOPHON: The question I pose is: how do you interpret that from your perspective for a particular water catchment area where they have already undertaken water efficiency measures and that can be reflected in terms of their productive capacity, for instance, comparable crops, megalitres used et cetera?

Ms Rivers: There is some discretion in the act to take things into account in implementing the act, looking at the social and economic considerations. The act requires that, yes, you have to implement sustainable diversion limits, but you must do it in a way that optimises the environmental, social and economic outcomes. If the authority were able to ensure that that particular catchment still had enough water to be sustainable and the water came from somewhere else that would still be fine. There is some level of discretion in the act to take those things into account where possible.

Senator XENOPHON: I understand that, but does the act give sufficient weight to early adopters? You have had the Prime Minister saying that early adopters of climate change measures should be rewarded, but it does not seem to be—

Mr Sydes: There is a broader question there, I suppose, about whether those sorts of broader equity considerations and so forth can be or ought to be dealt with purely under the legislative framework or whether they are part of the broader policy program. It is important to understand that the act does not operate in isolation and just on its own. It is part of a broader—

Senator XENOPHON: Sure. I think both you and Ms Rivers have made reference to a holistic approach—looking at water buybacks, for instance. Is that one way of restoring or taking into account equity issues in early adoption?

Mr Sydes: Yes, I suppose it would be to say, 'If we want to have a policy objective that early adopters ought not to be effectively subsequently penalised then there are policy mechanisms available to deal with that.'

Senator XENOPHON: Chair, I am conscious of time constraints. Finally—and if you need to take this on notice I do not mind—do you see any part of the act that would give scope or weight to early adopters other than the general discretion that Ms Rivers has referred to?

Ms Rivers: We are happy to take that on notice, if you like, and provide you with an answer in the next few days.

Senator XENOPHON: I appreciate that.

CHAIR: Thank you, Mr Sydes and Ms Rivers, for your evidence today.

KERR, Ms Deborah, Manager, Natural Resource Management, National Farmers Federation

LINNEGAR, Mr Matt, Chief Executive Officer, National Farmers Federation

[12:10]

CHAIR: Welcome. Thank you very much for being here. We appreciate it. We appreciate your submission and your evidence. We have your submission numbered 38. Do you wish to make any alterations or amendments?

Mr Linnegar: No, we do not.

CHAIR: I invite you to make an opening statement, after which we will have questions.

Mr Linnegar: Thank you for the opportunity. We will go straight to questions, if you like. We have made many a statement in this house on this issue.

CHAIR: Thank you very much indeed. Senator Crossin.

Senator CROSSIN: On the sort of triple-bottom-line issues we have been talking about, the environmental, social and economic impacts, it has been put to us that some people believe the act is not clear in the way those three interact. It has been put to us that the act is clear but there needs to be a matter of flexibility and discretion when it comes to actually implementing the objects of the act. Can you explain to me whether you believe that it is the interpretation and the practical application of the act that is the problem or whether the wording and the intent of the act need amending and altering?

Mr Linnegar: Thanks for the question. The first thing to say is that neither Deb or I are legal experts. There has been plenty said and I guess some conjecture about exactly what you are referring to. I can reflect back to the National Water Initiative in 2004, which was the predecessor to the act. I would have thought from my involvement there that the intent of the act was to achieve the balance that you refer to between those three factors. Whether the act that we see from 2007 delivers that or not, as I say, has been open to some conjecture since that point. From an NFF perspective, we are looking towards a draft basin plan that delivers the balance that you are referring to. We have been told by the government, both by the minister and the chair of the MDBA, that they believe the act provides them enough room to deliver that balance and from an NFF perspective we will be seeing what lands on the table in terms of the draft plan and making our own assessment about whether that balance is achieved or not. If it is achieved and it can be done within the confines of the act, well and good. If in our view that is not achieved then we will be looking towards changes in the act to resolve that, to achieve it.

Senator CROSSIN: Sure. But if at the end of the day the object is to actually look at the productive base of the water, even if we are talking about SDLs or extraction, surely you cannot isolate the concept of productive use of the water unless you also consider the economic factors. Then that would feed into the conclusion about the environmental health of what is happening.

Mr Linnegar: I would agree with that statement.

Senator CROSSIN: All right. But you have put to us that you do not believe the current act defines that enough or is clear enough in its application for that to occur.

Mr Linnegar: All I am saying is that there are many views about it and conjecture about whether it does deliver that or not. We will simply be looking to the results at hand in terms of the draft plan. If we believe it delivers it then well and good. If it does not then clearly we need to look at the pathway of review and changes to the act.

Senator CROSSIN: Can I just follow up on that, though. I have just one last question. At this point in time do you believe it does or does not do that?

Mr Linnegar: Whether we believe it does or does not do it is probably of no import in terms of the issue. The proof is in the pudding. If it is delivered in the draft plan then that is great. If it is not, then we will be seeking changes.

Senator CROSSIN: All right. Thanks.

Senator JOYCE: I have to be honest. Sometimes I get a sense that we are going around and around and around in circles on this. I am an accountant. I do not care if you end up with no water. In fact, my family would be quite happy, because we live below irrigation farms. So, if they lose their water, it suits us fine. We get more. Now, you have said in your submission that you believe that:

... there was sufficient scope within the Act to ensure that social, economic and environmental matters were treated equally in the Basin Plan.

Can you please point me to where in the act it actually says that?

Mr Linnegar: What we have said in the submission is that the advice from government is that they can provide that. It remains to be seen whether they do or not.

Senator JOYCE: It is a bit late if you do not get it right now, though. This is it. If we do not get it on the table now, if we are not dealing with it now during this inquiry, you're going to have Buckley's and none of trying to get this back again.

Mr Linnegar: That may be the case. From our perspective, we are interested in the outcomes at the end of the day. If those outcomes provide the balance we are seeking, we all move along merrily. If they do not, then changes will be required.

Senator JOYCE: Are you aware of what they said in the act would provide the premium environmental outcome—how many gigs would have to come out?

Mr Linnegar: In the act?

Senator JOYCE: In the guide.

Mr Linnegar: Very much aware.

Senator JOYCE: Seven thousand, six hundred.

Mr Linnegar: Yes, I am aware of that.

Senator JOYCE: Would you be happy with 7,600 gigs out?

Mr Linnegar: No, of course not. Not on the evidence we have seen to date, no.

Senator JOYCE: Is there anything in the act that says it has to be capped at between 3,000 and 4,000?

Mr Linnegar: No.

Senator JOYCE: Is there anything to stop someone from taking it to court and saying: 'Well, it says 7,600; that's on the record. That's the premium outcome; it doesn't matter what you say. Seven thousand, six hundred is what you should have delivered.'

Mr Linnegar: We were talking about where people might go with legal cases or not. I am not going to comment on whether they will or will not or who those groups may be, but, if people wanted to take that to court, I imagine that there would be nothing stopping them.

Senator JOYCE: You represent a business in the basin that produces \$15 billion worth of produce. That is a pretty substantial business. You would want to be pretty certain exactly where you were going here, wouldn't you? We heard evidence today from Professor John Briscoe that said this has an almost overwhelming, almost zealot, approach to compliance with the Ramsar convention, more than any other in the world. In your reading of the act, do you believe that it is a very prescriptive act?

Mr Linnegar: In our reading, it is an act that certainly mentions the balance we talk about. On the other hand, there is a lot of detail around the environmental aspects of it.

Senator JOYCE: The evidence also given by Professor Briscoe—and also I have seen it written by Judith Sloan and others, and Josephine Kelly, who is behind you—is that basically this is an environmental act. It has to be an environmental act because that is the way the external affairs power swings off it. If you are not compliant with the external affairs power the whole thing falls over. Unfortunately, the external affairs power relies on a very prescriptive environmental outcome. How are you going to segue social and economic outcomes into a document which does not actually mention social and economic outcomes in its crucial sections?

Mr Linnegar: With respect, that is not an issue for us in that sense. That is an issue for the government to deliver. They believe that they can deliver it. We will wait to see whether they can or cannot.

Senator JOYCE: You are aware of the difference between the Australian Government Solicitor's position—it has been in the media—which was reflected to the authority in the first instance and the Australian Government Solicitor's view as reflected to the parliament by the minister. There has been conjecture about the two. If it were a very prescriptive act with a very competent Australian Government Solicitor giving very precise advice and then competent bureaucrats were to come up with a guide to the draft, how would we end up with a different outcome next time?

Mr Linnegar: A good question. The assurances you talk about are ones that are coming from government that can deliver the balance required. The question is for them to deliver that.

Senator JOYCE: What is the absolute optimum way to deliver assurance—verbally or to actually make it part of the act?

Mr Linnegar: The optimum way to deliver assurance is to deliver something that provides it.

Senator JOYCE: The act is the optimum assurance you get. We are not casting aspersions. Minister Burke might be a top bloke, I might be an absolute ratbag and vice versa. It is really irrelevant. Do you agree that the ultimate assurance, the way that is ultimately challenged and is sustained or otherwise is by what is written in the act so that it can stand up in a court of law, predominantly the High Court, if it were ever challenged?

Mr Linnegar: Ultimately that is the case. An act can be changed and changed again. But as a basic principle, yes.

Ms Kerr: Ultimately the parliament has the ultimate say through its veto pass.

Senator BIRMINGHAM: As to how we go about fixing the act if it needs fixing and if so when it is fixed—and I put this to the Irrigators Council before: if Mr Knowles and Minister Burke deliver, as they say, a fair and balanced plan, is there still a problem?

Mr Linnegar: From an NFF perspective, if they deliver a fair and balanced plan then that is the outcome we are seeking from this.

Ms Kerr: The NFF would also be looking at longevity, so it would be whether or not in this instance the Basin Plan, when it is finalised next year, is balanced. In the weight of it, in the longer term there needs to be some defined assurance to the Australian community and the basin's community. So there is not only assurance short term, 2012, but also longer term.

Senator BIRMINGHAM: As to how we go about comparing environmental outcomes with economic outcomes and balancing those trade-offs, these are fairly non-comparable things in some ways. How do you write an act to deliver something that allows for a fair balance of very subjective aspects?

Mr Linnegar: How that is written into the act we will leave to the legal experts. What we need to see is what we have not seen to date and that is that all of those three aspects are examined and information provided at a similar level of depth, that what is put up in the draft plan and what follows that—as opposed to the guide—passes the test of good public policy, which is again what we did not see in the guide. If those three factors are given equal weighting in the depth to which they are examined, and there is sufficient basis then for the government of the day to make informed decisions—if they are making decisions about trade-offs—they will need to be informed decisions and not ones based on poor or non-existent evidence.

Senator BIRMINGHAM: If you have to trade one aspect of one of those three factors off to achieve a fairer outcome for one of the other factors, is that what you are looking at as the ideal outcome? Is that what you think is prevented in effective trade-offs under the current act?

Mr Linnegar: I am not sure to what extent it is that, but at the moment—and certainly in terms of the guide, which is all we can speak about at this point—those three aspects were not weighed or treated equally in that process, in our view. That is what you would be looking for in any progress from here.

Ms Kerr: And certainly some transparency around how information was derived, and that was certainly lacking in the guide.

Senator BIRMINGHAM: I understand that people throughout the community want some certainty. If this process can be wrapped up in existing timelines and with a fair outcome, then that is probably what everybody wants. Looking at how you would provide certainty beyond that, would there be a benefit in the Commonwealth and the states going back to the table around issues of the referral of powers and the capacity of this act so that it did not have to hinge so much on international conventions?

Mr Linnegar: I think there would be some merit in looking at that, yes.

Senator XENOPHON: I want to focus on the issue of where you see early adopters in the context of the SDLs being determined. I am not sure if either of you were in the room when the previous witnesses gave evidence or not.

Mr Linnegar: Yes we were.

Senator XENOPHON: So you understand my concern. Section 22, item six of the Water Act says:

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

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

How do you get it right in equity terms for those communities and for those irrigators who have already done the hard yards in water efficiency measures but who cannot, by virtue of their efficiency, get access to the \$5.9 billion water efficiency program?

Ms Kerr: It is probably a controversial issue with or without the \$5.8 billion, and if you look at programs at a state or federal level—

Senator XENOPHON: Sorry, did I get it wrong? Is it \$5.8 billion and not \$5.9 billion?

Ms Kerr: I believe it is \$5.8 billion, but I could be corrected.

Senator XENOPHON: Okay, I apologise for that.

Ms Kerr: So there is a range of programs over time that have been in place at a state level and at a Commonwealth level. I think part of the issue with the early adopters is that a lot of it was with their own capital investments, so they used their own funds—

Senator XENOPHON: And they borrowed heavily for that and they have that debt.

Ms Kerr: Absolutely, but on the other side of the ledger they have retained the savings so that they can use those for productive use themselves on farm or in the delivery systems of which they are shareholders in most cases.

Senator XENOPHON: But how? If there is a determination saying, 'We're going to cut this across the board', that means that those who have done the right thing in the past could be proportionally affected as much as those that, for whatever reason, did not implement water efficiency measures. So where does that leave them from an equity point of view?

Mr Linnegar: Are you suggesting that there are going to be cuts across the board?

Senator XENOPHON: No. If you look at what the guide suggested it was talking about cuts for each particular area in varying percentages. In South Australia—I do not have the percentage in front of me—it was a significant cut. How do you work out the equity aspects of this in the context of determining the plan and what would the view of the NFF be in balancing issues of equity, sustainability and productivity for areas? Those areas are already quite productive, or relatively more productive, than others.

Ms Kerr: I think there has been lots of efficiency investment, as you point out, not just in South Australia but across the basin. I think the bigger issue over sustainable diversion limits is the implication in the guide that there was going to be 27 to 37 per cent cut, depending on where the SDL ended up being. The issue that NFF identified quite early on when the guide was released was that that assumed that every water user would be equally treated. The bigger equity issue, in our view, is that that is not the way it would happen. State governments would not apply an SDL to town water supply. They would not apply an SDL to interception because there are too many of them and the uses are too small. They would not apply it to stock and domestic users or basic landholder rights. So, if you take those uses out of the equation, the SDL would be applied primarily to those irrigators who had entitlements. If you look at that—and we released a lot of information about that post the guide in the media and made media statements about it—you are looking at a range of cuts to irrigators of not 27 to 37 per cent but sometimes as much as 90 per cent. To NFF, that is the bigger equity issue.

Senator XENOPHON: I understand your position on that, but if someone has already been an early adopter and they have already invested their own money—and I know irrigators in the Riverland who have borrowed hundreds of thousands of dollars from the banks; they have been left with a huge debt because they wanted to keep going during the drought—there is nothing in it for them, in the sense that for any water buybacks they are getting the same value water buyback as someone upstream who has not put in the same investment. Isn't there an equity issue there to do with early adopters?

Mr Linnegar: I think the issue there is that there are early adopters everywhere. I do not think you can restrict it to one area or one—

Senator XENOPHON: No, but there might be some areas that have a disproportionately higher number of early adopters than others, for a number of reasons. You would acknowledge that?

Mr Linnegar: Look, I am not sure where this goes. It is a complex issue. You can look at equity and adoption—

Senator XENOPHON: Of course it is complex, but you understand the distress I get from Riverland irrigators who say that they did the hard yards earlier and they will be treated the same as those who for whatever reason did not do the hard yards.

Mr Linnegar: I speak to a number of those same irrigators, so I am aware of that—

Senator XENOPHON: Have the NFF got a blind spot to those irrigators who were early adopters?

Mr Linnegar: I do not think it is a blind spot. I am saying that there are early adopters all across the basin, so I do not think we can restrict it to one area. In terms of that—

Senator XENOPHON: Should consideration then be given to early adopters wherever they may be, who with their own funds, largely, undertook water efficiency measures and therefore are not eligible for grants to any real extent under the \$5.8 billion program?

Mr Linnegar: I do not know where you want to take this or where this is going to.

Senator XENOPHON: I am asking you the question. I do not want to 'take' it; I am just asking you the question. I am trying to get a response from the NFF.

Mr Linnegar: I think, on the broader issue of whether we need to consider matters of equity generally in consideration of the Basin Plan, the answer is yes. The issue of early adopters is not one that has been part of discussions at NFF, so we would probably have to take that on notice.

Senator XENOPHON: If you could, understanding that it is of key concern to many farmers in South Australia.

Mr Linnegar: Yes.

Senator XENOPHON: Thanks very much.

CHAIR: Thanks to the NFF for being here today.

Mr Linnegar: It is a pleasure. Thank you.

RYAN, Ms Georgiena Jacqueline, Member, Rural Issues Committee, Law Society of New South Wales

[12:33]

CHAIR: Welcome. Thanks very much for being here. Do you have any amendments or alterations to your submission?

Ms Ryan: No, I do not.

CHAIR: It is numbered 51. I invite you to make an opening statement, after which we will have questions. That would be great.

Ms Ryan: Thank you for the opportunity to address you. Firstly, I want to point out that I am here on behalf of the Rural Issues Committee, not the broader Law Society of New South Wales. It is an important distinction. The rural and regional issues committee is a group of solicitors who look primarily at rural and regional issues. As a group, while we are not pre-eminent law professors or the like or specialists in constitutional law, we are people who probably deal with these issues and the impacts of legislation such as this at the coalface. Rural communities have been through a tough time over the last ten years and you really come to appreciate it when you are part of the community and you are messing around in people's lives and dealing with the stress that the drought brought.

Having read through some of the other submissions since we put in our submission, I am a little bit concerned about what people really think of when they think of social and economic effects. While at the time I thought it was a little bit outside the terms of reference, in our submission we dealt with the impact, on legal practices and the provision of legal services in these areas, of making any sort of plan that is going to impact so heavily on rural and regional communities. Social and economic effects are much broader than what happens at the farm gate. They extend right across the community. If you do not have a healthy functioning economic community you do not have things such as healthy, functioning legal practices and if you do not have them you do not have legal services.

Senator CROSSIN: Can you give me a bit of a background about what your rural issues committee does. Have you ever looked at a legal interpretation of the Water Act or intervened in cases that affect the application of the act?

Ms Ryan: Not the Water Act itself. Short of doing this submission, we have not intervened in the legal interpretation of the Water Act per se. As a committee we did have input into the Water Management Act in New South Wales. But at the Commonwealth level, at this point in time, no.

Senator CROSSIN: You said in your submission that following comments from the Murray-Darling Basin Authority website it appears that the government solicitor has provided two different legal interpretations. My understanding is that none of those legal interpretations has been made public. In fact, one might be an interpretation A-G's advisers provided and one may be advice Mr Taylor sought personally. Can you explain to me why you make that statement in your submission.

Ms Ryan: I have taken it from what was on the MDBA website, which seemed to indicate that. And, certainly, what you read in the media seems to indicate that. That is where the position comes from. Having said that and having now had the benefit of reading through some of the other submissions, I would have thought that there is probably a reasonably consistent legal interpretation of the act that seems to suggest that social and economic considerations are obviously a consideration that can be taken into effect. But at the end of the day, primacy is given to environmental considerations.

ACTING CHAIR (Senator Crossin): Yes. There is some dispute about how you cannot actually give environmental considerations any precedence without looking at the social and economic impacts, and that is the debate at today's inquiry. I draw your attention, though, to the fact that it has been custom and practice across all governments, both coalition and Labor. In fact, I have a quote from Philip Ruddock when he was A-G that says:

It is not the practice of the Attorney to comment on matters of legal advice to the government. Any advice given, if it is given, is given to the government—

that is, not publicly released. So I wanted to make you aware that, to my knowledge, neither the coalition nor the Labor government has ever released any advice it has obtained, particularly from the A-G.

Senator BIRMINGHAM: Some of the stuff that Tony Burke released—

ACTING CHAIR: So I wondered if in that instance you would question the comments on the MDBA's website?

Ms Ryan: Noted.

Senator JOYCE: Chair, is the next question for us?

ACTING CHAIR: Sorry, what was the answer to that?

Ms Ryan: I just said 'noted'.

ACTING CHAIR: Okay, thanks.

Senator JOYCE: Ms Ryan, I want to also make you aware, on the back of the Australian Government Solicitor apparently not giving advice, that Minister Burke has tabled a whole swathe of advice from the Australian Government Solicitor, so apparently things have moved on a bit from when Philip Ruddock was around.

Ms Ryan: I read that very quickly this morning, yes.

ACTING CHAIR: Senator Joyce, Senator Crossin—

Senator JOYCE: On—

ACTING CHAIR: Senator Joyce, I think I am now chairing this.

Senator JOYCE: Sorry?

ACTING CHAIR: I think I am now chairing this committee with Senator Barnett gone.

Senator JOYCE: So?

ACTING CHAIR: I just wanted to ensure that that statement is accurate. My understanding is that Minister Burke tabled advice to say he would not be tabling that advice and that what we may have is just a summary of what people think that advice is. So we need to clarify that, perhaps.

Senator JOYCE: So, if we can give you something from the Australian Government Solicitor's advice such as what is right before me at this very moment with AGS on the top of it, would that do, Senator Crossin? Would this document do, or do you have in mind another one?

ACTING CHAIR: I think you need to be very careful about how that—

Senator JOYCE: 'The Australian Government Solicitor: summary.' I can go through it if you like; there are a few pages of it.

ACTING CHAIR: Yes, but it is a summary, it is not—

Senator JOYCE: Oh, right. I can go through the part that is not the summary if you would like me to do that. Do you want me to go to the discussion part? Which section do you want me to go to?

ACTING CHAIR: Senator Joyce, I think that for the public record we need to be very clear that it is a summary; it is not the actual advice that was provided to the minister or the Attorney-General. There may well be evidence of the legal advice; that is not in that summary, for very good reason.

Senator BIRMINGHAM: So, if we refer to it as the 'AGS prepared summary advice of the AGS prepared advice as provided to Minister Burke and tabled by Minister Burke in the House of Representatives on 25 October', will that suffice?

ACTING CHAIR: I think that would suffice, because it would be very clear that it may not be the full and complete legal advice.

Senator JOYCE: So you are saying there is advice out there that we do not know about.

ACTING CHAIR: That could well be the case.

Senator JOYCE: That is very important. You are the best witness here today, Senator Crossin. We want that advice because we want to know what it says, because it seems we have two different points of view: we have the point of view delivered by one group of people who say they are following the advice perfectly—

ACTING CHAIR: Senator Joyce, I do not think we need to—

Senator JOYCE: and we have the position of the minister. So maybe you should be a witness, Senator Crossin.

Senator HANSON-YOUNG: Senator Joyce, I cannot actually hear the—

ACTING CHAIR: I am chairing this, thank you. As chair, what I am saying is that it is the custom and practice across all levels of government to not table legal advice, and it is a matter you can take up with the department this afternoon.

Senator JOYCE: We understand you are hiding something; do not worry about that.

ACTING CHAIR: If you have questions of this witness, please ask those questions or we will move to another senator.

Senator JOYCE: You are doing all the talking.

ACTING CHAIR: I am the chair, thank you, Senator Joyce. If you have questions, please ask those.

Senator JOYCE: We certainly do. I just want to quote something to you from section 44, where it says:

The Minister must not give a direction under subparagraph (3)(b)(ii) ...

We look at 3(b)(ii) and it says:

... direct the Authority, in writing, to make modifications to that version of the Basin Plan and give it to the Minister for adoption.

The minister does not give directions to do that on any matters referred to in items 1, 2, 3 or 8 in section 22(1). In section 22(1) it says quite clearly in item d under 'Specific requirements':

... the social and economic circumstances of Basin communities dependent on the Basin water resources.

So quite clearly it say that the minister must not give directions for changes based on the social and economic circumstances of the basin. Do you find that quite prescriptive and restrictive in how the minister could actually alleviate pressures on regional communities?

Ms Ryan: Off the cuff, yes, but as to a detailed response I would probably need to take time to consider that.

Senator JOYCE: We have, as I have said, almost a zealot-like approach to compliance with the Ramsar Convention, and we had Professor John Briscoe from Harvard on here this morning saying no, he is not aware of other countries that have dived into the sort of compliance that we have. Do you believe that there is the capacity for amendments within this act so as to placate some of the more onerous aspects that were so evident in the initial guide to the draft, as seen through so many regional towns?

Ms Ryan: I do think that there is. Again, I am not a constitutional lawyer and I am not an expert on international treaties. In our submission we looked at whether perhaps in any amendments to the act, or even regulations, the government could look to treaties beyond environmental treaties. It was an obvious place to go: if you were looking for a constitutional basis for the Water Act, you would look firstly to treaties that deal specifically with water and wetlands and then further to environmental treaties. But as a nation I think we have broader obligations than just obligations to our environment: we have obligations to our communities, including our rural communities, and we have obligations to international communities. As I said, I am not an international treaty expert or an expert constitutional lawyer, but we looked at things such as the Food Aid Convention and whether there is capacity for the government to draw upon those sort of treaties so as to give the act a broader base.

Senator JOYCE: In your submission you state:

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.

That has been a common complaint all around the basin. Is there a way that the act could better consider these efforts? How would it practically do that?

Ms Ryan: It could simply refer to the existing state legislation and the existing state plans, yes.

Senator JOYCE: Tell me: in your own view, what is the process? We have heard and it is on the record that there has been the statement by the MDBA that 7,600 gegalitres would be the ideal amount to be delivered back to the river system. If the current process comes out with a proposition that, say, 2,000 gegalitres gets returned to the system, is there the capacity for someone to challenge that in the High Court?

Ms Ryan: I would have thought that in the way the act was framed at the moment there probably was, because it is an act that certainly asks the committee to take into account social and economic considerations. But it is meant to be subject to the environment, and it does seem to suggest that you take what the environment needs first and then you try to fit in a best fit for dealing with the social and economic ramifications of that. It would seem to me from a public policy view that that is probably not the approach we should be adopting.

Senator Joyce: Because it is such a prescriptive act, on it arriving at the High Court they would have a very literal interpretation of the act. I mean, they would not really care too much about what someone said or what someone did not say if it was not congruent with what was actually written in the act. What is written in the act is what matters, isn't it, not what someone says as an aside?

Ms Ryan: At the end of the day, yes.

Senator JOYCE: I want to go to another section of the act, section 4, which defines environmentally sustainable levels of takes. It says:

"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.

From what I have just described straight from the act, is there any section in there that talks to socio and economic circumstances of the towns?

Ms Ryan: No, there is not.

Senator JOYCE: So in an interpretation of the High Court, what are they going to say? They are going to say, 'If it looks after the environment, you're right, and if it doesn't we're going to kick it out.'

Ms Ryan: Yes, I would have thought that was correct.

Senator JOYCE: In your knowledge of how legislation is brought about, do you know of boards to just go off on a mindless frolic and develop a guide or a draft off their own bat or do you think they are pretty well guided by the act and have some pretty competent resources to guide them in that process of the act?

Ms Ryan: One would hope so.

Senator JOYCE: If these people are competent, diligent and honest and they are being guided by the act and they have come out with this guide to the draft and it has almost caused a riot, what is the only process that we could possibly follow to placate that outcome in the future?

Ms Ryan: I would have thought it was an amendment to the act. At this point in time it would seem that, if meeting those key environmental concerns comes at a social and economic cost that is simply too high, the act does not assist us.

Senator JOYCE: I find it interesting that an act the coalition wrote is so vehemently defended by parties that are not actually in our party—that is, they do not want any changes to it at all. Could there be any motivation as to why they would not want any changes?

Ms Ryan: I am sorry, that is outside my area.

Senator JOYCE: Could it be that they know full well that, if you end up at court, the numbers are stacked absolutely in favour of the environmental outcome?

Ms Ryan: I am sorry.

Senator JOYCE: There is the Food Aid Convention 1991 and other food conventions. How would the MDBA in any court deal with inconsistencies between our obligations under conventions such as Ramsar and conventions such as the Food Aid Convention? We are really just compliant with Ramsar, aren't we? In this act we are following Ramsar, the Bonn migratory bird act and some other things, and these are predominantly overwhelmingly environmental acts.

Ms Ryan: Yes, they are.

Senator JOYCE: Thank you very much.

Senator BIRMINGHAM: Very briefly, with regard to the interpretation of our obligations under these international treaties, how much flexibility do you think there is for the government in how they interpret and apply those treaties?

Ms Ryan: That is a question I would have to take on notice, if that is okay.

Senator BIRMINGHAM: If you could. When it comes to defining what are 'key environmental assets', do you think it is possible in a legislative sense to put tests around that, or will such decisions by their necessity always end up being subjective.

Ms Ryan: I would have thought that there is always going to be a degree of subjectiveness in any of that. What is a 'key environmental asset' to one person with a passionate interest in migratory birds is going to be completely different to somebody with a passionate interest in frogs, for example. I would have thought that it would be subjective, unless the government itself is going to define them.

Senator BIRMINGHAM: Having looked at the commentary on the Water Act and how it is operating, and other submissions to it, if it is finalised under the existing act with no amendments, what chance do you think there is of there not being some type of legal challenge to its findings?

Ms Ryan: If we end up with a basin plan that does not deliver on the environmental considerations, because the government or the authority ends up deciding the social and economic costs of doing that are too high, I would have thought that it is very likely to end up with a challenge and, quite possibly, a successful challenge. And if we end up with the current plan, which does deal with those things, I would have thought you would end up with a challenge.

Senator BIRMINGHAM: All roads lead to ...! Your submission touches on the basis on which the act works. Obviously, much of the act relies upon the external affairs powers of the Commonwealth and therefore the international treaty obligations. Your submission has argued that perhaps the Commonwealth and the states should go back to the table and renegotiate a decent referral of powers from the states. Even if we get through delivering what everyone agrees is by some miracle a fair and balanced basin plan under the act, given its longevity and the continual review mechanisms within the act, do you think that even if we get a good outcome this time around there would still be merit in the Commonwealth trying to seek that clarity, therefore basing the act, for future determinations, on a more solid footing.

Ms Ryan: I would have thought that would be a very sensible idea.

Senator XENOPHON: I will not ask you about constitutional issues or international treaties. I just want to focus on one aspect of the act. I have asked the previous witnesses about this. In terms of section 22, the content of the basin plan of the Water Act, item 6 makes reference to the maximum long-term annual average quantities of water that can be taken on a sustainable basis from a) the basin water resource as a whole and b) particular parts of the water resources of each water resource plan area. How do you see this working in the context of not just the entire basin but for each water resource plan area where one area has done more by way of early adoption of water efficiency measures than another area, for instance? How do you deal with the equity aspects of that compared to another area that has the benefit to a much larger extent of the \$5.8 billion Water Efficiency Plan? I am happy for you to take that on notice.

Ms Ryan: If that is okay. I would have thought that at the end of the day from an equity point of view it is going to be a political thing. Aside from the early adopters, the same theories could be applied to those, for example, in New South Wales and some of the basins, where they have already had very, very substantial cuts and they are now asking for more cuts. The same theory applies.

Senator XENOPHON: If you want to consider it further and provide further observations on that and how it would work with the current statutory scheme I would appreciate that.

ACTING CHAIR: We do not have any other questions. Ms Ryan, I thank you for your submission and for coming today.

Proceedings suspended from 13:00 to 13:47

FOERSTER, Dr Anita, Research Associate, Centre for Resources, Energy and Environmental Law

GARDNER, Associate Professor Alexander, Private capacity

Evidence was taken via teleconference—

CHAIR: I welcome our witnesses, Dr Anita Foerster and Associate Professor Alexander Gardner. Do you wish to add anything about the capacity in which you appear?

Prof. Gardner: I am an associate professor at the University of Western Australia.

Dr Foerster: I am appearing today in the personal capacity of a private individual, but I am speaking with respect to a submission made to this inquiry by a group of water law academics.

CHAIR: We have your submission No. 75. Do you wish to make any amendments or alterations to that submission?

Dr Foerster: Not at this point, no.

CHAIR: We invite you to make an opening statement at the conclusion of which we will invite members of the committee to ask questions.

Dr Foerster: Thank you very much. The main arguments of our submission were that the Water Act reflects a commitment made by state and federal governments in the National Water Initiative 2004 to return extraction in the Murray-Darling Basin to sustainable levels and a recognition that this would involve a transitional period of returning water to the environment to address past overallocation and overuse of water resources. The act has very clear objectives and related legal duties and standards to this effect to achieving environmentally sustainable levels of extraction. It does not solely prioritise environmental considerations and it does not disregard social and economic considerations. Rather we think it establishes a framework in which environmental commitments are to be implemented taking into account economic and social factors. In this respect it commits specifically to optimising economic, social and environmental outcomes from the use and management of water resources and contains a number of mechanisms to this effect. A good example of this are the mechanisms within the act to move to more sustainable levels of water allocation over a transitional period until 2014, or 2019 in Victoria, giving time to implement the new sustainable diversion limits.

Overall, we think the act provides already for an integrated treatment of economic, social and environmental factors in decision making about water resources and for the purposes of preparing a basin plan to return extraction to sustainable levels and to optimise economic, social and environmental considerations in the long term. We consider that it does not require any amendment.

CHAIR: Thank you. Associate Professor Gardner would you like to make an opening statement?

Prof. Gardner: I think Anita has made our opening statement but I would like to add that I sent by email to Owen this morning—

CHAIR: We do have the joint statement on the Water Act 2007.

Prof. Gardner: Just to make sure that the record is correctly presented you might like to note those minor amendments.

CHAIR: Thank you very much we have noted and received that on behalf of the committee. We will move to questions.

Senator JOYCE: You have used the words 'taking into account'. What precisely do you mean when you talk about socioeconomic issues being taken into account?

Dr Foerster: A good place to start there is the decision-making procedures around the sustainable diversion limit in the act. There is a definition in the act for the sustainable diversion limit to be set at an environmentally sustainable level of take which is defined as the level of water that can be taken from a water resource which if exceeded would compromise key environmental assets, key ecosystem functions, the productive base of the water resource and key environmental outcomes. Within some of those factors there such as key ecosystem functions and the productive base of the water resource, there is a clear recognition that social and economic uses of water depends on a healthy, functioning river. The act makes specific reference to values such as water resource health, mitigating pollution and limiting noxious algal blooms which all have to be taken into account in the

determination of the sustainable diversion limit. These are factors that guarantee ongoing social and economic use and that is part of the consideration that is built into the definition of the sustainable diversion limit in the act.

As you will see in the way that has been dealt with in the guide to the basin plan, the Murray-Darling Basin Authority has determined an amount of 3,000 up to 7,600 gigalitres would be needed by the environment to achieve an environmentally sustainable level of take. From that point they looked at how you would need to optimise social, economic and environmental outcomes around decision-making procedures in the act. They determined that they would only look at the range of 3,000 to 4,000 gigalitres per year. I think that is an example of factoring in social and economic considerations within the substantive decision-making around the sustainable diversion limits.

Senator JOYCE: So do you believe that the current guide to the draft complies with the act?

Dr Foerster: I am only speaking in respect of the sustainable diversion limits. In that respect I think they followed the decision-making procedure set up in the act. Yes, I would say it does comply with the decision-making procedure set up in the act around sustainable diversion limits.

Senator JOYCE: That is a fair answer. So you are basically saying that what is in the current guide to the draft complies with the act and is an appropriate outcome.

Prof. Gardner: I think Anita is approaching that question as a lawyer would approach that question not as a politician would approach that question. I will explain briefly, by reference to the way in which the High Court might address this question. It is based on the way in which it adjudicates the implementation of international obligations by Commonwealth parliamentary legislation. The court is absolutely loathe to get into a judgment of the merits of the decision, of what the legislation says. It is looking only at the proper exercise of power. This is actually articulated in the amendment I sent through this morning. It adopts an approach of saying: can the legislation—or applying it to this situation, the guide to the Basin Plan—be considered in a sense by a court as reasonably appropriate and adapted to achieving the purposes of the convention? That does not mean that the court would say: 'We think this is the right decision. We think this is the best implementation of the international obligations that could be made.' The court takes a much broader view and says: 'Because we are not getting into the merits of it, we are simply saying: "Could this be considered as reasonably appropriate and adapted?"' That gives both the executive and the legislature a broad range of discretion as to how those obligations are implemented. I think the latter part of your question put a prospect to Anita that is not the way a lawyer would address the question.

Senator JOYCE: I am very glad you are speaking for Anita. I want to continue with this. Basically, as Anita and you have said, the outcome is appropriate as determined by the legislation; therefore, there is a congruency between the outcome in the guide to the draft as it relates to the legislation. That has also been agreed across. It is just that the outcome is not agreed to by the Australian people. That is the problem we have got. Seeing it is congruent it would suggest that, if you want a different outcome, you would have to amend the legislation so you did not have to deal with those inconsistencies that would be brought up to the High Court between what was the outcome and what was the legislation. You believe that the Australian Government Solicitor is a competent interpreter of the act? Would you believe that to be the case?

Prof. Gardner: I think probably as good as most of us, yes.

Senator JOYCE: Good. So, if there was a congruence between the AGS's interpretation of the act and the actual guide to the draft, it would suggest to you that the guide to the draft is probably a fair outcome?

Prof. Gardner: I am not sure I have got your question. Would you mind repeating it?

Senator JOYCE: The *Guide to the Proposed Basin Plan* has already been tabled and everybody has seen it. If the Australian Government Solicitor had a strong understanding of exactly what was in there—that is, they were a pre-eminent resource of legal opinion in determining that outcome—then you would have to say that the *Guide to the Proposed Basin Plan* was a pertinent document as bringing about a congruence between what the act says and what the outcome should be.

Prof. Gardner: Yes, I would be inclined to agree. I think the AGS opinion from Robert Orr is very helpful. There is one element that I would probably add to—and I can elaborate on that if you like—but I guess the thrust of your question is whether the AGS's opinion is a reasonable guide on how to approach the question of whether the Basin Plan guidelines comply with the requirements of the act. As I read that opinion, I see no suggestion to the contrary.

Senator JOYCE: The AGS itself says as you said in your opening statement, or as Anita said. You did not talk about equivalence of outcomes. Anita actually used the word 'integrated' and, as we know, 'integrated' does not equal equivalence. You talk about 'taking into account', which also does not mean equivalence. You 'talk

about 'optimising', but of course optimising is just what you do with what is left over. 'Optimise' does not in itself suggest equivalence; it suggests that you do the best you can with what you have and what you are left with might be very little. I can optimise what I can do with 5c, but that is not about me having the equivalent amount of money as the person beside me.

If we made a promise about equivalence, not one thing you have said thus far talks about equivalence between socioeconomic and environmental outcomes. You talk about optimising socioeconomic outcomes and you talk about integrated socioeconomic outcomes, but you do not talk about equivalence between those outcomes, do you?

Dr Foerster: Perhaps I could comment on that. No, we do not talk about equivalence, and we have used the words you mentioned—'integrated' and 'optimising'—but what we are getting back to is that the act really reflects a commitment made by all governments in the National Water Initiative and throughout the water reform process to return the rivers of the Murray-Darling Basin to sustainable levels and a recognition that to do that we need to return water to the environment. That is really, in essence, about guaranteeing the future social and economic use of our Murray-Darling Basin resources.

CHAIR: Perhaps we could wrap it up there, Senator Joyce.

Senator JOYCE: I have a final question. Anita, you talked about 'depending on the health' and 'limiting noxious algal blooms'. These are all pertinent things, but if they are the human issues you are talking about—limiting noxious blooms and limiting algal blooms—then you would have to concede that what you have is predominantly an environmental act.

Dr Foerster: I think there are very strong environmental commitments within the act, but they are there because it was decided that we needed to move back to a sustainable level of water allocation in order to go on using Murray-Darling Basin water resources for our human purposes. I think that is the underlying recognition and purpose of the act.

Prof. Gardner: Perhaps I could add to that. I sense that Senator Joyce's questions may be picking up on a theme of the submission of the National Irrigators Council. Correct me if I am wrong, but that submission quotes that the purposes of the National Water Initiative were to optimise economic, social and environmental outcomes. That is part of the opening phraseology of paragraph 23. If you go to paragraph 23, it has 10 subparagraphs that articulate what 'optimises economic, social and environmental outcomes' means. When you use that phrase you do need to ask what it means. One of the things it means is articulated in subparagraph iv), and it says 'complete the return of all currently overallocated or overused systems to environmentally-sustainable levels of extraction'.

That purpose is specifically picked up in the Water Act. You could say it is a transitional purpose of the Water Act. It was referred to by Minister Malcolm Turnbull in the second reading speech on the initial enactment of the Water Act. I think you have to understand that for a period of time, to achieve the return to sustainability, more water needs to be returned to the environmental purposes. That is, I think, what Anita has been explaining. That, I think, is consistent with the act. I think the AGS opinion is concurrent with that, except that perhaps it does not emphasise the transitional nature as much as it might.

CHAIR: Thank you for that. We need to move on, and I remind all senators of the time constraints and the program we have agreed to.

Senator CROSSIN: If we are actually talking about a river being productive and having a productive base for the water solution, then does the Water Act encompass that concept?

Dr Foerster: I take you back to the definition in the act for sustainable diversion limits, which refers specifically to maintaining and not compromising the productive base of the water resource. I think there is a recognition in there that social and economic use, we understand as productive use of water resources, depends on having a healthy functioning river system—a healthy working river.

Senator CROSSIN: So what are you implying there—that a functioning river which is also healthy must consider social and economic factors when you look at the environment?

Dr Foerster: I am not sure I understand your question.

Senator CROSSIN: If you are going to look at a functioning river, which means you would look at the health of the river—that is, the environment—would you not also, then, assume that economic factors are part of a healthy river system?

Dr Foerster: Obviously there are very extensive social and economic uses of the water resources of the Murray-Darling Basin, and what I am saying is that they rely on having a healthy functioning ecological system that is supplying water to those uses. The act as a whole has this strong environmental standard in it but it also has

a requirement to consider best available socioeconomic information; it makes a number of references to optimising social and economic outcomes, maximising economic outputs from the use of water resources. So it is quite an integrated decision-making framework set up by the act, not purely an environmentally driven decision-making framework.

Senator CROSSIN: You would say that the act, then, is specific but in practical application flexible enough to achieve those outcomes?

Dr Foerster: I think we really have to distinguish between what the act can do and how far it can go in setting up a decision-making framework that then needs to be applied in practice. In this submission we have stated that we think the act puts forward an appropriate integrated decision-making framework for the purposes of preparing a Basin Plan that will return our systems to an ecologically sustainable level of allocation, and also optimise economic, social and environmental considerations. We think the act sets a framework to be able to do this. The implementation is obviously another question.

Prof. Gardner: If I can address that briefly, I think one of the tensions in the act—it is identified in some of the submissions and it is identified in the AGS opinion—is that there is not a whole lot of definition about what those four elements of the environmentally sustainable level of take mean. They take on meaning when you apply them to the ground and the water. Where possibly some of the difficulties have arisen is that the MDBA has taken an expert's approach to identifying those and yet there is the inevitable trade-off of which ones you identify, how much water they need as to what would ultimately be the sustainable diversion limit. Do you get my point?

Senator CROSSIN: I do, yes.

Prof. Gardner: I think it is possible to say that where the act does not speak is how exactly do you do that. As Anita has pointed out, our submission is that the act goes far enough and that it is very difficult to devise legislative guidance; rather, it is a case of devising effective administrative implementation of the statute. It is possible to say with hindsight that the MDBA may have got it a bit wrong. I say 'may' because I am a bit distant for judging these things. If you look at the level of community reaction—and maybe this is Senator Joyce's concern—how much consultation was there and could there have been to identify those key environmental assets which then had ramifications for what should be the sustainable diversion limits? I note that the new chairman, Craig Knowles, has been emphasising the local consultation that should be undertaken. This is an enormous process and understandably the MDBA did not embark upon it before as an explicit exercise—'Well, let's get the guidelines out and then we can have that consultation.' Maybe it should have been staged a bit more. Those are things you learn administratively. I do not think it means you have got to run away and amend the act.

Senator CROSSIN: Thank you; that is good. I do not have any other questions.

Senator XENOPHON: I have just one line of questioning consistent with my previous questions today. This relates to section 22 of the act, item 6, which makes reference to the mandatory content of the Basin Plan to determine the SDL. Item 6 says:

The maximum long-term annual average quantities of water that can be taken, on a sustainable basis, from: (a) the Basin's water resources as a whole; and (b) the water resources, or particular parts of the water resources, of each water resource plan area.

I think that the witnesses are familiar with that aspect of the Water Act.

Dr Foerster: Yes.

Senator XENOPHON: I refer to paragraph 6 on page 4 of your submission, and in particular paragraph 8 where you say:

It is important to view the provisions of the Water Act in relation to the Basin Plan in light of previous efforts to achieve sustainable levels of water extraction in the Basin.

The dilemma I have is that the complaint from South Australian irrigators is that they have been early adopters of water efficiency measures—they had to—and therefore cannot access much of the \$5.8 billion set aside for water efficiency measures. They say that that puts them at a disadvantage to other states. Those irrigators who borrowed money—their own money—to get through the drought and well before the last drought are at a disadvantage to those who can access the water efficiency payout where they get to keep half the water and get their infrastructure done for free. How should that be taken into account in the context of determining an SDL for a particular area if there is evidence of early adopters?

Prof. Gardner: Anita, do you want to have first go at that or should I?

Dr Foerster: I would just make a quick point. The SDL is determined on the basis of what is going to constitute an environmentally sustainable level of take for that particular region. What you are getting at is how

we implement this, which is the process in which the state water resource plans must be accredited under the Basin Plan, and the adjustment mechanisms that you are talking about are rolled out. That is a different question to setting the sustainable diversion limit itself. Alex, would you add anything?

Prof. Gardner: I think it is a very good question.

Senator XENOPHON: I am happy for you to take it on notice.

Prof. Gardner: I think it is better to take it on notice. But I will add that it is a question that has beset this issue of determining sustainable yields and adjusting to them for quite some time. It is probably one that we are better off giving a bit of careful thought to and making a written submission about because, Anita is right, ultimately the implementation at the state level may be a significant aspect of how you deal with that problem.

Senator XENOPHON: But it may not be in the context of an SDL. I am conscious of time constraints, but I guess the issue I have for the South Australian irrigators is that there is, I suppose, an SDL ultimately for the entire basin but within that there are 23 separate water resources plan areas.

Prof. Gardner: I suspect that, as Anita explained earlier—I am not sure that you had joined us by that time—

Senator XENOPHON: Yes.

Prof. Gardner: there was the initial bracket of what could be a return of the water to the environment, remembering that that includes productive processes. Then there is a taking into account of the process of optimising economic, social and environmental factors. It is probably at that stage that you start to look at the efficiency indicators and take account of who had been the early movers and what levels of efficiency they have. You pointed out the difficulties of accessing Commonwealth funding for the efficiency innovation. That is perhaps another question and maybe that program needs tweaking. When it comes to setting the sustainable diversion limits, it is possible—and Anita and I would like the chance to—

Senator XENOPHON: That would be valued. While you are considering that, the final issue is this: other witnesses have talked about having a holistic approach to look at issues of water buybacks, where the water buybacks are done differently for the areas that were early adopters, because there is a greater value for water in those areas, in an equity sense, and any other program so that there is an acknowledgement of early adopters in the context of having a sustainable basin.

Prof. Gardner: In other words, there should be an appreciation of the value of the water in different regions when the buyback criteria are applied.

Senator XENOPHON: Yes, in terms of early movers on water efficiency measures.

Prof. Gardner: That is another very good point. I would have thought, to the extent that we could address it, we would have a look at it, but I suspect that that is less a matter of sustainable diversion limits, of course, and much more one for the actual process of implementation and Commonwealth environmental water holders.

Senator XENOPHON: Your input would be very valued because you are at least attempting to address this more than some of the other witnesses, which I am grateful for. That is it from me. You will not hear from me again until 3.30 your time.

CHAIR: Thank you, Senator Xenophon. We will hear from you then.

Senator BIRMINGHAM: I heard the evidence you gave to Senator Joyce and others which continues to reinforce the point that, yes, you need sustainability in the system for irrigators, the economy and the local community, but of course sustainability is not a singular point in the spectrum. It is a case of choosing where in the spectrum you get that sustainability, and, indeed, sustainability for the productive base of the water resource is only one part of the definitions under the environmentally sustainable level of take. How much flexibility do you think there is for the government, bearing in mind the international treaty obligations in the act, when it comes to meeting the other three points in the definition of environmentally sustainable level of take—the key environmental assets, the key ecosystem functions and the key environmental outcomes?

Dr Foerster: I would just say that the way the act addresses this builds in discretion for the decision-maker around determining the sustainable diversion limit according to this definition and talks about the level of water use that, which if exceeded, would compromise key assets, key functions et cetera. Around the words 'compromise' and 'key', there is a fair bit of discretion built into the decision-making framework for the Murray-Darling Basin Authority to work with in answering that question.

Prof. Gardner: I agree with Anita's point. The only point I would add is perhaps a difficult one to articulate an answer to at short notice. Because it is using the external affairs power and giving effect to international obligations, one of the ways in which we define how to give effect to international obligations is to look at the recommendations of the conference of the parties that meet on those conventions. One may want to have a look at

the recommendations to get some guidance on how the executive might give effect to those definitions. Does that help you?

Senator BIRMINGHAM: It is a useful suggestion. With regard to the guide to the Basin Plan that was released by the Murray-Darling Basin Authority, do you believe that that document and the work that the MDBA released in association with that satisfactorily identify what the key assets, key functions and key outcomes are?

Dr Foerster: I do not think that is a question necessarily for us. It goes to the implementation of this statutory framework for decision making. I do not think I can comment on the merits of the work that the Murray-Darling Basin Authority has done in that respect.

Prof. Gardner: I generally agree with Anita on that point, but I would add two qualifying propositions. One is that I have not had the chance to read all of it. It is an enormous body of work. As a lawyer, you do not tend to read all of that sort of thing, but this morning I was looking for some exploration of the 'productive base' concept. I thought that in volume 2 of part 1 there was not much discussion, but it may be that it is in another part of the material. I just add that comment. It is perhaps only half-informed.

CHAIR: Thank you very much to both the witnesses. We appreciate your time.

Prof. Gardner: May I add one more point please, just briefly.

CHAIR: Just briefly.

Prof. Gardner: I am also an adjunct professor at the Australian National University, which is why I have a fair bit of interest in this material.

CHAIR: Thank you very much.

KELLY, Mrs Josephine, Private capacity

[14:21]

CHAIR: We have your submission, No. 54. Do you wish to make any amendments or alterations?

Mrs Kelly: Yes, there is a typing error on page 7 in paragraph 30. Three lines from the bottom it says 'environmentally sustainable level of rake' and of course it should be 'take'.

CHAIR: Thank you. We invite you to make an opening statement, after which we will have questions. I know you are aware of who is online as you have been sitting and listening to the hearing today.

Mrs Kelly: Yes. Just very briefly, in my view social and environmental outcomes are not relevant to the determination of the amount of water that is to be allocated to the environment. I do not think that anybody, when you analyse what they have said, disputes that. Secondly, the AGS advice that was tabled by the minister in the House of Representatives last October does not say otherwise. It is important to bear in mind, when you look at that advice, what matters the advice was addressing. The advice was addressing where social and environmental factors are relevant; it was not addressing where they were not. That is the critical question. So there is no inconsistency between what the approach of the Murray-Darling Basin Authority was in preparing the guide and that advice as tabled by the minister.

Minister Burke actually acknowledged in his ministerial statement on 25 October 2010 that the environmental issues are dominant in the act. He said that, subject to environmentally sustainable limits, you go to particularly economic factors, but there is nothing in the advice he tabled to support a proposition that the act gives you the triple bottom line.

As far as international conventions are concerned, in my view they do not prevent taking into account social and environmental impacts when you are looking at determining the amount of water for the environment. Those conventions, as the AGS advice says, use very high-level language; it is not prescriptive. To the extent that there are requirements under those conventions, it is very much up to the governments how they implement them, and I think that was referred to earlier today in some of the submissions. So, in my view, the act can be amended to permit social and economic outcomes to be considered when determining the water allocation for the environment and be consistent with the international conventions.

CHAIR: Thank you for that opening statement. Senator Crossin, we will go to you first, if you are ready.

Senator CROSSIN: Yes, thank you. Can I just pick up on that. Do you think there is scope within the relevant international agreements of the Water Act for consideration of social and economic factors?

Mrs Kelly: Do you mean under the convention?

Senator CROSSIN: I am talking about within the relevant international agreements of the Water Act.

Mrs Kelly: There are a number of the international agreements or conventions referred to. The main ones are the Ramsar convention, which talks about wetlands, and also the convention on biodiversity.

Senator CROSSIN: If we go to the Ramsar convention, do you think there is adequate scope for consideration of social and economic factors within that?

Mrs Kelly: Both those conventions, in my view, refer to social and environmental factors. They also talk about the sovereignty of the individual countries that are implementing them. Again, in my view, both those conventions would allow the government to amend the legislation. The decision that has been made is a draftsman's decision or a decision by this government to put the environment first in terms of the sustainable level of take.

Senator CROSSIN: So you do not believe that the Water Act clearly relies on social and economic factors in determining those environment factors?

Mrs Kelly: In my view, in determining a certain level of water for the environment the act does not allow social and economic impacts of such a level of water for the environment to be taken into account. So you cannot look at what the effect will be on a rural community of a certain reduction in the allocation for the environment.

Senator CROSSIN: That is in conflict with some of the witnesses we have had today.

Mrs Kelly: I do not think so, with respect.

Senator CROSSIN: Sorry?

Mrs Kelly: I disagree with that. I do not think it is in conflict. For example, Professor Gardner and Dr Foerster say that social and economic factors are relevant because you basically have to have a healthy river and, therefore,

that is of social and economic interests because you cannot have economic activity if you do not have a healthy river. That is the line of argument. My argument is that, when you determine the amount of water for the environment, at that point you cannot take into account the impact that a reduction of water for agriculture, for example, will have on the rural communities.

Senator CROSSIN: But there are some people who will argue today that the act allows for a productive base for a water solution and who believes it does not focus purely on environmental consideration and that the act actually acknowledges the human use of the basin in determining that.

Mrs Kelly: To the extent that that is said, what is meant is the fact that you have to have a healthy river for it to be able to be used by human beings. It is not actually saying, 'What is the effect on a rural community of reducing the allocation for agriculture by increasing the environmental needs to be satisfied?'

Senator CROSSIN: But it could be interpreted differently.

Mrs Kelly: I think that, as was previously indicated and as is also stated in the AGS advice, the fact is that key 'environmental assets', 'ecosystem outcomes' and 'productive base' are not defined in the act. It does confer discretion on the decision maker. But what you are looking for is an environmentally sustainable level of take, and focus is on the environmental values being preserved by the water allocation for the environment. I confirm my view that what it certainly means is that you cannot take into account any adverse impact that would be suffered by a rural community by increasing the allocation for the environment to the detriment of allocation for irrigation, for example.

Senator CROSSIN: Can I just finally ask you, is it the wording in the act that is the problem or is it the interpretation that it needs to provide flexibility that is causing a problem for people—that is, the application of the act? Is it that each time the application becomes an area of conflict you run away and change the wording in the act or is in fact the wording of the act strong enough to guide the Basin Plan with some flexibility?

Mrs Kelly: As I have already indicated, my view is that, if you want social and environmental impacts of reductions of water because of an increase in allocation to the environment, the act does not allow you to take that into account. Therefore the act needs to be amended if you want to change that outcome. If you are happy to have the outcome as has been described by Professor Gardner and Dr Foerster and others, then you leave it as it is. But if you are concerned to ensure that the impacts on regional and rural Australia are taken into account then it has to be amended.

Senator JOYCE: Thank you very much, Mrs Kelly. I think what you say is very pertinent. They are very selective in dodging around the issue—there is almost a pathological avoidance of grasping the nettle and understanding that it is an environmental act. If an environmental act is what you want then it is a good act, but if you want one of equivalence then it does not provide that. So what are your suggestions for amendments that could be made so as to deliver on the promise made by both the Labor Party and the coalition, that it is not a case of optimising, integrating or considering but a case of equivalence? How could we do that? Could we do it?

Mrs Kelly: As a lawyer, I would have some difficulty with getting an equivalent outcome because mostly you would say it is up to a decision maker. You would say, 'You can take into account these considerations.' So my suggestion in my submission has been that you put in a consideration of social, environmental and economic factors when determining the level of water for the environment. That is the best I can do, I suppose. As to getting equivalence, I would have some difficulty in coming up with a form of words that I could give you at this point.

Senator JOYCE: Then it really becomes a case of: who goes to the High Court? In one direction it is quite obvious. The last witness, as you rightly said, described it perfectly: basically they said that this is an environmental act and therefore it is good, and the human interest is looked after—just as it says in the Ramsar convention—by water flowing down the river; that is a human benefit. Well of course it is, but that says nothing about growing crops or sustaining a town—in fact, it never mentions that in Ramsar at all. Say an outcome is brought about—and there has been discussion about winding down the amount from 4,000, and there is currently a bracket between 3,000 and 4,000—and they come out with, for instance, 2½ thousand gigs, which is what they are actually taking out. I do not know whether they did, but let us say they just stated that. What would be the process then for an environmental group which was, rightly, in consideration of the act, unhappy with that? What could they do? They have a legal avenue in front of them, don't they?

Mrs Kelly: Well, it would depend on whether they could point to a failure of the decision makers. There is no merits review; it is judicial review. So it would depend on whether there was any ground of judicial review that they could point to in terms of the decision that had been made to come to that amount of water: have they followed all the procedures and take into account all the relevant considerations? So I cannot answer the question on a particular amount of water. You would have to go through the decision making process.

Senator JOYCE: But where would they end up? Say, hypothetically, they decide to take out one gig and everyone screams blue murder. Where are they off to?

Mrs Kelly: Probably to the Federal Court or, if there were a constitutional issue, to the High Court straight off.

Senator JOYCE: And what would the High Court take into account? Would it take into account the statements by the minister, the statements by Mr Knowles, or what is actually written in the act?

Mrs Kelly: Obviously, fundamentally you would have to look at what the act has required. It would also be getting into the territory of the international conventions to see if obligations have been enacted and implemented, to the extent that you can find them.

Senator JOYCE: I am just going to read out this paragraph from the Australian Government Solicitor. It says:

Neither the Convention on Biological Diversity nor the Ramsar Convention require that the Parties disregard economic and social considerations ...

That is a very peculiar form of words. 'Requires them to disregard' means that they have the option to regard—

Ms Kelly: They can have it taken into account, which is what I have said.

Senator JOYCE: Don't you find that all through this debate there is this form of weasel words where people talk about things that they do not need to do? It is sort of a self-fulfilling argument—'I'm not obliged to disregard'—which means what?

Ms Kelly: What Mr Orr QC, I think, says there—and this is what I have said—is that neither of those conventions requires the outcome of the act to be that you cannot take into account social or environmental impacts at the point of determining the amount of water for the environment. You were given a history earlier by Dr Gardner and Professor Foerster about the water initiative and the decision, apparently, to bring the river back to a sustainable level. It has been an Australian political decision to do that, and that is what the act has done.

Senator JOYCE: What would happen if there was a town, and, let us say, an environmental asset—let us call it a swamp—and in this environmental asset, the swamp, there was a precious frog, and just before the swamp with the precious frog there was a town that had a rice mill. You might say, 'The water that has to go to that swamp is 10 gigs; but that is the water, unfortunately, that we need for the rice mill, so now we've got a choice between the rice mill and the Ramsar convention area with the frogs.' Who would win? The rice mill or the frogs?

Ms Kelly: Under the act, the frog.

Senator JOYCE: The frogs would win. That is not precisely what the people in the Murray-Darling Basin were thinking about. So it does not really matter what Mr Knowles does or what Mr Burke says or what happens; how are we going to get an equivalence between the frogs and the people without changing the act? Or can we not do it?

Ms Kelly: I am not sure what measures can be taken. There is a huge discretion—as, I think, Professor Foerster and Dr Gardner and others before have already said—about determining what the key environmental assets, outcomes et cetera are in that provision. But, in saying that, there are also guidelines as to how you make that determination. So I suppose that, at one extreme, you could say that there could be hard decisions made about what key environmental assets and outcomes are. But I do not know how that would work.

Senator JOYCE: In conclusion, just as an example, because it is so classic I am going to read something for the Water Act that I am sure you are aware of. It is in part 2, section 44, subsection 5. It reads:

The Minister must not give a direction under subparagraph (3)(b)(ii)—

which talks about his instructions to the Murray-Darling Basin Authority, on matters referred to—
in subsection 22(1)—

and in subsection 22(1)(d) it says:

the social and economic circumstances of Basin communities dependent on the Basin water resources.

So if the minister was to write up and say, 'you can't look after the frogs; you've got to look after that town, and I'm directing you to do that', with that section alone would they be able to take that to court and say 'the minister's not allowed to say that'?

Ms Kelly: I think that is right: section 44 has a number of limitations on what the minister can do.

Senator BIRMINGHAM: Ms Kelly, thanks so much for your evidence today. It was put to us earlier, and you touched on this towards the end of the evidence with Senator Joyce, that having a means within the existing act to reduce the reductions in water allocation necessary to achieve an environmentally sustainable level of take would be to somehow reduce the number of key environmental aspect assets and key ecosystem functions, and you just

alluded to that. In doing that, is it possible, the authority having already given consideration to the science and the evidence that they claim to have done in preparing the guide, for them now to revise that science and come up with a far smaller list of key assets or key functions under the act?

Mrs Kelly: It would depend on the scientific advice, and I am not a scientist.

Senator BIRMINGHAM: But if there were enough room for argument within the scientific advice then there would be enough room for them to revise those numbers or exact assets and functions?

Mrs Kelly: But one might think that, if there were a radical reduction in the number of environmental assets identified, there would be perhaps people who were concerned particularly about wanting to maintain the existing emphasis on the environmental outcomes. One could suspect that there might be a legal challenge to any such decision. It would depend on how it was done and what considerations were taken into account—what it was based on.

Senator BIRMINGHAM: Sure. Your submission contends that, in determining what those key assets and key functions are, there is no role for economic or social considerations. Is that correct?

Mrs Kelly: What I was doing was emphasising paragraph 32 of the AGS advice to just try and make a point, because in that paragraph they talk about how you could identify a key asset. They say:

For example, the MDBA and the minister could not—

this is doing the negative thing again—

identify an environmental asset as key if this was not necessary to achieve the specific requirements of the Water Act (such as those under s 21) and would have significant negative social and economic effects.

I am just putting it in the positive and saying that, if it was necessary to achieve the specific requirements then social and economic effects are not relevant. I was trying to just make the point, concentrating on the way that the AGS has looked at that matter and putting it in the positive. That was really what I was trying to achieve there. In terms of discarding assets and saying no, they are not key assets: yes, social and environmental matters are relevant, but if an asset is necessary to achieve the specific requirements of the Water Act then they are not. That is what Mr Orr is saying there.

Senator BIRMINGHAM: So, for Senator Joyce's example before of the wetland downstream from the town with the cotton mill, if that wetland is a Ramsar listed site and there is quite clearly advice that a minimum flow is necessary to maintain the ecological functions of that site then there is no ambiguity in that regard?

Mrs Kelly: If something is a Ramsar site, given that the Ramsar convention is one of the conventions on which the legislation is based, I just cannot imagine that a Ramsar wetland would not be a key environmental asset.

Senator BIRMINGHAM: But, more generally, where the MDBA has decided to go down the path of, shall I say, system health, where they have looked at the entire health of different catchments within the system, ultimately adding up to the entire system, there is plenty of scope for potential refinement of what key functions could be within that system health?

Mrs Kelly: It depends on the scientific advice. I am sure they have many environmental scientists—zoologists, biologists, hydrologists—in the monumental amount of science input in relation to each of those. It would just depend on what that material said.

Senator BIRMINGHAM: In regard to the interpretation of these international agreements, in your understanding, has the interpretation of these agreements been tested at all in Australia or elsewhere that you are aware of?

Mrs Kelly: I am not aware that they have been tested, for example, in the High Court in Australia. I should just say that, while the EPBC Act and the Water Act at the Commonwealth level are where you see these conventions relied on, because of the Intergovernmental Agreement on the Environment, I think, many years ago, a lot of the ideas in these conventions and other international environmental conventions percolate through the whole system of our environmental law throughout the country—for example, the precautionary principle and ecologically sustainable development. There are lots of principles out of these conventions which have been incorporated into our environmental law and have been subject to legal consideration, judicial consideration.

Senator BIRMINGHAM: Principles like wise use of wetlands.

Mrs Kelly: Wise use I think you probably have to look internationally and, as Professor Gardner said at the meetings of the members of the parties to the conventions and what they have said about those, but that would only be guidance anyway.

Senator BIRMINGHAM: If through the course of this year—in fact in a month's time—and then beyond that we end up with a draft plan and then a final plan which does provide a sense of balance which makes everybody equally unhappy with the outcome, will that be more a result of some good luck and some interesting manipulation of the terms, the science and the advice and, more importantly, in terms of your expertise, would they still be benefit, even if we get an acceptable plan now, to clarify aspects of the act ahead of the development of future iterations of that plan?

Mrs Kelly: I certainly think so, yes, because people may be happy with it this time, however it is done, and not challenge the legality of it, but down the track, if there is a change in approach, somebody may be so unhappy that it would be much better to have certainty in terms of legislative scheme.

Senator BIRMINGHAM: And to get that certainty it would be far better to get the states and the Commonwealth to agree on a reasonable referral of powers arrangement rather than having to hang off with these international agreements?

Mrs Kelly: That would clearly be much the better way to go.

CHAIR: Thank you for your evidence today, Mrs Kelly.

DUNNE, Mrs Vicki, Shadow Attorney-General and Shadow Minister for Water, ACT Legislative Assembly

CORKE, Mr Kerry, Adviser to Vicki Dunne MLA

[14:47]

CHAIR: Welcome. Is there anything you wish to add on the capacity in which you appear?

Mrs Dunne: I have made a submission which is accompanied by a legal advice provided by my colleague, Mr Kerry Corke, who has long experience in public law.

CHAIR: We have your submission, which is numbered 96. Do you wish to make any amendments alterations to it?

Mrs Dunne: No, I do not.

CHAIR: We would welcome an opening statement and then we will have questions.

Mrs Dunne: I welcome the opportunity to make these comments today. In making this submission, I have drawn on many years experience as a policy adviser and a legislator. I was the adviser on water managers generally and specifically on the Murray-Darling Basin matters to former ACT Chief Minister now Senator Gary Humphries. As a member of the ACT Legislative Assembly of 10 years standing, I have had almost continuous responsibility for policy formulation on water. I also bring to this submission my experience as the shadow Attorney-General and the chair of the assembly Standing Committee on the Scrutiny Of Bills and Subordinate Legislation.

My submission makes a number of recommendations: firstly, that the Water Act 2007 should be amended to ensure that social, economic and environmental considerations are treated with equal importance. Secondly, there are two recommendations about the setting of diversion limits asking the Senate to require the Murray-Darling Basin Authority to consider those economic, social and environmental factors in the context of the local need rather than creating a one size fits all approach across large catchments and across the whole basin. The final recommendation is that the act be amended to make it clear that the critical water needs of the Australian Capital Territory are protected in the same way that they were envisaged in 1909.

On the first of these recommendations, it is clear from the ongoing controversy that what is actually meant by the Water Act needs to be revised. Listening to the evidence previously, it shows that there is such a diversity of opinion about what the law means, but it is quite clear that there needs to be significant reform so that there is a wide-scale broad consensus about what the legislation means. If legislators and our advisers differ so widely on what the law says, we must clarify it.

I also would submit that the failure of the plan for the guide itself demonstrates the need to implement the first two sets of recommendations. Drawing on my own experience as a legislator in the ACT, we need look no further than what was recommended for the ACT in the guide to show how little the balancing of environmental, social and economic impacts was brought to bear. In fact, it is freely admitted by officers of the Murray-Darling Basin Authority, and it was in the public consultation in Canberra, that the ACT was deliberately excluded from the models that they drew up, because they believed that the ACT skewed the results for the rest of the basin. This demonstrates not only contempt for the ACT, as the largest urban community in the basin, but also brings into serious question the integrity of the study in its entirety. I ask: how can a study ignore the role of Canberra as the nation's capital and seat of federal government? How can the study ignore the services Canberra provides to the surrounding region in the areas of health, education, tourism and economic development and the sway that Canberra has to areas as far afield as Wagga. Indeed, how can a study have no regard to the fact that Canberra is the largest urban community in the basin? How could it pay no regard to this city that holds 17 per cent of the basin's population but which is so frugal with its water use that it uses less than one per cent of the total basin inflows? How can a study pay no regard to the fact that the ACT's water use is significantly different from other regions in the basin? These are critically important considerations that impact on the ACT's social, economic and environmental needs and practices.

All of this brings me to the failure of the Water Act to acknowledge the special nature of the Australian Capital Territory as the home of the nation's capital and the federal parliament. There has been considerable legal

argument about the interaction of various pieces of relevant legislation. There are many pieces that interact. In summary I put to you that when Canberra was established the Commonwealth acquired for itself paramount rights to the waters of the Queanbeyan and Molonglo Rivers to address the national capital needs of the entity that they were setting up. An agreement between New South Wales and the Commonwealth that was annexed to the Seat of Government Acceptance Act 1909 gives the ACT paramount rights to the waters of the Queanbeyan and Molonglo Rivers. It states that the Commonwealth has paramount rights to those waters 'for all purposes of the territory'. To this extent the Water Act is in conflict with the establishment of the Australian Capital Territory. In defining the ACT as a state for the purpose of this act it requires it to manage water resources in accordance with the Water Act and has no regard to previous legislation. The paramountcy given to the Commonwealth is of course based on the fact that the ACT is located in a naturally dry environment and so that the needs of the Commonwealth became paramount over the needs of neighbouring areas of New South Wales. The Water Act ignores this. The act fails to take into account the national capital role of the Australian Capital Territory as well as its regional and local role.

I contend that the Water Act needs to recognise those roles to ensure that there is sufficient water available to meet the needs of the territory. I draw to members' attention the advice provided by Mr Corke about the interaction of the Water Act and various previous pieces of legislation, including the Seat of Government Acceptance Act. In the summation of Mr Cork's advice, he said: 'For reasons recognised in 1909, the Water Act must be amended to remove any doubt that the critical needs of the ACT are if not paramount certainly assured, not withstanding any other provisions contained in the Water Act, in much the same way as the Commonwealth has used the National Capital Plan to protect the water needs of Canberra.' I can leave my opening comments there. I welcome any questions that you may have.

CHAIR: Thank you, very much, Mrs Dunne. Mr Corke, are you happy with that approach?

Mr Corke: Yes. I have nothing to add.

Senator JOYCE: Mrs Dunne, can you please explain to me what you would see as the social and economic needs of Canberra? We have heard quite clearly today that they are subservient to environmental needs. Can you please explain the social and economic needs of Canberra.

Mrs Dunne: We need to look at one of the assumptions that underpins the whole formulation of the guide for the plan. It goes back to my comment about their being a one-size-fits-all approach. It is almost as if the planning for the Murray-Darling Basin really only looks at the agricultural use. As a sort of second thought, they thought about what to do with the urban areas and decided to treat them very much the same. What that effectively means is that in the ACT, where more than 90 per cent of our water use is for urban use and less than five per cent is agricultural use, we have very little scope for wide scale water efficiency. This is unlike other parts of the catchment, where most of the water use is for agricultural purposes and probably one or two per cent is for urban use. It is quite possible for other areas to make efficiencies without having a deep impact on the operation of the cities and towns in those areas. But because the ACT has had a potentially onerous impact put on it by such large reductions, this will have an adverse impact on every aspect of society. The look and the feel of the city will be substantially changed. It will mean that Canberra will be subjected to stage 3 or worse water restrictions in perpetuity. The look and the feel of the city will change.

Senator JOYCE: Please explain for the record what stage 3 water restrictions are.

Mrs Dunne: Stage 3 water restrictions are what we experienced through most of the drought period of the last 10 years, which resulted in severely curtailed outside water use and things like odds and evens watering of minimal garden. This resulted in the loss of a large amount of urban amenity, loss of large amounts of trees both in the public domain and the private domain. The cost of water restrictions has been quantified in the tens of millions of dollars. I do not have it with me and I did not provide it in the submission, but the advice from the ACT government to the House of Representatives committee includes a report that quantifies the cost of water restrictions. I can provide that to members, as it is a publicly available document.

On top of that, as things are currently envisaged under the plan, there is no scope for economic or population growth in the territory, because the sustainable diversion limits as proposed for the ACT do not allow for population growth.

Senator JOYCE: You would have heard the previous witness. In your understanding, if upstream or downstream from you, Mrs Dunne, was a swamp full of frogs that required the same amount of water as Canberra and that swamp full of frogs was covered by a Ramsar agreement, who would have a greater right to that water, the people of Canberra or the frogs?

Mrs Dunne: My understanding is that the wetland would have the greater right under the current construction of the act. This is a problem, because it creates confusion. You have the minister and the head of the Murray-Darling Basin Authority saying one thing and you have witnesses before you today saying quite the opposite. I am a legislator. I am not an environmental lawyer, nor a lawyer of any sort. I come to the conclusion that if there is so much doubt about what the legislation means then it needs to be fixed. From one legislator speaking to other legislators, you need to fix this to remove doubt. But if the government's policy is to manage all those three things together—the social, environmental and economic impacts—the legislation needs to say it. It needs to say it clearly. It should not say it just in the objects and not say it anywhere else. It is quite clear from the sort of evidence that I heard before coming to the table that there are extreme levels of doubt.

Senator JOYCE: Obviously the legislation is one of double negatives and entendres and very cryptic and strategic omissions so that a belief is given but the actuality in the legislation is something entirely different. And the one witness we cannot get before us today is the Australian Government Solicitor. Were you led to believe that this legislation would give equivalence to environmental, economic and social outcomes? I know that it is not what you got, but is that what you thought you were going to get with it?

Mrs Dunne: If I really thought about it in simple terms, yes. I do not think I ever asked myself that question that directly, but I think the general perception was that there would be a balancing and an equivalence of those issues. I think the many extraordinary outbursts of anger that we saw was because when people got the guide for the plan they suddenly realised that was not the case and that the livelihoods of individuals and whole communities were at stake.

Bringing it back to the ACT, the ACT entered into arrangements, agreements and commitments on the understanding that certain things would hold true. Everything was thrown out the day the guide was brought down. For instance, in 2008 the ACT signed up to a cap. That cap was 40 gigalitres of net use. In conjunction with that cap, the ACT then made a range of commitments to build half a billion dollars worth of water security infrastructure. It is ironic that we may spend half a billion dollars on water security infrastructure in the ACT and we may be able to hold water in those dams but we may never legally be able to use it.

Senator JOYCE: It is like Cotter Dam and—

Mrs Dunne: And the pipeline to Googong Dam.

Senator JOYCE: Do you think there is the capacity for the suggestion of amendments so as to secure the rights of the people of the ACT and Canberra?

Mrs Dunne: I think that generally we need to secure the rights of the people who live in the basin by changing the emphasis in the legislation. But specifically and in addition to that I believe that we need to secure the territorial rights to water as were envisaged in 1909 when the territory was set up and through the various pieces of legislation that have come since then. The National Capital Plan is a plan that this Senate is responsible for. It establishes the regime under which water is used in the ACT. All of these things have been put to one side and have not been considered in the formulation of the Water Act. It seems very short-sighted.

I can understand how we got to this. The ACT is a small jurisdiction in the basin, but it is the only jurisdiction that lives entirely in the basin. It is of fundamental importance to the people of the ACT that we get this right. And it is of fundamental importance to the members of this parliament that we get it right in relation to the ACT because you are responsible for the national capital functions. If we do not take this into consideration, the national capital functions of Canberra will be severely diminished by the operation of the act.

Senator CROSSIN: I want to ask you, Mrs Dunne: have you met with the Murray-Darling Basin Authority?

Mrs Dunne: I have not. I asked for a meeting at the time that the plan came down and they specifically said that they would not meet with me—because I am a member of the opposition, I presume. I know that there have been discussions with the responsible minister. But, at the time, I asked for a briefing and a meeting on the subject and they specifically declined to meet with me.

Senator CROSSIN: Why would the authority do that, though?

Mrs Dunne: You would have to ask the authority that. It left me a little confused.

Senator CROSSIN: Have you at least written to them and somehow provided your views to them?

Mrs Dunne: Yes.

Senator CROSSIN: Did they ever give you a response to that?

Mrs Dunne: No.

Senator CROSSIN: All right. So this is the first time you have been able to, I suppose, publicly put your views forward about the act.

Mrs Dunne: I have used the offices available to me in my own parliament to speak at length and I speak at length in my own community. In fact, I was at a community meeting only this morning discussing these issues.

Senator CROSSIN: Some witnesses have put to us today that the international obligations reflected in the act, such as the Ramsar convention, do clearly optimise economic, environmental and social concerns. Do you believe that that is not reflected in the wording of the act or the application of the act.

Mrs Dunne: It is clearly not reflected in the application of the act as outlined in the guide for the plan but it is clear that especially section 21 does not create a balance between environmental, economic and social factors. The only place where you could possibly say that there is an attempt to balance that is in the objects. You will see in my submission that I have some comments, which are comments made by a parliamentary counsel in the Commonwealth, about the appropriateness of using objects clauses as a fix up for bad drafting elsewhere in the legislation.

Senator CROSSIN: Okay.

CHAIR: I have a supplementary question, Mrs Dunne. The attachment to your submission is a submission from the ACT government to the basin authority. Do you have any observations or comments on that submission on the guide to the proposed Basin Plan?

Mrs Dunne: I attach it because it outlines the problems from an ACT perspective with the guide to the plan. The views I fairly much entirely endorse. It looks at all of the problems. Because it has been put together by an ACT government department they have many more resources than a humble opposition member has. I endorse it and bring it to your attention because I think that it is a fairly detailed description of what is wrong with the guide in relation to the ACT.

CHAIR: Are the views of the ACT government similar to your own on these matters? If not, how are they different?

Mrs Dunne: They are somewhat similar. The water minister has from the outset expressed his concerns about the impact that the plan would have. He seems to be much more sanguine than I am about it saying, 'If the worst comes to the worst, we will go out and buy water rights elsewhere.' I think that is quite problematic and I have encouraged the minister privately and publicly to be more forthright in standing up for the ACT. I do believe however that the submission that he made to the Murray-Darling Basin Authority and also submitted to Mr Windsor's inquiry did make a very good representation of how badly off the ACT would be.

CHAIR: Sure. I just note that I do not believe that we have a submission from the ACT government to this inquiry.

Mrs Dunne: I did notice that and I regret that.

CHAIR: Thank you very much. We have no further questions and we thank you for your evidence today.

Mrs Dunne: Thank you very much.

BOUWHUIS, Mr Stephen, Assistant Secretary, Office of International Law, Attorney-General's Department

FAULKNER, Mr James, Assistant Secretary, Constitutional Policy Unit, Attorney-General's Department

FREEMAN, Mr Rob, Chief Executive, Murray-Darling Basin Authority

PARKER, Mr David, Deputy Secretary, Water Group, Department of Sustainability, Environment, Water, Population and Communities

SLATYER, Mr Tony, First Assistant Secretary, Water Reform Division, Department of Sustainability, Environment, Water, Population and Communities

[15:10]

CHAIR: Welcome. I remind senators that the Senate has resolved that an officer of the department of the Commonwealth or of the state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it could be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis of the claim.

I invite you to make an opening statement, if you would like and then we will have questions from members of the committee.

Mr Parker: Mr Chairman, we do not have an opening statement other than to note that in our role here today we are not able to provide legal advice to the committee.

CHAIR: Thank you.

Mr Freeman: The authority does not have a prepared statement but it is pleased to answer any questions.

CHAIR: Thanks very much.

Senator JOYCE: Congratulations, commiserations or bon voyage, Mr Freeman. I do not know which one it is! The conjecture around this is all about the understanding of the priorities, so I am posing a question to you so that we can clearly elucidate this. There is a swamp that is a Ramsar wetland. It requires 10 gigs of water to maintain the population of frogs and other wildlife in that area. Just above it is a town that needs the same 10 gigs of water to maintain the industry of the town. Which one is going to get the water?

Mr Freeman: The hypothetical question is probably not how the act works. The 10 gigs of water might be an optimum solution for the environment of that wetland, for that swamp. However, clearly a lesser volume of water would have an environmental benefit, but that would lead to less certainty in achieving the environmental objectives for the Ramsar site. In applying the Water Act, the authority has to take into account the environmental water requirements and those economic and social considerations for upstream. So it is not 10 gegalitres to either/or; it is actually about balancing those three things.

Senator JOYCE: Which one do you consider first?

Mr Freeman: Clearly the authority would have to look at the wetland to determine what its water requirements might be. You cannot deal with the issue with going there. Having considered what the environmental water requirements might be, then you would be looking at the economic and social impacts of those numbers.

Senator JOYCE: If the scientists come back and say they need 10 gigs and you say, 'Hang on, that's all the water that the town has,' what happens?

Mr Freeman: If the scientists come back and say, 'It's 10 gigalitres or nothing for that wetland,' clearly, as an authority member and chief executive, I would be challenging that because science is not that perfect and clearly there are degrees to which you meet these environmental objectives. If it were 10 gigalitres or nothing, if that is the choice that the authority had to make, then the authority would have to look at the economic and social impacts of 10 gigs.

Senator JOYCE: I would tell you that the town would close down.

Mr Freeman: Then the authority would have to determine which of those was more important in the context of the act.

Senator JOYCE: So you are allowed to compromise environmental aspects by reason of social and economic outcomes?

Mr Freeman: We are dealing with a hypothetical; it is not really how it works. But the authority has to exercise judgment; and, in exercising judgment, if you are looking at not meeting that 10 gigs, would you compromise completely the environmental objectives of that wetland?. The answer is you would not meet your Ramsar requirements and, clearly, you would have to go there. But the act is not singular, as you have indicated, and with these things, while they are not linear, there is never a fixed number or no number.

Senator JOYCE: So, basically, you must look after the environment and then you use whatever is left over to optimise your social and economic outcomes as much as possible.

Mr Freeman: No, it is not whatever is left over. In determining what the environmental water requirements are, the authority takes into account economic and social factors. It is a difficult balancing act between meeting the environmental objectives at a level of risk that the authority believes is appropriate and, in considering that, taking into account the economic and social impacts of meeting that number.

Senator JOYCE: How many times did the Australian Government Solicitor speak to the Murray-Darling Basin Authority while you were developing a guide to the proposed Basin Plan? You might say, 'I don't know exactly,' but was it once a week, once a month, once a day, twice a day, terribly regularly, nonstop?

Mr Faulkner: I am sorry; I did not realise that was directed to me.

Senator JOYCE: Anyone can have it. We can do it from both sides. I can ask Mr Freeman: how often did you receive advice from the Australian Government Solicitor? Was it a regular occurrence? Was it once a day, once a week, once a month, continuously—or was there no connection between the Australian Government Solicitor offering advice and the Murray-Darling Basin Authority using it, or the Murray-Darling Basin Authority requesting advice and you giving it?

Mr Faulkner: From the Attorney-General's Department's view, as it were, we do not know what communication there is between the authority and AGS, which is—

Senator JOYCE: Well, I will ask the MDBA.

Mr Freeman: Senator, an Australian Government Solicitor officer is outposted in the authority, so the authority would have sought advice on a regular basis. I do not know whether that was daily, but it certainly would have been on a weekly basis.

Senator JOYCE: Okay. If you were receiving regular advice, then you would have to say that the outcome you came up with in the guide to the proposed Basin Plan is congruous—and I believe it is—with the actual interpretation of the act.

Mr Freeman: The guide does not outline exact policy positions. It puts forward proposals for discussion and comment prior to the authority producing its proposed positions in accordance with the Water Act. So the positions are put forward simply to inform people of the thinking of the authority at that stage but, more importantly perhaps, to elicit new science, new information, that we did not have access to.

Senator JOYCE: Mr Freeman, you are a very competent person; you would not have gone on a frolic. When you came out with that guide to the proposed plan, as you just said you had the Australian Government Solicitor in the office. You would have been tick-tacking with them all the time. When you came out with that guide, they would have said, 'This is the interpretation of the act; this is what you've got to deliver.' You delivered it and then it hit the fan. It is not that you have misinterpreted the act; you interpreted the act perfectly when you delivered the guide to the proposed Basin Plan.

Mr Freeman: I think there are two comments to be made here. The guide was 'legalled' by AGS. However, the guide does not offer actual policy positions. That is why it put forward a range, for instance. It actually exposes the thinking of the authority prior to developing proposed policy positions.

Senator JOYCE: I want to ask you about this double negative kind of approach. Maybe the Australian Government Solicitor can tell me exactly what that means. The Australian Government Solicitor has tabled a summary, and paragraph 23 says:

Neither the Convention on Biological Diversity nor the Ramsar Convention require that the Parties disregard economic and social considerations ...

What does that mean?

Mr Faulkner: There might be a little bit of a misunderstanding here. We are from the Attorney-General's Department. The Australian Government Solicitor is an entirely different agency.

Senator JOYCE: Well what do you see it as meaning?

Mr Faulkner: I am afraid I have no idea.

Senator JOYCE: I have no idea what it means either. What does this mean to you:

The Minister must not give a direction under subparagraph (3)(b)(ii)—

and (3)(b)(ii) refers to directing the Authority, in writing, to make modifications to that version of the Basin Plan and give it to the minister for adoption, so that is communication between you and the minister, obviously—

on any of the matters referred to in:

(i) items 1, 2, 3 or 8 of the table in subsection 22(1) ...

Subsection 22(1) talks about the social and economic circumstances of basin communities dependent on the basin water resources. That is pretty black and white, isn't it?

Mr Freeman: I think it is referring to those issues of fact such as we had to describe the basin through three lenses—economic, social and environmental—and the minister could not give a direction to the authority in regard to a description of the basin.

Senator JOYCE: I know exactly what it means. If the minister says to you, if we go forward with that idea about frogs, Mr Freeman, we are going to shut down Ricetown, and I do not want you to shut down Ricetown so you are going to just have to ignore the frogs. That specifically says he cannot do that. He is specifically precluded from doing that.

Mr Freeman: I do not believe so—

Senator JOYCE: So he can say that to you?

Mr Freeman: What that section says, on page 64, is that the matters referred to that the minister must not give a direction on are items 1, 2, 3 and 8 of section 22—

Senator JOYCE: Which is on page 41?

Mr Freeman: That is correct. Item 1 is a description of the basin, as I have said, through social, economic and environmental lenses—

Senator JOYCE: Read out (d) under 'Specific requirements' on page 41.

Mr Freeman: Item 1 is 'A description of the basin—

Senator JOYCE: Yes and it refers to specific requirements that describe the matters to be included.

Mr Freeman: It says:

The description must include information about:

(a) the size, extent, connectivity, variability and condition of the Basin water resources; and

(b) the uses to which the Basin water resources are put (including by Indigenous people); and

(c) the users of the Basin water resources; and

(d) the social and economic circumstances of the Basin communities dependent on the Basin water resources.

Senator JOYCE: That is black and white. That is basically saying that if that minister rings you up and says you had better change something because of the socioeconomic outcomes of Ricetown or Irrigationtown, he cannot—he is outside the law; he cannot do that.

Mr Freeman: Item 1 is the descriptive element. It is also describing the economic and social circumstances of the basin. Item 1 is not the deliberative step whereby economic and social is taken into account in determining the sustainable diversion limit; it is simply a description of the basin, as I have said, through three lenses. The act is saying is that the minister cannot change the description or recommend a change to the description.

Senator JOYCE: You acknowledge that everybody has talked about this triple bottom line, because that is the terminology used by the Labor Party and the coalition—triple bottom line equivalence. But there is nothing in

this whole act that delivers equivalence. It talks about looking after the environment and subsequently looking after other issues that come after that—social and economic outcomes.

Mr Freeman: The issue that you are referring to is actually item 6, and item 6 is where the SDLs are set. The SDLs are where the authority takes into account the environmental water requirements of the ecosystem functions and the ecosystem assets. It considers the economic and social impacts of meeting those environmental water requirements and then determines SDLs in accordance with item 6. The minister could direct in regard to item 6.

Senator JOYCE: Mr Freeman, I remember you from all those meetings we went to. You had the courage of Gunga Din, because it was not really your problem. You were given the act and you had to try and administer it. You were merely there for us to throw rocks at, which everyone did with consummate ease. Has the science changed since any of those meetings?

Mr Freeman: We have got some new science in the northern basin. The authority has continued to do more modelling as well. The guide was very much based on intersystem flows. We have been able to continue the modelling based on more precise environmental water requirements on an asset-per-function basis. So I think it is fair to say that the science has been improved since the publication of the guidelines.

Senator JOYCE: So you can go below 3,000 gigs now?

Mr Freeman: The ultimate long-term sustainable diversion limit is a decision the authority will have to take. But that will be published in the proposed basin plan and there has not been a final decision in that regard.

Senator JOYCE: So what you are saying is that the act has not changed. We heard from Professor John Briscoe that the act is terribly prescriptive. In fact, someone said it is one of the most prescriptive acts they have ever seen in how it actually operates. There is no real latitude there. What has to change is the science because there is no scope for changing and there is no latitude in the act. It is the science that you are really looking at changing. That is going to be a mighty fine trick to try and change the science, isn't it? It is going to suggest that you got it all wrong in the first place—and I know you do not believe that.

Mr Freeman: There are issues. You heard me admit in the St George RSL hall that I believe some of the judgements of the authority, with the benefit of community consultation, would be varied. One of those, which you have heard me talk about, is the connectivity, or not, of the Warrego. In making water savings in the Warrego for downstream benefit, when it is a relatively disconnected river system, you have to worry about the economic and social impacts of that for minimal environmental gain. So I think it is fair to say that there is improved science. I think the authority members gained a better understanding through the public process that we have had with the guide. So I see that the content of the proposed basin plan can be varied on both of those factors, one of which might not be science but simply a better understanding to inform the authority members' judgement.

Senator JOYCE: I am going to ask you a very succinct question. Can you go below 3,000 gegalitres on social and economic conditions alone?

Mr Freeman: At the time of publishing the guide, 3,000 gigs was the lowest threshold the authority believed would satisfy the environmental water requirements. As I have said, that could be varied either through new science or a better understanding of some of those issues by authority members.

Senator JOYCE: You know what I am asking. Can you go below 3,000 gegalitres not on environmental conditions but just social and economic conditions alone? Can they force you below 3,000 gigs?

Mr Freeman: As I have said several times the 3,000 was based on the science at that stage. I guess what you are implying is if we just assume the science does not change and that the authority members' judgement does not change. If 3,000 was the minimum number to satisfy the environmental water requirements beyond which authority members believe that you would be taking an inappropriate risk with the environment and therefore not satisfying the environmental objectives, then that could be correct. But there are a whole lot of qualifications to the answer I have just given. As I have indicated, some of those things have shifted. If authority members—and I can only speak on behalf of myself—had a better understanding of the Warrego, for instance, it would vary that number. There was a contribution to downstream water requirements—

Senator JOYCE: But that is not social and economic conditions, that is based on science.

Mr Freeman: The science has not really improved. I guess what I am saying is that the authority members' understanding has, and therefore the authority members' judgement has.

Senator JOYCE: But they are weighted by environmental factors, not socioeconomic conditions, aren't they?

Mr Freeman: The numbers can be varied by an increased understanding of social and economic factors but, as you are implying, eventually you hit a lower threshold beyond which you would not meet the environmental objectives of the act.

Senator JOYCE: It is just logic. Everybody has to understand that it is about the environment and that is it—it is an environmental act—and then subsequently look after socioeconomic conditions. I can quote to you from your own foreword:

The Water Act requires the Authority to determine the volume of water required to maintain and restore environmental assets, using best available science and the principles of ecologically sustainable development. Subsequently the Authority addressed the optimisation of environmental, social and economic outcomes.

Optimisation does not equal equivalence. This is in your own foreword from your own document. It is quite clear that you cannot go below a certain level of socioeconomic conditions alone. Therefore, there is not equivalence of environmental, social and economic conditions.

CHAIR: Is that a question or a statement?

Senator JOYCE: That is a question.

Mr Freeman: Yes, those elements are not equal, which I have expressed before.

Senator JOYCE: Thank you very much. I just want to read another section. The act's section 4 defines environmentally sustainable levels of take as:

"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.

For the sustainable diversion limits, there is nothing in there about socioeconomic conditions. It is all about environmental aspects. I will pose this as a question. Can you direct me to any socioeconomic considerations in that statement?

Mr Freeman: The consideration of what is 'key' is an environmental consideration. So what is a key environmental asset or a key ecosystem function? They are environmental considerations. The determination of the water requirements, however, takes into account economic and social factors. Those international conventions provide for that. We could not compromise key environmental assets; however, there is the ability to consider economic and social issues in determining the water requirements.

Senator JOYCE: Do we have access to all the legal advice so as to have a transparent understanding of what the Australian Government Solicitor said to you compared to what we have been led to believe the Australian Government Solicitor said to you? Is there anything out there that you believe is pertinent that we should be aware of to give us a greater understanding of the exact advice that was delivered to the Murray-Darling Basin Authority?

Mr Freeman: The authority has chosen not to release its legal advice, as you are aware. The authority has said though that the legal advice that the minister has released is entirely consistent with its advice.

Senator JOYCE: And complete?

Mr Freeman: Sorry?

Senator JOYCE: Has anything been omitted in such a way such that what he said was true about the section that has disclosed but was not a balanced view in its entirety? That is, if you saw the entirety of the advice would your view would be different to what has been disclosed to the Australian people thus far?

Mr Freeman: I have not recently read the advice released by the minister but I believe that it was complete. To answer your original question, I am not aware of any other document that would explain all that completely to the community. The guide, I guess, attempted to do that in a layperson's sense.

Senator JOYCE: I do not believe for one moment that you were trying to pick a fight and thought you would release this document just because you wanted to go around the countryside being pilloried by everyone. I believe that you released this because that was the guidance of the act and the Australian Government Solicitor had been in your office. You had been in direct consultation with them daily sometimes, as you said, and sometimes more often and maybe some days you missed. Therefore, what has happened is that it has hit the fan and then we have gone out and said, 'What on earth can we change?' They do not want to change the act so we have to go on this desperate search to try and change the science to get around the fact that we have said that we will not amend the act. Because changing the science is the only way you are going to change the outcome, now, isn't it? If you are

saying we cannot change the act then we have to, I suppose, desperately change the science. The problem there, of course, is that if the science changes again we end up back where we started.

Mr Freeman: The authority was well aware of the impacts of some of these potential policy positions. That is why the authority made the decision itself to release a guide. The act does not provide for a guide. The authority was deeply concerned about the impact of the proposed policy positions in the guide and therefore felt that the extra step, even though it was going to take some extra time, was essential in order to flush out new science and new information. The guide is an additional step. It was entirely of the authority's decision making that there was such an instrument created. It was purely put out there so people could probe the science, could challenge it, because the impacts of the Basin Plan are so significant.

Senator JOYCE: Have you read the legal advice that has been released by the minister?

Mr Freeman: I have read the legal advice that was released by the minister, that is correct, together with our legal advice.

Senator JOYCE: You have read the legal advice released by the minister; you are aware of the legal advice that has been given to you. Are they the same thing?

Mr Freeman: The legal advice is different, but the legal advice is entirely consistent, as I have said, and we have actually had the Australian Government Solicitor confirm that they are entirely consistent.

Senator JOYCE: It is different, but it is consistent?

Mr Freeman: That is correct.

Senator JOYCE: Why can't it just be the same and consistent? Why can't you just tell us what they told you?

Mr Freeman: Maybe the questions that were asked were slightly different.

Senator JOYCE: Do you understand that it is kind of perplexing watching you at every meeting go through the torment of saying that you cannot below 3,000 gigs, and now all of a sudden you are suggesting to me that you can? I can go to some of the quotes you said to my colleague here, Senator Birmingham, about how you could not go below 3,000 gigs and now apparently we can. Do you understand how we would find that a little bit perplexing?

Mr Freeman: No, I do not believe you should. When I gave a response in Senate estimates I did qualify that response, saying that, assuming there was no new science, assuming no new information became available, and the authority did not change its judgment, then that would mean that the 3,000 position. But it was qualified.

Senator JOYCE: The purpose of the science is to justify the environmental outcome and then you just hope and pray that the socioeconomic outcome is looked after in the same breath—basically. Your science is not social science; it is not economic science; it is environmental science and if you can tick the environmental box and look after rice town or irrigation town above the frog-filled lake then everybody is happy. The essence of the act says that you have got to look after the environmental place. So now we are on a desperate, selective search for science that is going to tick the boxes for us.

This is so important, because we have a problem and we have got to try to fix it up; otherwise we are going to go through all this again. I don't want to do it and you don't want to do it. So, if we need an amendment, we have got to get an amendment. Can you tell us the questions that you asked the Australian Government Solicitor?

Mr Freeman: I do not have those. Certainly there was a series of various questions. It was almost on a weekly basis.

Senator JOYCE: You asked them questions on a weekly basis?

Mr Freeman: We would have been asking questions of the outposted solicitor on a weekly basis.

Senator JOYCE: Obviously they would be surrounding whether you would be compliant with the act?

Mr Freeman: Not all of them. Sometimes it was about expression, but, yes, clearly the authority was keen to make sure that it complied with the act.

Senator JOYCE: If I were you I would be furious if after all that communication with the Australian Government Solicitor—I had come to the end of the day and as far as I was concerned I was compliant with the act—someone then popped up and told me I had done a terrible job. You must have been frustrated when that happened.

Mr Freeman: I always anticipated the sort of response that we got. That is not in any way to devalue the response, given that—

Senator JOYCE: I am not talking from the public; I am talking from the minister.

Mr Freeman: I have never heard the minister say that we got it wrong.

Senator JOYCE: Did the minister not say at one stage that the choice of whether you had your job is a choice for you or something? I remember him saying that on Sky News, basically implying that people should consider their positions.

Mr Freeman: I have never had that discussion with the minister, no.

Senator JOYCE: Because all you are doing is complying with the act.

CHAIR: We might move on, Senator Joyce, and we can come back if we have time.

Senator CROSSIN: Mr Freeman, can I take you to legal advice that I understand the authority received on or around 26 November last year.

Mr Freeman: I do not have a copy of the legal advice.

Senator CROSSIN: I am referring you to the date. Is it correct that the authority received legal advice on 26 November last year?

Mr Freeman: I cannot confirm that. I do not have copies of the legal advice here.

Senator BIRMINGHAM: I can confirm that 25 October is when the minister made his statement in the House.

Senator CROSSIN: I am not referring to that. There was a date last year, I understand, when the authority reportedly sought legal advice from the Solicitor-General. Is that correct?

Mr Freeman: Yes. The authority did seek additional legal advice in mid- to late-November. That is correct.

Senator CROSSIN: How is it determined to seek that advice? Is it through a formal meeting, through telephone chats and through consensus with people? Could I request a copy of the minutes of the board meeting at which there was an agreement that that advice would be sought or does the chair just pick up the phone and ask the Solicitor-General for advice when he wants it?

Mr Freeman: There was a discussion as to the nature of the questions. It was a teleconference, from memory, where there was an agreement that these were the questions we needed to ask the Australian Government Solicitor. I do not recall whether that was actually part of an authority meeting or not, but there certainly was a teleconference.

Senator CROSSIN: So do you as CEO then put that advice to the Solicitor-General or does the chair do that?

Mr Freeman: I cannot recall. I think the chair may have initiated it on that occasion, but it varied from time to time as to whether the chair sought it or I sought it myself.

Senator CROSSIN: What is the delineation, then, in responsibilities and roles when it comes to you and the chair?

Mr Freeman: Clearly there was always communication between us. Sometimes it was simply about availability, and I think this would have been the case on that occasion as we were on the road with those regional visits at the time. I would have to go back and check whether I requested the advice or the chair did. Certainly there was a discussion including authority members as to the nature of the additional questions.

Senator CROSSIN: Would the authority agree with the ministerial statement that the minister gave on 25 October?

Mr Freeman: To the extent that there is any disagreement, there has been the issue of whether equivalence can be applied here. As I have indicated before, it is very difficult, for me at least, to comprehend the notion of equivalence. What we are trying to do here is have an environmental benefit. It is about improving the environment, and of course that has an economic and social disbenefit. So the notion of equivalence is a difficult one, and I think the minister did use the word equivalence, except in that regard the authority would be consistent with the minister's advice.

Senator CROSSIN: Would it be fair to say that a relevant object of the act is to determine which environmental assets can also optimise economic and social outcomes?

Mr Freeman: In the identification of key environmental assets and key ecosystem functions, which was part of the definition that Senator Joyce was talking about before, we have to determine the environmentally sustainable level of take. When you look at the definition, I think it is fair to say that there is a decision on what are the functions that make healthy river systems, and the authority has outlined in the guide the four functions that it believes underpin healthy riparian systems. In determining the key environmental assets I think that that is less subjective because the international agreements actually give us the framework to do that, so we can go

through and identify the assets. There is a degree of judgment certainly in functions and that is why we wanted to test that with the guide. The authority has identified some 2,442 assets. To the extent that there are some missing, they should come forward through the consultation process. However, it is likely that they will have relatively minor environmental water requirements, given that the big ones—the Ramsar sites et cetera—are identified. But there is less judgment in the identification of assets.

Senator BIRMINGHAM: Thank you for your time today. Firstly, I want to go to some of the advice that the authority has received that Senator Crossin and Senator Joyce have picked up on. Senator Crossin just established that the authority sought further advice from AGS subsequent to the minister making his statement on 25 October; is that correct?

Mr Freeman: Yes, that is correct.

Senator BIRMINGHAM: And that advice was sought sometime around mid-November?

Mr Freeman: That is correct.

Senator BIRMINGHAM: Did the authority ever consider releasing that advice?

Mr Freeman: The authority did consider at a meeting whether it should release all of its advice essentially, and the authority determined that it should not.

Senator BIRMINGHAM: And the authority only ever considered it at one meeting and came to that conclusion?

Mr Freeman: I would have to refer back. Certainly there was discussion around whether we should or should not. I believe we had only ever one decision point, but that was not just discussed at one meeting; it was discussed over a couple of meetings.

Senator BIRMINGHAM: Was advice ever sought from elsewhere in government on whether such information should be released?

Mr Freeman: Yes, we did seek advice from the Attorney-General's Department on the appropriateness of releasing that advice.

Senator BIRMINGHAM: And what was the recommendation of the Attorney-General's Department?

Mr Freeman: We have officers here, but to paraphrase it I believe it was that the information should not be released without further discussion with the department.

Senator BIRMINGHAM: Mr Faulkner, is that an appropriate paraphrasing?

Mr Faulkner: Yes.

Senator JOYCE: Did they contact you or did you contact them?

Mr Faulkner: Mr Freeman wrote to the secretary of our department seeking our views on the possibility of disclosing a particular opinion and the department responded accordingly.

Senator JOYCE: Why did you say no?

Senator BIRMINGHAM: Firstly, what prompted you to ask the Attorney-General's Department for their opinion when in every other matter you had sought the advice of AGS?

Mr Freeman: There is longstanding conventional protocol that requires us to do that.

Senator BIRMINGHAM: Did you or Mr Taylor ever tell the minister that it was the authority's desire or that the authority was considering releasing advice subsequent to the release of his advice?

Mr Freeman: I do not believe so.

Senator BIRMINGHAM: So there was no knowledge that you are aware of that the authority was going down this path of getting its own advice and/or seeking to release it?

Mr Freeman: I do not believe there was specific advice to the minister. The authority made public its view that it was considering whether it would or would not release its advice, so I guess the minister would have been generally aware of it. I cannot recall specific advice to the minister in that regard.

Mr Parker: We would need to take on notice whether specific advice was requested. We can do that.

Senator BIRMINGHAM: Thank you, Mr Parker. Mr Faulkner, why did the Attorney-General's Department advise the MDBA not to release their legal advice from AGS when Minister Burke had already released his legal advice from AGS?

Mr Faulkner: It is perhaps worth mentioning that, in response to a question from Senator Barnett at last estimates, I think, we provided an answer to a question on notice—it was question No. 60—which set out the

letter to the secretary of our department from Mr Freeman, seeking the department's view, and the response from our department to Mr Freeman, explaining why we thought the advice should not be disclosed. It was set out at some length in that letter. But, broadly, our interest in this is rather abstracted. The Attorney-General's Department is always consulted in relation to a question about the possible disclosure of constitutional advice, and it is very rarely done, because of the almost inevitable general implications of constitutional advice. It runs a relatively high risk of prejudicing the Commonwealth's legal position. That is the interest we have in this process. It is not unlike other kinds of questions of that sort that are put to us from time to time. Basically, the difference in the advice that the minister disclosed previously was that in our view it was at a much higher level. I hesitate to say this because it may confuse the issue somewhat, but I think it was referred to generally as a summary kind of advice. We took the view in that case that it was unlikely to prejudice the Commonwealth's legal position. I am not talking about the government's legal position per se but the Commonwealth's legal position. The advice that Mr Freeman sought our views on was much more detailed and therefore potentially more significant legally.

Senator BIRMINGHAM: Mr Faulkner, did the minister seek your opinion prior to making his public commitment around late September? Forgive me for not having the date in front of me. Around late September he made a public commitment that he would seek legal advice on the act and he would publicly release it. Did the minister seek your advice on the appropriateness or otherwise of doing that prior to making that public commitment?

Mr Faulkner: I am afraid I could not say. I would have to take that question on notice. What I can say is that the department certainly was consulted before any advice was released. I can confirm that.

Senator BIRMINGHAM: Perhaps you could take that on notice and advise us when the department was first consulted. Obviously, there is an issue here as to whether the department was consulted about what was released rather than about whether something could be released, given the minister had made a public commitment that he would be releasing some advice, which ultimately became the summary or otherwise. We will look at those answers and we may have elsewhere to go on that at a later time.

I will try to move on. Again, Mr Freeman, these matters have been somewhat canvassed. So that we are all quite clear, as you have highlighted, item 6 of section 22 sets out the definition for the long-term average sustainable diversion limits, aided and abetted by section 23. Is that correct?

Mr Freeman: That is correct.

Senator BIRMINGHAM: Section 23 requires that these average SDLs must reflect an environmentally sustainable level of take.

Mr Freeman: That is correct.

Senator BIRMINGHAM: That brings us right back around to section 4, where we come to the argument over what is an environmentally sustainable level of take. I think it is useful to have on record exactly how the act relates to each section. At this point you say that determining what the key environmental assets are is a relatively precise decision based on the international treaties. Is that correct?

Mr Freeman: That is correct.

Senator BIRMINGHAM: But determining how much water they may need to not be compromised is a judgment call based on science.

Mr Freeman: That is correct.

Senator BIRMINGHAM: Mr Bouwhuis, in your understanding of the treaties in question, is that a fair point—that knowing what the assets are should be a fair thing to derive from those treaties?

Mr Bouwhuis: I am not sure I am able to provide ad hoc legal advice to the committee about the interpretation of particular treaty provisions, so we would provide advice to the department or agency and then they would present the evidence before the committee. That is my understanding of my proper role.

Senator BIRMINGHAM: That is almost a circular response, but perhaps if you could attempt—we may or may not get an answer through this process—to look at the response Mr Freeman just gave to my question and see whether the treaties division has an opinion that it can or cannot offer on that.

Mr Faulkner: It would seem to me that that is in fact seeking an opinion from the department, which is not something I think we can do.

Senator BIRMINGHAM: You have to excuse me for trying occasionally, Mr Faulkner.

Mr Faulkner: Of course.

Senator BIRMINGHAM: We will come back, Mr Freeman. How does the authority believe the key ecosystem functions of the resource are determined—again, by reference to the treaties, or is there greater scope for judgment on what they are?

Mr Freeman: As I said, I believe that that is an area of greater judgment, so there are the key ecosystem functions of water resources. The others are places; assets are places and they have been recognised in these agreements. Functions are less acknowledged. So what do you require to have a healthy ecosystem function? Clearly you would want areas of high and low flow. You would want areas of flow that actually created habitat—deep holes and sandbanks and things are important in river systems. You want above-bank flows to get out on to the floodplain to water those vegetation communities that are part of the Ramsar and other conventions. But I believe that there is scope for the authority to develop those in its own way. We put forward four functions that we believed were critical for the functioning of these riparian systems. If there were science that came forward and said there was a fifth, we would then have to model that and see whether that required extra water requirements, which you would then have to source through SDLs. So I believe there is more scope with regard to functions, as it is not a precise answer like a place.

Senator BIRMINGHAM: In relation to productive base, when considering that there is a very direct consideration of at least the economic circumstances of that base, I assume—

Mr Freeman: Yes, the authority actually took legal advice on the definition of productive base, because it is a term that could be interpreted in multiple ways. It is actually issues such as water quality that underpin both the economic and environmental basis of the water resource. What this is requiring us to do here is determine the environmentally sustainable level of take and, with regard to productive base, it would be water quality et cetera, which is essential not only for the environment but also for economic use of water. It is those other things that may not be volume based that underpin the water resource, and quality is an easy one to relate to.

Senator BIRMINGHAM: Is there a potential within that definition of 'productive base' to argue that, if you reduce the number of rice growers in an area to such a level, in fact you eliminate the potential productive capacity of that region?

Mr Freeman: No. The legal advice that we have is very clear that the productive base is not the economic base of that water resource but actually the broader productive base in both an economic and environmental sense.

Senator BIRMINGHAM: Lastly, on key environmental outcomes for the water resource, are there things that are not ecosystem functions or key environmental assets or factors that relate to the productive base that get roped in under that catchall phrase at the end?

Mr Freeman: I think we have been given some opportunity to express those other things in a broad way. Under the environmental outcomes, for example, there is the need to export salt and nutrient out of the river system. They probably do overlap—

Senator BIRMINGHAM: Although that is just as easily captured under (c) or (b) isn't it?

Mr Freeman: Yes, that is correct. As you are implying, (d) is less definitive than the environmental asset point. But it is there as a very broad term.

Senator BIRMINGHAM: As we have gone through each of those, we have not managed to find an area in which upfront consideration in the definition is given to economic or social factors, have we?

Mr Freeman: What I have said is that the amount of water required that will not compromise those things does allow for economic and social considerations. The identification of assets, functions and the productive base tends to be science driven. The assessment of how much water you need includes a range. As the authority said in the guide, if the Water Act was purely about the environment, the amount of water that we believe needs to be returned to the river system to make it healthy from an environmental perspective would be 7,600 gegalitres. But the act does not stop there. The act allows you to take into account economic and social considerations, and hence the range that was put out in the guide was 3,000 gegalitres to 4,000 gegalitres.

Senator BIRMINGHAM: Is there a capacity within a particular key ecosystem function—let us say that you need the river to run pink once a year or something totally abstract—to say that the economic cost of achieving this one key ecosystem function is too great and therefore we may need to compromise on it?

Mr Freeman: There are degrees of meeting these functions. While it might be optimum to have water out on the flood plain every second year, for instance, the authority has had to look at what the impact on those environmental assets and functions would be if that occurred only every third year in order to reduce the economic and social impacts. The questioning tends to be about where we meet them or not. The authority has to

meet them at a level of risk that it believes will not compromise them. But there are clearly decisions that can be taken in there.

Senator BIRMINGHAM: Were any of you involved in the original drafting of the Water Act?

Mr Slatyer: I was involved to a point. But there were a number of officials involved at that time. It was not my central responsibility, but I was partly involved.

Senator BIRMINGHAM: We will see how we go, Mr Slatyer. I know that you will take joy in taking questions on notice to consult with others if you cannot come up with an answer.

Mr Faulkner: I should mention that I was also involved in the drafting of that act in a very general constitutional sense.

Mr Freeman: For completeness, I was not involved in the drafting. However, until I decided to come to the Commonwealth I was involved in negotiations on the part of South Australia in regard to what went into the Water Act.

Mr Bouwhuis: I should also add that our office would have seen the legislation and commented on it as it read through. I could not comment on whether I personally have or have not seen it.

Senator BIRMINGHAM: Mr Parker?

Mr Parker: I am the odd one out.

Senator BIRMINGHAM: The point of my question here is that we have had evidence about how the draft of the bill changed—and people have said dramatically—in the final stages when a determination was made to hinge it on the international obligations. Is that accurate?

Mr Slatyer: I did not hear that earlier evidence, so I cannot speak about how accurate that evidence was.

Senator BIRMINGHAM: But is the statement I have made accurate? I made the statement based on the evidence.

Mr Slatyer: The bill was modified to allow for that approach, but I cannot give you a statement about how accurate other people's evidence may have been.

Senator BIRMINGHAM: No, I am not asking you to. I am taking their evidence and putting it in my words. So the earlier drafts did not rely upon the international obligations but assumed a more complete referral of powers; is that right?

Mr Slatyer: My recollection—and this may have to be corrected afterwards—is that the original bill relied on a range of constitutional authorities, including referrals and the Commonwealth's own powers. We were just policy people, so the actual draughtsmen would be in a better position to answer that question accurately.

Senator BIRMINGHAM: I am sure you will have to take this on notice, but was advice offered to the government at that stage that dealt with what the implications were to balancing economic, social and environmental factors of shifting from those initial drafts of the Water Bill to a draft that was more reliant upon international treaties and, if so, what did that advice say?

Mr Slatyer: I would have to take that on notice.

CHAIR: Is it your understanding that the Water Act does not require the consideration of the environment, social and economic considerations but only allows for the consideration of the environment, social and economic considerations?

Mr Freeman: The act requires the consideration of economic and social factors as well as environmental.

CHAIR: But not on an equal basis?

Mr Freeman: That is correct.

CHAIR: Would you say that the act requires the consideration of the environment, economic and social considerations but that the environment is primary?

Mr Freeman: I have some difficulty with primacy. The authority is required to meet the environmental objectives, so that is correct. The authority is also required to meet the economic and social objectives and actually talks about maximising the economic outcomes for Australia, so the idea of those being exclusive I have some difficulty with. We actually have to meet all of those, but we could not compromise the environmental water requirements.

Senator BIRMINGHAM: No. Noted. I want to go to the answer to question on notice that Mr Faulkner has alerted the committee to. I have a copy in front of me. I asked these questions at Senate estimates on 22 February. They were answered. They are public documents. Thank you for that. You wrote to the minister in December. I

do not have the date; you have not dated that. The response was on 3 December, so I think it was on 1 December. Are you aware of that letter? Do you know what I am referring to in terms of that correspondence?

Mr Freeman: I am aware of that correspondence.

Senator BIRMINGHAM: I want to refer to Mr Wilkins' response of 3 December. He refers in his fourth last paragraph:

Any suggestion that these issues may be reduced in significance by release only of the summary advice dated 30 November 2010 would, in my view, be problematic.

He then goes on:

One obvious risk would be that release of that advice would lead to questions about waiver of privilege in the 26 November advice.

Clearly there is more than one piece of advice. So, Mr Freeman, how many opinions did you request of the Australian Government Solicitor, how many did you receive and when?

Mr Freeman: I would have to take that on notice.

CHAIR: Can you recall how many you requested? Clearly it was more than one.

Mr Freeman: Yes.

CHAIR: And earlier in the advice you referred to 'advices'.

Mr Freeman: That is correct.

CHAIR: So how many?

Mr Freeman: I think the formal legal advice would have been somewhere in the order of eight to 10. However, as I have indicated, there was lots of iterative advice, including meetings and discussions with the Australian Government Solicitor.

CHAIR: So there were eight to 10 pieces of written advice that you sought written advice on, and you received that advice back?

Mr Freeman: That is correct, but the eight to 10 may be wrong; it is of that magnitude.

CHAIR: It is of that magnitude, and you will advise us of that on notice, and of the dates of when you requested it and when you received it—are you happy with that?

Mr Freeman: Yes.

CHAIR: When did your AGS officer get put into your authority? When did they commence?

Mr Freeman: Again, I would probably have to take that on notice, but it was very early days—probably December 2008.

CHAIR: Finally, I would like you to take this question on notice. This letter from Mr Wilkins gives the authority an out; in the third last paragraph it says: 'On the same basis it would not be appropriate to take the matter further without discussing it with the Attorney-General's Department as it would be necessary to raise the matter with the Attorney-General.' Well, why didn't you take it further? You had the opportunity to take it further and ask the government to release that advice; why didn't you?

Mr Freeman: The authority received this advice. The authority made a decision that it was not going to release its advice on the back of this and, I guess, the broader convention of not releasing legal advice.

CHAIR: Well, this clearly gave you the opportunity to release it. I am asking you, on notice, to reconsider that matter. I would ask you, on notice, for the authority to provide that advice or at least the advices that you believe would be possible to be released, and if you have to refer to the department please feel free to do so. It is clearly the summary advice with the constitutional issues that are the concern, according to the department, and I would ask you to reconsider that, on notice.

Mr Freeman: That will have to be a consideration of the authority, not just me as the chief executive.

CHAIR: Of course.

Senator JOYCE: Just quickly, for the record: Mr Freeman, if I gave you \$30 and told you to share it in equivalence with Mr Parker and Mr Slatyer, how much would you give them?

Mr Freeman: I would probably give them \$10 each.

Senator JOYCE: And if I said, 'Mr Freeman, you're a jolly good bloke so I am going to give you \$25 and I want you to optimise what is left over,' you would still be able to do that, wouldn't you?

Mr Freeman: I do not quite understand the question.

Senator JOYCE: Well, if I told you to optimise the \$5 that was left over between Mr Slatyer and Mr Parker, you would still be able to do it—that is absolutely possible and completely legitimate?

Mr Freeman: Yes.

Senator JOYCE: So 'optimising' and 'equivalence' are vastly different terms, aren't they?

Mr Freeman: I think they are different terms. That is correct.

Senator JOYCE: Just like 'integrating'—if I told you to integrate that \$5 between Mr Slatyer and Mr Parker, you would be able to integrate it between them. You would be able to optimise it between them. But you would not be able to give them equivalence to what you have got.

Mr Freeman: There may be times when equivalence happened to be the outcome.

Senator JOYCE: Possibly. But only if I decided to give you \$10. The reason I say that is because all the way through this legislation are words which mean one thing out there in Deniliquin but which we know perfectly well mean something entirely different here. You said before—and I was interested in this—that you still hold that 7,600 gigs is the optimum amount that the environment should get.

Mr Freeman: No, I did not say that. I was saying at the time of releasing the guide that if the act was simply about the environment then, to the best of our knowledge at that stage, assuming there was no new knowledge et cetera, the answer would have been 7,600.

Senator JOYCE: I will check the *Hansard* very particularly, but I will allow you to correct it as that. So are you saying now that 7,600 gigs may not be the optimum position for the environment?

Mr Freeman: The 7,600 would not be, based on new knowledge and new science; that it is correct.

Senator JOYCE: So this new knowledge: when did it turn up? Just in the last month or so?

Mr Freeman: No, it has come from ongoing work of the authority. It has come from ongoing consultancies. And a significant tranche of it has come out of jurisdictions.

Senator JOYCE: So the one thing I am absolutely certain that we have proved there is that advice can change; it can, can't it?

Mr Freeman: That is correct.

Senator JOYCE: So it could go back in the other direction, couldn't it?

Mr Freeman: It could.

Senator JOYCE: If that was the case, we would actually take more away from the socioeconomic considerations because the scientific advice would change again. The most powerful person in the room seems to be the scientist. He is a very good person to know because he can make or break towns up and down the basin. The scientist is the most important person—that is the pre-eminent position. If he says it needs 6,000 gigs, everybody is broke; if he says it needs 2,000 gigs, I do not know what would happen then; and, if it is 4,000 gigs, things are miserable. The scientist is a very powerful person. He is more powerful than the legislators, he is more powerful than you and he is more powerful than the people in the basin.

Mr Freeman: I think the science is giving us a fairly broad band within which the authority has to exercise its judgment. As you say, the science—I do not want to personalise it—actually sets that range; but that range, as we are finding, is incredibly broad. The bigger issue is the judgment that the authority uses in optimising economic and social environmental outcomes in deciding where to land within that scientific range.

Senator JOYCE: The minister said in a statement about why we can look after social and economic conditions:

... international agreements which underpin the Water Act and it's been suggested that these agreements prevent socioeconomic factors being taken into account. In fact, these agreements themselves recognise the need to consider these factors.

Can you please direct me to the form of words in those international agreements which underpin the socioeconomic factors that are obviously of concern to the people of the basin.

Mr Faulkner: That is not a matter that we can have a view on in this forum, I do not think.

Senator JOYCE: Do you have a rough idea of where we might be able to find them? Can someone tell me where we will find them in these international agreements?

Mr Slatyer: The department is responsible for the administration of these treaties in Australia. In the language of the Ramsar convention there are two formulations. One is in regard to wetlands generally which are any kind of place that has water. The principle of the convention there is to promote the wise use of those sites. Wise use

has been interpreted through the convention processes in a very broad manner and is set out in the advice that the minister released.

Senator JOYCE: Direct me to your form of words on the wise use that deals with the socioeconomic conditions such as would maintain the economic base of a town by reason of the industry there, such as rice or cotton.

Mr Slatyer: The convention only uses this broad language. It does not prescribe specifically how these terms should be used. What does contain that sort of description, even though for your purposes it is probably still too broad, is the guidance material for the convention which is not binding on any country, including Australia.

Senator JOYCE: Any form of words, Mr Slatyer, which is prescriptive to clearly elucidate for the people in the basin so that they have socioeconomic certainty. They are relying on these international agreements, as your minister said in his statement. If there is no direction to any actual or real phrase or terminology that underpins that socioeconomic certainty, then wouldn't it be wise for us to put it in as an amendment?

Mr Slatyer: These conventions are not written with this degree of specificity. What the Ramsar convention allows is a lot of discretion for member countries to administer them in a way they think is wise and appropriate. That is the language that the convention allows for.

Senator JOYCE: So 'wise and appropriate' can be anything—is that what you are telling me?

Mr Slatyer: As I said, there is guidance material written down, which is referenced in the advice that was tabled by the minister and we can provide you with any detail you want with copies of the guidance material.

Senator JOYCE: Except the form of words that specifically talks of that issue.

Mr Slatyer: The convention language allows judgments by member countries in the exercise of those provisions.

CHAIR: Thank you, Senator Joyce, and to Senator Crossin on the line, thank you for being there. To the witnesses, we have had a good hour and we appreciate your time today. Thank you for being here.

Committee adjourned at 16:19