

14 March 2017

Terry Korn
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Dear Terry,

Interpretation of Basin Plan, clause 6.14

1. You have requested advice regarding the correct interpretation of cl. 6.14 of the Basin Plan (**Plan**). Specifically, you have sought advice as to whether cl. 6.14 can override the requirements of any other clauses or chapters within the Plan, or dictate the contents of a water resource plan (**WRP**).

Executive summary

2. Clause 6.14 does not prohibit another provision in the Basin Plan from causing a change in the reliability of allocations.
3. Where another clause in the Basin Plan may result in a change in the reliability of allocations, clause 6.14 does not automatically override that clause.
4. Failing to properly implement a clause in the Basin Plan that requires a change in the reliability of water allocations due to clause 6.14 is therefore potentially unlawful. This is because the rules of statutory interpretation that have been developed by the High Court indicate that it is necessary to 'read down' inconsistent clauses (rather than to assume that one overrides the other). Reading down is explained in greater detail in the body of this advice. However, as 'reading down' is a legally complex exercise, it would be useful to brief counsel about this matter.
5. Clause 6.14 does not preclude a WRP from including a rule or rules that may change the reliability of water allocations. Again, any conflict between clause 6.14 and another clause in the Basin Plan must be 'read down'.
6. It is important to distinguish between reliability of water allocations and reliability of access to/use of water. Clause 6.14 cannot have any bearing on any other clause in the Basin Plan that affects the latter but not the former. Therefore clause 6.14 cannot be invoked to prohibit the inclusion of a rule in a WRP that affects reliability of access or use (but not allocations).
7. The concept of 'reliability' is not defined in the Basin Plan or *Water Act 2007* (Cth) (**Water Act**). As determining its meaning is a legally complex exercise, we can provide further, specific advice about this matter (or brief counsel).

Interface between cl. 6.14 and Subdivision B of Division 4 of Part 2 of the Water Act

8. Clause 6.14 of the Basin Plan is reproduced below:

6.14 Risks arising from other changes to the Basin Plan

Nothing in the Basin Plan requires a change in the reliability of water allocations of a kind that would trigger Subdivision B of Division 4 of Part 2 of the Act.

9. We note in the first instance that the ‘Act’ is a reference to the Water Act. Subdivision B of Division 4 of Part 2 of the Act (**Subdivision B**) concerns a change to the Plan that would result in a change in the reliability of water allocations due to something other than reduced SDLs. It provides for payment (or compensation) if such a change occurs and certain conditions are met.¹
10. Subdivision B sets out the circumstances in which it is triggered. Specifically, it is only triggered if the following three elements are satisfied: first, the Plan must be changed (or put differently, amended);² second, that change must in turn change reliability of water allocations in a particular water resource area;³ and third, the change in reliability must be independent of reductions in long-term annual average SDLs under the Plan⁴ (such changes are provided for in Subdivision A of the Water Act).⁵ Subsequent to these factors being satisfied, a set of additional conditions must be met before the Minister may determine whether compensation is payable to the affected entitlement holder.⁶
11. Subdivision B also sets out when the Plan is to refer to any changes in reliability that are covered by Subdivision B. Specifically, it only requires the Plan to specify: if the change to the Plan results in a change to the reliability of water allocations in a particular water resource area⁷; the nature of that change; and that Subdivision B applies to that change.⁸ That is, Subdivision B does not provide for the Plan to include a general, non-specific clause about whether or not anything in the Plan triggers Subdivision B.
12. To summarise, it is only after the Plan has been amended and this amendment results in a change in the reliability of water allocations (due to something other than altered SDLs) that it would be necessary to include a clause in the Basin Plan outlining the specific nature of those changes, and that Subdivision B is applicable. This effectively means that the starting point for reliability is the original Plan, with any subsequent change in reliability potentially triggering Subdivision B.
13. The Plan has only been amended on one occasion (in late 2016)⁹. This amendment was minor in nature and did not have any impact on reliability of allocations. As such, Subdivision B has not been triggered.
14. As Subdivision B has not been triggered, cl. 6.14 can only relate to future, possible amendments to the Plan that will result in changes in the reliability of allocations (and

¹ Water Act, s. 83(1).

² Water Act, ss. 81(1)(a). This is clearly expressed as a ‘change to the Basin Plan’. A necessary pre-condition for causing a change to something is that the existence of that something in the first place. This is reinforced by s. 83(1)(d).

³ Water Act, s. (1)(a).

⁴ Water Act, s. 81(1)(b).

⁵ Water Act, Subdivision A of Division 4 of Part 2.

⁶ Water Act, s.83.

⁷ We note that ss. 81(1) and (2) are to be read together. As s. 81(1)(a) refers to a change to the if ‘action were not to be taken under the Subdivision...’

⁸ Water Act, s. 81(2).

⁹ *Water Legislation Amendment (Sustainable Diversion Limit Adjustment) Act 2016*
<https://www.legislation.gov.au/Details/C2016A00072>

that are not caused by reducing SDLs). As such, '[n]othing in the Basin Plan requires a change in reliability of water allocations of a kind that would trigger Subdivision B...' can only be interpreted to mean that 'nothing in the Basin Plan requires a future amendment to the Basin Plan that would trigger Subdivision B'. This is on the face of it nonsensical, unless considered in conjunction with s. 84, which forms part of Subdivision B.

15. Section 84 provides that:

Applying Subdivision when transitional or interim water resource plan ends

- 1) *This section applies if a transitional water resource plan, or an interim water resource plan, for a water resource plan area is in effect when the Basin Plan first takes effect.*
- 2) *This Subdivision applies as if the provisions of the transitional water resource plan, or the interim water resource plan, had been provisions of the Basin Plan.*

14. By way of background, a transitional water resource plan (**TWR Plan**) or an interim water resource plan (**IWR Plan**) is a water sharing plan that was in existence immediately before the Basin Plan became law in November 2012.¹⁰

15. The effect of s. 84 is essentially twofold. First, it makes TWR Plans and IWR Plans a part of the Basin Plan for the purposes of Subdivision B. Second and by way of corollary, any changes to a TWR Plan or an IWR Plan constitute a change to the Basin Plan which could in turn potentially trigger Subdivision B.

16. Accordingly, when considered in conjunction with s. 84, cl. 6.14 may be interpreted to mean that 'nothing in the Basin Plan requires a future amendment to an IWR Plan or TWR Plan that would trigger Subdivision B'. In other words, nothing in the Basin Plan requires an IWR Plan or a TWR Plan to be changed (for the purposes of accreditation under the Water Act in 2019, for example)¹¹ in such a way that would reduce the reliability of water allocations as contemplated by Subdivision B.

17. Three issues must be considered at this juncture. First, it is necessary to understand what it meant by the terms 'reliability' and 'water allocations'. Second, does cl. 6.14 override any provision with which it is inconsistent? Third, does cl. 6.14 override any provision in the Basin Plan that would change reliability of access or use of water? These issues will be dealt with in turn in the following sections of this advice.

Meaning of certain terms

18. To reiterate, Subdivision B concerns changes in the reliability of water allocations. It is therefore important to understand what is meant by these terms.

19. We note in the first instance that the term 'reliability' is not defined in either the Water Act or Basin Plan. In order to ascertain the meaning of this term, the court would therefore be required to:¹² consider the 'ordinary meaning' of the word;¹³ have recourse to extrinsic

¹⁰ Water Act, Part 11.

¹¹ That is, accreditation of water resource plan under Subdivision D of Division 2 of Part 2 of the Water Act.

¹² This is not an exhaustive list of the tools of statutory interpretation that could be applied in these circumstances.

materials;¹⁴ consider the word within the context of the purpose and scope of the Water Act and the Basin Plan;¹⁵ and to ensure that any definition is not, given the purpose and scope of the Act, unreasonable (in the legal sense of the word).¹⁶ This is a legally complex task, and one which would be best addressed in a separate advice in relation to a specific allegation that cl 6.14 has in fact been used to justify a failure to implement another clause in the Basin Plan. We would be happy to provide such an advice or if necessary, brief counsel, at that point in time.¹⁷

20. It is now necessary to consider the term 'water allocations'. Helpfully, the Water Act includes the following definition: 'the specific volume of water allocated to water access entitlements in a given water accounting period.'¹⁸
21. In order to understand the significance of this definition within the context of Subdivision B, we must examine the difference between 'water allocation' and 'water access/use'. The starting point for any such inquiry is the fact that water can be allocated to an entitlement without being *accessed* or *used* by the entitlement holder. Indeed, the holder may choose to sell the allocation to another user, or if the law permits, carry it over for use or trade in the next water accounting year. In other words, there is no legal obligation to use water once it is allocated and recorded in the holder's water account. This makes it abundantly clear that there is a distinction between a water allocation - which is virtual volume of water attributed to an entitlement in an accounting year - and access and use of the actual water that is authorised by the allocation.
22. Further to this point, allocation and access/use are subject to different regulatory processes. In NSW, for example, water is allocated to the 'share component' of an entitlement in accordance with the annual water determination (**AWD**) for the relevant water resource and class of licence.¹⁹ The AWD is published by the NSW Government and is determined by a range of factors, including the security level of the entitlement, the water available in storage and river flows.²⁰ This volume may in certain circumstances be increased by way of a 'water allocation statement'.²¹
23. Access and use, on the other hand, are primarily governed by the conditions attached to licenses and associated works and use approvals, as well as the rules in water sharing plans. For example, the 'extraction component' of a licence will specify the rates, times circumstance and location from which water can be taken (or accessed). It is not

¹³ *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* [2007] 57.

¹⁴ *Acts Interpretation Act 1901* (Cth), s. 15AB. See also: *Newcastle City Council v GIO General Ltd* [1997] HCA 53.

¹⁵ *Ibid*, s.15AA. This section states that '[i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.' See also: *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* [2007] HCA 57; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003] HCS 59.

¹⁶ *IW v City of Perth* [1997] HCA 30.

¹⁷ Any such advice would query the legitimacy of the definition of 'reliability' that has been adopted by the MDBA in 'Position Statement IH - Potential Reliability Changes'. Available online:

<http://www.mdba.gov.au/sites/default/files/pubs/WRP-Position-Statement-1H-Changing-reliability.pdf>

¹⁸ Water Act, s. 4.

¹⁹ *Water Management Act 2000* (NSW), s. 59.

²⁰ <http://www.water.nsw.gov.au/water-management/water-availability>

²¹ <http://www.water.nsw.gov.au/water-management/water-availability/water-allocation-statements>

uncommon for this component to be set out in the works approval²² for the relevant pump. Similarly, the activities for which the water may be used may be specified in the use approval.²³ For example, a use approval may state that water taken from the specified pump may only be used to irrigate a particular Lot/ DP. Finally, the relevant water sharing plan will set out the flow rates (for surface water) which determine when pumping can commence and must cease.

24. Given the clear practical and regulatory differences between allocations and access/use - and regardless of the definition of reliability which we settle on - Subdivision B could only be *potentially* triggered²⁴ if there is a change in the Basin Plan which in turn causes a change in the reliability of the virtual volume that is attributed to the entitlement holder's water account. That is, any change to the Basin Plan that in turn has an impact on the frequency with which an entitlement holder can access or use their allocation would not trigger Subdivision B - as long as the reliability of the allocation itself is maintained. By way of concrete example, changing an IWR Plan or a TWR Plan so that the accredited version includes a cease-to-pump rule to protect environmental water would not trigger Subdivision B. This is because such a rule concerns the access to, rather than the allocation of, water.

Does clause 6.14 override any inconsistent provisions in the Basin Plan?

25. Before examining this issue in detail, it is important to note that cl. 6.14 does not prohibit a change to the Basin Plan (including a change to an IWR Plan or a TWR Plan) that would trigger Subdivision B. Rather, it merely states that nothing in the Basin Plan *requires* such a change. However, it is plausible that another provision could - despite the wording of cl. 6.14 - trigger Subdivision B. This being the case, it is necessary to examine whether cl. 6.14 would override any such provision or provisions. In examining this issue, it is important to reiterate that a change in the Basin Plan (including an IWR Plan or TWR Plan) that has an impact on access or use of water only would not trigger Subdivision B.
26. Statutory interpretation must start with the language of the provision or provisions in question.²⁵ In this instance, cl. 6.14 does not explicitly state that it overrides any other, conflicting provision in the Basin Plan.
27. The High Court addressed the issue of inconsistency of provisions within a single Act or legislative instrument in the landmark case of *Project Blue Sky v Australian Broadcasting Authority*.²⁶ Relevantly, the Court held as follows:

Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory

²² This may be a combined 'works and use' approval, in which case the approval also includes certain conditions regarding use (for example, the water may only be used to irrigate a particular lot/dp. A works and use approval may be issued under s. 90 of the *Water Management Act 2000* (NSW).

²³ Issued under s. 89 of the *Water Management Act 2000* (NSW).

²⁴ Assuming all of the conditions set out in s. 83 of the Water Act are met. The Minister is 'satisfied' that all of these conditions have been met, the Minister 'must' determine that a payment is to be made to the entitlement holder.

²⁵ *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* [2007] 57; *Foots v Southern Cross Mine Management Pty Ltd* [2007] HSC 56.

²⁶ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other."²⁷

28. It is clear that in the absence of specific language indicating that one provision overrides another, the court will attempt to 'read down' the competing provisions in order to preserve the overall integrity of the legislation in question. As previously indicated, preservation of the overall integrity of the legislation requires consideration of the scope and purpose of the Act in question.²⁸ This could result in one clause being classified as the 'leading provision', or it may result in the court seeking to reconcile the two conflicting provisions in some other way.
29. As reading down can be a legally complex exercise, we can provide further advice regarding the likely outcome of such an exercise, or if necessary brief counsel in relation to this issue. In the meantime, we can confidently advise that there is no legal basis to the assumption that cl. 6.14 automatically overrides any other provision in the Basin Plan that triggers Subdivision B. This includes any provision in the Plan that may require - in order to be given full effect - the inclusion of a new rule or rules in (or the removal of existing rules from) an IWR Plan or a TWR Plan for the purposes of accreditation under the Water Act.

Can cl. 6.14 be used to 'switch' off clauses or chapters in the Basin Plan that may require a change to a IWR Plans or TWR Plans) that impacts on access or use of water (but not the reliability of allocations)?

30. The simple answer to this question is 'no'. This is because cl. 6.14 (and Subdivision B) do not, as outlined above, concern access to or use of water. As a consequence, where a provision or provisions in the Basin Plan require (either mandatorily or discretionarily) water access or use rules in IWR Plans or TWR Plans to be changed before they are accredited, cl. 6.14 cannot be used to override of 'switch-off' these provisions. Any attempt to do so would be entirely unlawful.

Please do not hesitate to contact us to discuss this advice or any matters arising from this advice

Yours sincerely,
EDO NSW

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²⁷ Ibid at 69. Citing *The Commonwealth v Baume* (1905) 2 CLR 405 at 414, per Griffith CJ; at 419, per O'Connor J; *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 12-13, per Mason CJ.

²⁸ *Acts Interpretation Act 1901* (Cth), s. 15AA. See also: *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003] HCS 59; *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* [2007] HCA 57.