

# GETTING THE BALANCE RIGHT: WHY THE MURRAY DARLING BASIN PLAN CAN IMPLEMENT THE ‘TRIPLE BOTTOM LINE’ APPROACH

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## I INTRODUCTION

Australia is the second most arid continent on Earth after Antarctica.<sup>1</sup> Therefore the management of our valuable water resources should be one of our main priorities. Australia’s dependence on water is profound and this is highlighted by the needs of two important stakeholders who rely on this valuable asset, being the agricultural industry and the environment.

Water within the Murray-Darling Basin is essential to the agricultural industry. The Murray Darling Basin is responsible for 40 percent of the nation’s gross value of agricultural production and is home to 75 percent of Australia’s irrigated agriculture.<sup>2</sup> However this industry is under increasing pressure to produce more food as a consequence of population growth both nationally and internationally. It is estimated that each Australian farmer currently feeds 600 people, 150 within Australia and 450 overseas.<sup>3</sup> However the UN Food and Agricultural Organisation has estimated that food production must increase by 70 percent in order to feed the world’s population in 2050.<sup>4</sup> There is a significant reliance on irrigation farmers, who are responsible for the widest variety of, and highest yielding, agricultural production.<sup>5</sup>

Water within the Murray-Darling Basin is obviously also essential to ensuring the sustainability of the local environment. Australia’s isolation from other continents

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<sup>1</sup> Power, Matthew, ‘Peak Water: Aquifers and Rivers Are Running Dry. How Three Regions Are Coping’ (2008) 16(5) *Wired Magazine* 7.

<sup>2</sup> ABS, ‘Socio-Economic Context for the Murray–Darling Basin’ (Descriptive Report MDBA Technical Report Series: Basin Plan: BP02, September 2009), 50

<sup>3</sup> Mick Keough, ‘Australia’s Response to World Food Security Concerns’ (Speech Delivered at the National Farmers Federation Annual Conference, Brisbane, 2009).

<sup>4</sup> United Nations Food and Agricultural Organisation, *How To Feed The World In 2050*, (2011) 2.

<sup>5</sup> *Ibid*, 52, 59.

means it is residence to countless unique and varied ecosystems,<sup>6</sup> many located within the basin. Hence it is vital water is supplied to meet the needs of these ecosystems.

The Federal government has endeavoured to regulate water use in the Murray-Darling Basin through the *Water Act 2007* (Cth). This Act made provisions for the establishment of the Murray-Darling Basin Authority (MBDA), responsible for creating a plan to regulate the Basin's water resources. The Act also necessitated the establishment, by the MDBA, of Sustainable Diversion Limits (SDLs), which determine the quantity of water that can be extracted from the river systems for human consumption, including agriculture.

The Guide to the plan was released in October 2010.<sup>7</sup> It prioritised the needs of the environment over the social and economic needs of the basin.<sup>8</sup> It was argued that this approach was necessary as the Act sourced its power from the external affairs power granted to the Commonwealth under section 51 (xxix) of the Constitution, and relied upon a number of environmental treaties.<sup>9</sup>

However this article will argue that a 'triple bottom line' approach, where environmental, social and economical factors can be prioritised equally, can be implemented under the current legislative framework. This argument focuses on the extent to which the MDBA is obliged to implement the requirements of the treaties, and what the treaties themselves actually necessitate.

It will also be argued that the SDLs implemented under the Act are both impractical and unnecessary and should either be altered with amendments to the Act, or the relevant sections of the Act should be revoked and alternative strategies, better suited to achieving the goals of the triple bottom line approach should be implemented.

## II WATER REFORM IN THE MURRAY-DARLING BASIN

The *Water Act 2007* (Cth) was passed by Federal Parliament on 3 September 2007. Its title reads: '[this] is an Act to make provision for the management of the water resources of the Murray-Darling Basin (MDB)'.<sup>10</sup> Its implementation signalled a new era for water politics in Australia.<sup>11</sup> Until its enactment, the sole power to regulate water in the MDB had been granted to the States. As water is a very important and necessary common resource of the five states and territories of the MDB, being Queensland, New South Wales, Australian Capital Territory, Victoria and South

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<sup>6</sup> Daniel Connell, *Water Politics In The Murray-Darling Basin* (Federation Press, 2007) 8

<sup>7</sup> Murray Murray-Darling Basin Authority, 'Guide to The Proposed Basin Plan: Overview' (Murray-Darling Basin Authority, 2010)

<sup>8</sup> Kildea, Paul And Williams, George, 'The Water Act And The Murray Darling Basin Plan' (2011) 22 Plr 9

<sup>9</sup> Ibid

<sup>10</sup> *Water Act 2007* (Cth), Title.

<sup>11</sup> Kelly, N, 'A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use' (2007) 30(3) *UNSW Law Journal* 639.

Australia, these states and the ACT had coordinated the use of the Basin's water through a number of inter-governmental agreements.<sup>12</sup>

The MDB produces the major share of Australia's agricultural produce,<sup>13</sup> and there are many industries and communities which rely upon this. At the time of the 2006 Census, 3.4 million people, or 17 percent of the Australian population, lived in communities directly reliant on the Basin's water. Further, agriculture was the third largest direct employer in the region, accounting for the employment of 11 percent of this population. It was third to retail and public administration (mainly in Canberra) sectors<sup>14</sup>. The Basin is also home to many significant and unique environmental ecosystems.<sup>15</sup>

Considering the impacts of the worst drought in Australia's recorded history, from late 2001 to 2010,<sup>16</sup> the Commonwealth sought to harmonise the regulation of water within the basin to balance the needs of the environment and communities in the region.

The move towards a holistic approach to managing the MDB began in 1994 when the Council of Australian Governments (COAG) agreed to a Water Reform Framework Agreement which sought to 'implement a strategic framework to achieve an efficient and sustainable water industry.'<sup>17</sup>

However the ability of the Government to achieve this holistic management approach was limited by the *Constitution*. The Commonwealth only has the ability to regulate in accordance with powers granted under section 51 of the *Constitution*. In this section there is no reference to a power to regulate water resources. Therefore the management of water resources is exclusively a power of the states, and the Commonwealth would need either a reference of this power from the MDB states or a referendum changing the Constitution to be granted this power.<sup>18</sup>

In early 2007, the Howard government announced a National Plan for Water Security.<sup>19</sup> This 10 year plan endeavoured to achieve the goal of Federal regulation of the MDB.<sup>20</sup> It included provisions for the investment of \$10 billion of Federal funds into water management strategies in the MDB.<sup>21</sup> The Howard Government had anticipated achieving the power to implement this plan through negotiating a referral

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<sup>12</sup> Ibid

<sup>13</sup> ABS, above n 2, 50.

<sup>14</sup> Ibid, 42, 52.

<sup>15</sup> Connell, above n 6, 8

<sup>16</sup> Wahlquist, Asa, 'Longest, hottest drought on record, says Bureau of Meteorology', *The Australian* (online), 11 October 2008 <<http://www.theaustralian.com.au/news/health-science/longest-hottest-drought-on-record/story-e6frg8gf-111117721981>>.

<sup>17</sup> COAG, *Communique*, Attachment A, Hobart, 25 February 1994

<sup>18</sup> Tony Abbott, 'Address to the Sydney Institute' (Speech delivered at the Sydney Institute, Sydney, 14 January 2010).

<sup>19</sup> Parliament of Australia, *A National Plan for Water Security* (2007), <[http://www.nalwt.gov.au/files/national\\_plan\\_for\\_water\\_security.pdf](http://www.nalwt.gov.au/files/national_plan_for_water_security.pdf)>

<sup>20</sup> Kildea and Williams, above n 8.

<sup>21</sup> Ibid, 2.

of legislative power from the four basin states. However Victoria refused to grant this referral. Premier Steve Bracks sought a greater share of the federal investment, and argued the plan favoured states with poor infrastructure and water efficiency.<sup>22, 23</sup>

Following this failure of negotiations, the Commonwealth sought another avenue for implementing its plan. In August 2007 the *Water Bill 2007* (Cth) was tabled and passed through Parliament. According to section 9, the Bill relied upon several constitutional powers to regulate the MDB water resources. These constitutional powers are as follows: Interstate trade and commerce, corporations, external affairs, and territories powers, along with powers relating to meteorological observations, statistics and weights and measures.<sup>24</sup>

### III THE WATER ACT AND THE MURRAY-DARLING BASIN PLAN

The key components of the *Water Act 2007* (Cth), for the purpose of this essay, are the sections regarding the establishment of a Murray-Darling Basin Authority (MDBA). This body has the responsibility for creating a Murray-Darling Basin Plan. The power to enact these relevant sections stemmed from the external affairs power.<sup>25</sup> The external affairs power has been interpreted by the High Court to give the Commonwealth Parliament power to implement treaty obligations as law for the whole of Australia. The fact that the Commonwealth can use treaties as a means of overriding State legislation and policy has been made clear by the High Court in several cases,<sup>26</sup> the most famous example being the *Franklin River Dam Case*.<sup>27</sup> The *Water Act 2007* relied on a number of 'relevant international treaties' described in section 4(1) to include the Ramsar Convention on Wetlands and the Convention on Biological Diversity.

Considering this, the purposes of the Basin Plan relevant to this essay, described in section 20 are,<sup>28</sup> amongst other things, to provide for:

- (a) giving effect to the relevant international agreements,
- (b) the establishment and enforcement of environmentally sustainable quantities of ... water that may be taken from the Basin water resources,...
- (d) The use and management of the Basin Water resources in a way that optimises economic, social and environmental outcomes.

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<sup>22</sup> P Ker and M Grattan, 'Bracks Isolated as Premiers Sign Up for Water Deal', *The Age* (Sydney), 24 February 2007, 4.

<sup>23</sup> In July 2008, the basin states signed an Intergovernmental agreement providing for a referral of constitutional powers. The purpose of the referral was limited to transferring powers of MDB Commission to MDBA, granting ACCC increased powers to regulate Irrigation Infrastructure Operators and enabling the Basin Plan to provide for critical human water needs.

<sup>24</sup> Australian Constitution s51(i), 51(xx), 51(xxix), 122, 51(viii), 51(xi) and 51(xv)

<sup>25</sup> Kildea and Williams, above n 8.

<sup>26</sup> *Koowatta v Bjelke-Petersen* (1982) 153 CLR 168; *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992. (1994).

<sup>27</sup> *Commonwealth of Australia v Tasmania* (1983) 158 CLR, 541 per Deane J

<sup>28</sup> *Water Act 2007* (Cth)

With these objectives in mind, the appointed MDBA released a guide to the proposed Murray-Darling Basin Plan (Guide) in October 2010. The guide was subject to much criticism and a fiery public debate.<sup>29</sup> Central to the debate were the proposed SDLs.

The SDLs proposed under section 20(b)<sup>30</sup> are described as the quantity of water which can be extracted for consumption<sup>31</sup> after environmental requirements have been met. These SDLs must reflect an 'environmentally sustainable level of take.'<sup>32</sup> According to section 23(2)<sup>33</sup> these limits may be expressed as a formula or in any other way that the MDBA determines to be appropriate. Furthermore the limits are determined according to, and may vary between, each catchment area.<sup>34</sup>

#### IV CONTROVERSY SURROUNDING THE MURRAY-DARLING BASIN PLAN

The Guide recommended that to meet environmental objectives, current diversion limits<sup>35</sup> would need to be reduced by between 3,000 and 7,600 gigalitres annually.<sup>36</sup> This equated to reductions of 27 percent to 37 percent to the water allocations of irrigation farmers under their irrigation licenses.<sup>37</sup> Further the guide noted that this increase in SDLs would 'have significant negative implications on some Basin communities, industries, enterprises and individuals' and that these effects would vary in each catchment and community, 'depending on a complex array of factors'.<sup>38</sup>

The criticisms centred on the fact that the plan prioritised the outcomes of the environment, rather than applying a 'triple bottom line' approach where environmental, social and economic outcomes were balanced.<sup>39</sup> This was a significant issue as the proposed percentage cuts to water allocations would have major flow-on

<sup>29</sup> See for example Anne Delaney, 'Massive water meeting for Griffith', *ABC Riverina* (online), 15 October 2010 <<http://www.abc.net.au/local/stories/2010/10/15/3039023.htm>>.

<sup>30</sup> *Water Act 2007* (Cth)

<sup>31</sup> Consumption includes use of water for watercourse diversions, floodplain harvesting and for water taken by farm dams and for forestry: Murray-Darling Basin Authority, 'FAQs: Sustainable Diversion Limits', (24 February 2011)

<[http://www.mdba.gov.au/basin\\_plan/faqs/sdl#What\\_sustainable\\_diversion\\_limit\\_accessed](http://www.mdba.gov.au/basin_plan/faqs/sdl#What_sustainable_diversion_limit_accessed)>; *Water Act 2007* (Cth) s23.

<sup>32</sup> *Water Act 2007* (Cth) s23(1).

<sup>33</sup> *Water Act 2007* (Cth)

<sup>34</sup> Murray-Darling Basin Authority, 'Basin Plan Guide released for public discussion', (Media Release, 8 October 2010) <<http://www.mdba.gov.au/files/Media-release-Basin-Plan-Guide.pdf>>

<sup>35</sup> There is currently a limit, called 'the Cap', on the amount of surface water that can be taken for consumptive use in the Basin. The current Cap on surface-water diversions is set at a level based on historic use, and varies dependent on the different irrigation areas within the basin; Murray-Darling Basin Authority, *Key elements of the Basin Plan* (2008) <[http://www.mdba.gov.au/basin\\_plan/concept-statement/key-elements](http://www.mdba.gov.au/basin_plan/concept-statement/key-elements)>.

<sup>36</sup> Murray-Darling Basin Authority, *Above n 7*, 57.

<sup>37</sup> *Ibid* 110.

<sup>38</sup> *Ibid* 81.

<sup>39</sup> Senate, Parliament of Australia, *A Balancing Act: provisions of the Water Act 2007*, (2011).

effects for agriculture, including the livelihoods of the people and the survival of the communities reliant on irrigation, as well as the more general effects nationally and internationally, regarding food availability, increased food prices and the global food shortage crisis.<sup>40</sup>

The approach of prioritising environmental outcomes was confirmed by the then Chair of the MDBA, Mr Mike Taylor, who stated the Water Act was ‘focused on returning water to the environment.’<sup>41</sup> The argument for this approach is found in section 3 of the Act, which describes the relevant objects of the Act as:

- (b) to give effect to relevant international agreements ... and  
 (c) in giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes.

It is argued that subsection (c) implies that economic and social outcomes can only be taken into account after the requirements of the relevant treaties have been implemented.<sup>42</sup> As the Act has sourced its power from several environmental treaties this means that the economic and social considerations are secondary to the environmental requirements within those treaties.<sup>43</sup> However several weaknesses in this reasoning have been identified below.

## V GETTING THE BALANCE RIGHT: WHY THE ‘TRIPLE BOTTOM LINE’ APPROACH CAN BE IMPLEMENTED

While it is acknowledged that an ‘objective of the Act and the Plan is to give effect to relevant international agreements,’<sup>44</sup> the first criticism centres on the extent that the external affairs power necessitates the Commonwealth to implement the requirements of the treaties. According to the case of *Victoria v Commonwealth*,<sup>45</sup> it is clear that legislation based upon the external affairs power must be ‘reasonably capable of being considered appropriate and adapted to implementing the treaty.’<sup>46</sup> If not it bears the risk of being struck down by the court on the grounds that it is unconstitutional.<sup>47</sup> However in this case, the High Court further clarified this by stating that:

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<sup>40</sup> House of Representatives Standing Committee on Regional Australia, Parliament of Australia, *Inquiry into the impact of the Guide to the Murray-Darling Basin Plan: Of drought and flooding rains*, (2011).

<sup>41</sup> ‘Murray-Darling Water Meeting in Deniliquin Overflows with Farmers’, *ABC* (online), 13 October 2010 <<http://www.abc.net.au/pm/content/2010/s3037494.htm>>.

<sup>42</sup> Kildea and Williams, above n 8.

<sup>43</sup> *Ibid.*

<sup>44</sup> Robert Orr QC, Chief General Counsel, and Ms Helen Neville, Senior General Counsel, ‘The role of Social and economic factors in the basin plan’, (Advice, Australian Government Solicitors, 25 October 2010) Para 9.

<sup>45</sup> *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

<sup>46</sup> *Ibid.*, at 34 per Brennan CJ, Toohey, Gaudron, McHugh AND Gummow JJ.

<sup>47</sup> *Ibid.*

- The law under the external affairs power which implements the treaty need not implement the whole treaty; and
- The Commonwealth has a great deal of scope in deciding exactly how it will implement treaty obligations.<sup>48</sup>

This was further explained in the case of *Project Blue Sky Inc v Australian Broadcasting Authority*<sup>49</sup> which stated 'Often [treaties] provisions are more aptly described as goals to be achieved, rather than rules to be obeyed'. This is relevant to the *Water Act* which sources its power from a number of identified treaties, as well as 'any other international convention that is...relevant to the use and management of Basin water resources.'<sup>50</sup> Hence considering the sources of power for the Act have not all been identified, and the Act may be subject to treaties which have not yet been ratified, it would be more appropriate to describe the provisions of the identified treaties as goals providing direction to the MDBA, rather than strict rules that must be obeyed.

Considering these decisions, two conclusions can be reached. Firstly the *Water Act* does not oblige the MDBA to implement the provisions of the relevant treaties that require the environment to take precedence over economic and social outcomes, and secondly the MDBA, through delegation of executive power within the Act, is given a great deal of discretion in deciding what provisions of the treaty they may implement, and how they may implement these chosen provisions.

The discretion to decide how the treaty's provisions will be implemented is conferred by section 18E(1), which grants the MDBA the functions, powers and duties that (b) relate to water and other natural resources in the Murray-Darling basin. It is a very broad provision, which allows the authority to make any relevant decision as long as the requirements of the Act are complied with.<sup>51</sup> However the acts requirements are very unspecific, the objectives of the act in Section 3<sup>52</sup> simply states that the relevant treaties, economic, social and environmental outcomes should be taken into account in giving effect to the agreements. As the treaties, simply provide direction to the authority, there is no requirement on the MDBA to not accept a triple bottom line approach.

However if it is established otherwise, and held that all requirements of the identified treaties must be implemented, a careful analysis of the treaties is necessary to discern what the specific requirements of the treaties are. It has been suggested that 'the terms of the key treaties provide an indirect avenue for the Commonwealth to take into account social and economic factors'.<sup>53</sup> In particular, 'both the Convention on Biological Diversity and the Ramsar Convention on wetlands appear to frame their

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<sup>48</sup> Ibid.

<sup>49</sup> (1998) 194 CLR 355

<sup>50</sup> *Water Act 2007* (Cth) s4

<sup>51</sup> *Water Act 2007* (Cth) s 18E(2).

<sup>52</sup> Ibid.

<sup>53</sup> Gilbert and Tobin Centre of Public Law, Submission No 15 to Senate Legal and Constitutional Affairs Reference Committee, *A Balancing Act: provisions of the Water Act 2007*, 10 June 2011, 3.

environmental obligations in ways which permit consideration of social and economic factors'.<sup>54</sup>

For example, the Convention on Biological Diversity requires signatories to 'as far as possible and appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity'.<sup>55</sup> Therefore when this treaty is implemented in Federal legislation, it specifically requires that the relevant legislation take into account economic and social factors, so far as is possible and appropriate.

Also the current text of the Ramsar convention states 'The inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated.' Hence this treaty provides that the ratification and implementation of the treaty does not affect the nation's ability to legislate in its best interests.<sup>56</sup>

This position was confirmed by the advice released by the Australian Government Solicitors (AGS) following the release of the Guide. This advice stated that both conventions 'establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allow consideration of social and economic factors'.<sup>57</sup> Therefore, if this is correct, then the MDBA is still under no obligation to favour environmental outcomes at the expense of social and economic outcomes. Rather this obligation should be framed as follows: the environment should be protected to such an extent that is possible considering economic and social outcomes.

The advice stated that the Act does allow the MBDA to consider the triple-bottom-line approach:

The *Water Act* makes clear that in giving effect to those agreements the Plan needs to optimise economic, social and environmental outcomes. Therefore, where a discretionary choice must be made between a number of options the decision-maker should, having considered the economic, social and environmental impacts choose the option which optimises these outcomes.<sup>58</sup>

The currently proposed SDL's will drastically cut the amount of water irrigators available to irrigators and will create major losses both socially and economically for many people living in the MDB.<sup>59</sup> Hence they can be considered unnecessary to achieving the outcomes desired by the treaties and the *Water Act*. They are unnecessary as there are a number of other more suitable strategies based on water

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<sup>54</sup> Ibid.

<sup>55</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992 (entered into force 29 December 1993), Article 11.

<sup>56</sup> *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Ramsar, opened for signature 2 February 1971, (entered into force 8 May 1974), Article 2(3).

<sup>57</sup> Australian Government Solicitors, above n 44, [23].

<sup>58</sup> Australian Government Solicitors, above n 44, [4].

<sup>59</sup> Kildea and Williams, above n 8.



saving initiatives, that have been recommended by the 'Windsor Committee' report,<sup>60</sup> that could be implemented alternatively. These strategies are more suitable as they will optimise all three outcomes. These strategies form part of the 21 recommendations made by the committee regarding the Guide, and include establishing a national water fund to invest in water saving projects, environmental works and measures, strategic purchase of water entitlements and research to improve irrigation efficiency.<sup>61</sup> This report opposed the view that the Act required environmental outcomes to take precedence, and rather supported the view that a triple bottom line approach could be implemented under the current legislative framework.

These, and the other various alternative strategies recommended in the report, would lead to increases in water-use efficiency within the irrigation sector.<sup>62</sup> This would allow farmers to sustain their current levels of production, and therefore their livelihoods and communities and the industries reliant upon them.<sup>63</sup> Also these strategies allow for water surplus's gained through more efficient water use to be returned to the environment, increasing the amount of water available to the environment simultaneously. For example the report stated that 'Whereas the buyback program [and SDLs] are seen to be removing productive water from regions, government investment in infrastructure [alone] provides 50 percent of the water savings to the environment without reducing agricultural productivity'.<sup>64</sup> These strategies have much more potential for successfully achieving a 'triple bottom line' approach.

Not only are the currently proposed SDLs unnecessary, their calculation is also very impractical. According to the Act, the MDBA is given the power to express the SDLs as a formula or in any way that the MDBA determines appropriate<sup>65</sup>. As mentioned earlier, the SDLs are proposed as a numerical figure, currently 3000 gigalitres. This is inflexible considering climatic fluctuations.

A formula that takes into account the effects of drought and years of above average rainfall is more appropriate.<sup>66</sup> To ensure this is achieved, it is recommended that the definition in section 4<sup>67</sup> for the 'environmentally sustainable level of take' should be amended to include the object of optimising economic, social and environmental

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<sup>60</sup> On Thursday 28 October 2010 the Minister for Regional Australia, Regional Development and Local Government, The Hon Simon Crean MP, asked the Committee to inquire into and report on *the impact of the Murray-Darling Basin Plan in Regional Australia*. The Committee invites interested persons and organisations to make submissions. On Thursday 2 June 2011, the Committee tabled its report on the inquiry entitled *Of drought and flooding rains*.

<sup>61</sup> House of Representatives Standing Committee on Regional Australia, above n 40, ch 5.

<sup>62</sup> *Ibid*, [5.79].

<sup>63</sup> *Ibid*, ch 5.

<sup>64</sup> *Ibid*, 120.

<sup>65</sup> *Water Act 2007* (Cth) s 23(2)

<sup>66</sup> House of Representatives Standing Committee on Regional Australia, above n 40.

<sup>67</sup> *Water Act 2007* (Cth).

outcomes equally, as a factor to be taken into account.<sup>68</sup> This would simply ensure that the triple bottom line approach is utilised when formulating the SDL's.

On the other hand, considering the unnecessary nature of the SDLs and their impracticality, it has been suggested that the legislation requiring them and other strategies of a similar be revoked.<sup>69</sup> Alternatively, the more relevant strategies proposed by the 'Windsor Committee' that seek to sustain and protect the environment, while providing for economic and social needs, should be incorporated into the Act instead.<sup>70</sup>

## VI CONCLUSION

This article has demonstrated that the Commonwealth government does have the ability to implement a 'triple bottom line', where environmental, social and economic needs are all given equal weight, when regulating water use in the MDB under the *Water Act 2007* (Cth). This is due to a number of High Court decisions which have established that the government is given a wide discretion when implementing treaties. Further this approach is justified by the various requirements within the applicable treaties.

It has also been shown that the requirement for SDLs within the Act is both impractical and unnecessary, and would be better substituted with the strategies recommended by the 'Windsor Committee' report which are more apt to achieving the 'triple bottom line' approach.

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<sup>68</sup> Commonwealth, Productivity Commission, *Market Mechanisms for Recovering Water in the Murray-Darling Basin Research Report* (2010) 114.

<sup>69</sup> National Irrigators Council, Submission No 19 to Senate Legal and Constitutional Affairs Reference Committee, *A Balancing Act: provisions of the Water Act 2007*, 10 June 2011; Cotton Australia, Submission No 43 to Senate Legal and Constitutional Affairs Reference Committee, *A Balancing Act: provisions of the Water Act 2007*, 10 June 2011, 3.

<sup>70</sup> House of Representatives Standing Committee on Regional Australia, Parliament of Australia, *Regional Committee release report on impacts of the Guide to the proposed Murray-Darling Basin Plan*, (2011).