Managing our scarce water resources: recent developments in the Murray-Darling Basin

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Snapshot

- Water law and policy in the Murray-Darling Basin has dominated Australia's news headlines over the past 18 months.
- It has been a tumultuous period with a number of inquiries into water management ordered and undertaken at both levels of government; court cases were commenced in the New South Wales Land and Environment Court (including civil enforcement proceedings being run by EDO NSW); and legislative amendments were passed – with more to come in 2019.

Water law and policy in the Murray-Darling Basin ('**MDB**') has dominated headlines over the last 16 months or so. The genesis of this renewed interest in our scarce water resources was the much-discussed Four Corners episode 'Pumped', which aired on 24 July 2017. As is now widely known, the episode included allegations of non-compliance by certain water users on the Barwon-Darling River and maladministration of water laws by relevant agencies. It also discussed the government's ongoing failure to address the lawful pumping of environmental water purchased by the Commonwealth with public money (noting that this water was purchased to restore the health of the MDB consistently with specific statutory obligations set out in the *Water Act 2007* (Cth) and Basin Plan).

In the tumultuous period that followed, a number of inquiries into water management were ordered and undertaken at both levels of government; court cases were commenced in the New South Wales Land and Environment Court (including civil enforcement proceedings being run by EDO NSW); and legislative amendments were passed – with more to come in 2019. This article will outline and contextualise these developments – and in so doing hopefully assist legal practitioners to increase their understanding of water governance challenges across the Basin.

Why is the MDB significant?

Water management in the MBD has been contentious since Federation, with the creation of states and territories transforming the Basin into a transboundary system subject to the sorts of 'upstream v downstream' boundary challenges seen in many other regions. Against this backdrop, the size of the MDB – one million square km – coupled with its economic, social, cultural and environmental significance, has given rise to heated debates regarding allocation of water for different uses, and what exactly constitutes 'sustainable' management of the Basin's rivers and aquifers. It is therefore unsurprising that the community – one apprised of serious allegations regarding compliance and enforcement – would demand a swift response from government.

Inquiries and reviews

In the immediate aftermath of Four Corners, a number of the allegations raised on the program (in particular those involving public officials) were referred to the Independent Commission Against Corruption. Additional matters were referred to the anti-corruption watchdog in the weeks and months that followed, with the resulting investigation still in train some 16 months later. Under the *Independent Commission Against Corruption Act 1988*, the Commission 'may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry'. At this stage, it is unclear whether the Commission will order such an inquiry and if it does, what its scope may be. However, given the apparent scale of the current investigation and the level of public interest in the subject matter, it is reasonable to assume that the Commission will exercise its discretion under the Act to produce a formal report, which must be tabled in Parliament.

Independently of the aforementioned investigation, the NSW Minister for Water responded quickly and appointed respected former Commonwealth public servant, Mr. Ken Matthews AO, to investigate the allegations raised on the program and report on the same. Briefly, Mr. Matthews produced two reports, the first of which found that: the overall standard of NSW compliance and enforcement work had been poor; arrangements for metering, monitoring and measurement of water extractions, especially in the Barwon–Darling river system, were not at the standard required for sound water management and did not meet community expectations; certain individual cases of alleged non-compliance have remained unresolved for far too long; and there was little transparency to members of the public of water regulation arrangements in NSW, including the compliance and enforcement arrangements which should underpin public confidence.

Both reports included a set of recommendations intended to address these issues, notably the creation of an independent Natural Resources Access Regulator charged with enforcing water laws in NSW, the introduction of a 'no meter, no pump' rule, significantly increased access to information (including in relation to individual water extractions) and ethics training for water bureaucrats. Some of these recommendations have been partially or fully implemented, as discussed below.

To Mr Matthews' reports we can add three reports by the NSW Ombudsman into water management in NSW, tabled in the NSW Parliament between November 2017 and August 2018. The first of these reports revealed that:

'From 2006 onwards the NSW Ombudsman's office has received complaints and public interest disclosures alleging that the water management principles and rules were not being properly complied with and enforced. We have undertaken three prior investigations into those complaints and disclosures that resulted in reports to Government and the Minister. We are now undertaking a fourth investigation, once again triggered by complaints from the public and public interest disclosures from officials working in the agencies charged with administering the legislation.'

It went on to find, *inter alia*, that there was a strong clash between customer service delivery (such as billing customers for delivery of water) on the one hand, and compliance and enforcement functions (which apply to the same 'customers') on the other. It also found that the efficacy of water agencies was undermined by a lack of resourcing and constant restructuring. Significantly, the report noted that the NSW Ombudsman's observations were essentially the same as those that emerged from the previous three investigations, and that those three reports had not been made public as the agency in question had assured the Ombudsman that all matters of concern would be addressed. This perhaps serves as a reminder of the importance of publicly disclosing all reports produced under Part 4 of the *Ombudsman Act 1979* (noting that such reports are not, by nature, anodyne as they must only be produced where there is an adverse finding of the kind specified in s 26 of the Act).

At the Commonwealth level, the 'Murray-Darling Basin Compliance Review' which included a report by the Murray-Darling Basin Authority ('**MDBA**'), as well as by an independent panel of experts appointed by the MDBA, was published in November 2017. The review, which was undertaken at the behest of the former Prime Minister and Deputy Prime Minister, found significant deficiencies with respect to compliance and enforcement in New South Wales and Queensland. Notably, it found that only 29 per cent of surface water that is taken is metered in the northern MDB and the standard and accuracy of meters in this part of the Basin is poor in many instances. The Review included a range of recommendations including, *inter alia*, the introduction of a 'no meter, no pump' rule (designed to cover 95 per cent of extractions), the use of telemetry, a requirement that meters meet Australian Standard 4747 and the need to improve compliance functions within the MDBA.

Murray-Darling Basin Royal Commission

The complexities of managing a transboundary water basin, the scientific (and therefore legal) validity of certain administrative decisions and ongoing questions regarding the proper implementation of the *Water Act 2007* and Basin Plan, have been the focus of the Murray-Darling Basin Royal Commission (established by the Governor of South Australia in January 2018). Commissioner Bret Walker SC and Counsel Assisting, Richard Beasley SC, took evidence from over 70 witnesses during a series of hearings held in Adelaide between June and October of this year.

In his final submissions, Mr. Beasley SC found:

'the *Water Act* and the Basin Plan have been hailed as ground-breaking reform. They are. What this Commission has learnt, however, from the evidence it has gathered, and from the witnesses that have informed us, is that it's one thing to enact transformative legislation like the *Water Act* and the Basin Plan, it's quite another thing to faithfully implement it. Sadly, the implementation of the Basin Plan at crucial times has been characterised by a lack of attention to the requirements of the *Water Act* and a near total lack of transparency in an important sense ...'.

Mr Beasley went on to state that the 'implementation of the Basin Plan has been marred by maladministration. By that I mean mismanagement by those in charge of the task in the Basin Authority, its executives and its board, and the consequent mismanagement of huge amounts of public funds.' Commissioner Walker will deliver his final report in February of 2019.

As an aside, it is worth noting that Commissioner Walker issued summonses compelling certain bureaucrats within the MDBA to appear before the Commission and ordering the production of specified documents. In response, the Commonwealth took the unprecedented step of seeking an injunction in the High Court to avoid complying with said summonses. Unfortunately, the South Australian Government denied Commissioner Walker's request to extend the reporting date to ensure affected witnesses would be granted procedural fairness in the event that the Commonwealth's claim was dismissed by the Court. As a consequence, the Commissioner felt obliged to withdraw the summonses. As the MDBA would not voluntarily send any witnesses, the Commission concluded its hearings without obtaining oral evidence from any current employees of that organisation.

Legislative changes

As alluded to earlier in this article, some of the recommendations by Mr. Matthews – combined with the work of EDO NSW and others – have resulted in legislative reforms occurring in NSW. Most significantly, the *Natural Resources Access Regulator Act 2017* ('***NRAR Act***') has resulted in the formation of an independent regulator of the same name charged with enforcing

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water laws in NSW. The regulator (or ***NRAR***) has commenced a number of criminal proceedings in the NSW Land and Environment Court and various local courts, as discussed below.

The *Water Management Act 2000* has also been amended to create, *inter alia*, new obligations with respect to metering (the details of which will be set out in a new regulation, likely to be tabled in Parliament shortly). While the amendments do not reflect the 'no meter, no pump' rule advocated by Mr. Matthews and others, if properly implemented they will result in considerable improvements with respect to both coverage and quality of metering, which is an excellent outcome. The NSW Government is currently working on developing a licensing framework for floodplain harvesting and creating mandatory 'reasonable use' guidelines for stock and domestic use, both of which will be rolled out in 2019. The licensing of floodplain harvesting is a particularly controversial issue, with certain stakeholders concerned about the possible volumes that may be licensed in northern Basin catchments, and how this will fit within the legal framework of the *Water Act 2007* and Basin Plan.

Court cases

Finally, a number of legal proceedings concerning alleged breaches of the *Water Management Act 2000* have been commenced in both the civil and criminal jurisdictions of the NSW Land and Environment Court, as well as various local courts. Indeed, it was arguably EDO NSW's landmark civil enforcement case – the first of its kind to be brought under the Act – that triggered renewed interest in compliance and enforcement by the NSW Government. The case, *Inland Rivers Network v Harris & Anor*, concerns two water access licences owned by a large-scale irrigator on the Barwon-Darling River (in north-western NSW). Our client, the Inland Rivers Network, alleges that the holder of these licences extracted water in contravention of specific licence conditions and other rules, thereby breaching certain offence provisions in the *Water Management Act 2000* (NSW). As overlapping criminal proceedings were commenced some months later by the former regulator, WaterNSW, the civil matter has been stayed until the criminal proceedings are concluded in February 2019.

The various proceedings being brought by the new regulator, or NRAR, concern a range of alleged offences including in relation to water theft, construction of a channel without approval, undertaking a controlled activity without approval, and providing false and misleading information to the regulator (with the last of these being successfully prosecuted in the Walgett Local Court in October). Further details about these proceedings, and other enforcement actions brought by the NRAR since its inception in April 2018, can be found on its website: www.industry.nsw.gov.au/natural-resources-access-regulator.

Conclusion

A number of developments at both the NSW and Commonwealth levels are expected in 2019. In NSW (and as noted above), floodplain harvesting is likely to be licensed in a number of northern NSW catchments, with many scrutinising how these volumes will be accounted for under the Basin Plan – and whether this process will comply with the Plan's enabling statute, namely the *Water Act 2007*. Basin States will continue to develop water resource plans (which set out water sharing arrangements for all users, including the environment) for catchments across the MDB. In NSW, water resource plans will replace water sharing plans in those parts of the state that fall within the Basin; five draft plans are currently on public exhibition and can be accessed at: https://www.industry.nsw.gov.au/water/plans-programs/water-resource-plans/drafts

While the Commonwealth Minister is currently required to accredit water resource plans by mid-2019, there is considerable support from across the board to postpone this deadline to ensure that these highly technical legislative instruments are properly developed and legally compliant. To that end, and regardless of whether Parliament agrees to amend the deadline, interested parties will carefully assess whether the accredited instruments comply with the requirements of the Basin Plan and *Water Act 2007,* and in particular whether they include rules to protect environmental water from extraction for consumptive use. In the meantime, all eyes will be on Commissioner Walker's final report for the Murray-Darling Basin Royal Commission, which is due in February 2019. **LSJ**