

## REFLECTING ON THE WATERS: PAST AND FUTURE CHALLENGES FOR THE REGULATION OF THE MURRAY-DARLING BASIN

### I INTRODUCTION

The regulation of the waters of the Murray-Darling Basin has caused tension between New South Wales, South Australia and Victoria since before Federation. It is an issue that evokes strong emotions in South Australian politicians,<sup>1</sup> sometimes leading to threats of litigation to resolve these tensions.<sup>2</sup>

Prior to Federation the river system was first used as an important transport route, providing access to inland Australia. In particular, the river was vital for the transportation of the wool clip from farms in South-Eastern Australia to the South Australian ports for export.<sup>3</sup> As the railways expanded inland, the need for the river system as a means of transport declined.<sup>4</sup> At the same time, the waters of the Basin were starting to be used for irrigation.<sup>5</sup>

As the downstream state, South Australia is at the mercy of the upstream states when it comes to the allocation of the waters of the Basin. South Australia's geographical position, coupled with uncertainty as to the legal rights it has to a share of the water from the Basin, places the State in a challenging negotiating position.

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<sup>1</sup> See, eg, 'SA MP Reined in after "F\*\*\* You All" Comments over Murray-Darling Basin Plan', *ABC News* (online, 19 November 2016) <<http://www.abc.net.au/news/2016-11-19/sa-minister-reined-in-over-expetive-laden-outburst/8039798>>.

<sup>2</sup> Premiers Weatherill, Rann, and Olsen each threatened legal action against the upstream states at one point or another: see respectively Lucille Keen, 'SA Mulls Legal Redress', *The Australian Financial Review* (Sydney, 29 May 2012) 11; Michael Owen and John Ferguson, 'Rann's Murray Warning to States', *The Australian* (Sydney, 15 June 2011) 10; Greg Kelton, 'Olsen's Warning at Interstate Plans to Divert Murray Water', *The Advertiser* (Adelaide, 10 January 2000) 5.

<sup>3</sup> Adam Webster, 'A Colonial History of the River Murray Dispute' (2017) 38(1) *Adelaide Law Review* 13, 15–16.

<sup>4</sup> *Ibid* 16–17.

<sup>5</sup> *Ibid* 18–21.

## II REFLECTING ON THE PAST

The legal uncertainty over the rights of the states to a share of the waters of the Basin was left unresolved by the *Australian Constitution*. Instead, the rights of the states have been defined by intergovernmental agreement since the signing of the River Murray Waters Agreement in 1914.<sup>6</sup>

Since 1914, the intergovernmental agreement between the Commonwealth and states on the regulation of the Basin has been revised and amended on a number of occasions. One such amendment occurred in 1981, when the then River Murray Commission was given the power to monitor water quality and conduct water quality investigations. In an article published in the *Adelaide Law Review* entitled ‘The River Murray Waters Agreement: Peace in Our Time?’, Sandford Clark examined the 1981 amendments and considered some of the broader legal uncertainty surrounding the regulation of the waters of the Basin.<sup>7</sup> The article is an important contribution to the field of water law in Australia, highlighting some of the challenges associated with regulating the waters of a river system that flows through more than one state. As an aside, in this special issue for volume 40 issue 1 of the *Review*, Clark’s contribution to the very first volume of the *Review* as an editor must also be acknowledged.<sup>8</sup>

Since the publication of Clark’s article in 1983, the regulation of the waters of the Basin has evolved further. The most significant reform over the past 30 years — prompted by the millennium drought (2001–09) — has been the passing of the *Water Act 2007* (Cth) (*‘Water Act’*) and the making of the *Basin Plan 2012* (Cth) (*‘Basin Plan’*) under the *Water Act* ss 41–44. By placing environmental considerations at the forefront and addressing the over-extraction of water from the Basin, the *Water Act* and *Basin Plan* are intended to reform how water within the Basin is shared.

While the agreement between the Commonwealth and states has evolved considerably since the publication of Clark’s article, many of the legal uncertainties that Clark identified still exist today. With that in mind, it is important to recognise the question mark in the title of Clark’s article. The author was well aware of the protracted history of the dispute over the waters of the Basin, acknowledging towards the end of the article that any goodwill displayed by the upstream states must be treated with some caution:

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<sup>6</sup> Agreement was reached on 9 September 1914 when the Prime Minister and the Premiers of New South Wales, South Australia and Victoria signed the River Murray Waters Agreement. The agreement was implemented by the Commonwealth and those States passing separate but substantially similar legislation: see *River Murray Waters Act 1915* (Cth); *River Murray Waters Act 1915* (NSW); *River Murray Waters Act 1915* (SA); *River Murray Waters Act 1915* (Vic).

<sup>7</sup> Sandford D Clark, ‘The River Murray Waters Agreement: Peace in Our Time?’ (1983) 9(1) *Adelaide Law Review* 108.

<sup>8</sup> Clark was a Case Note Editor for volume 1 issue 1 (1960), Book Review Editor for volume 1 issue 2 (1961) and Assistant Editor and Book Review Editor for volume 1 issue 3 (1962).

As things stand, South Australia's interests in the matter of water quality continue to depend on the goodwill of the upstream States. There is nothing in the history of the Murray question to create sanguine expectations of the continuance of that goodwill or that any solution which depends upon it will be permanent.<sup>9</sup>

Clark's words of caution are still relevant today and are apposite in light of the more recent events that led to the establishment in 2018 of the South Australian Murray-Darling Basin Royal Commission.

Clark's article is also instructive in emphasising that much can be learned from examining the history of this dispute. That is still true today. This is not the first time that South Australia has established a royal commission to examine the use of the waters of the River Murray. In 1887, the South Australian Government established a royal commission to investigate

the questions of utilising the waters of the River Murray for irrigation purposes, and the preservation of the navigation and water rights of this province in the river; and, for that purpose, to confer and consult with any Commission appointed, or to be appointed, by the Governments of New South Wales and Victoria on the same subject.<sup>10</sup>

While much has changed since 1887 in the way in which the waters of the Basin are utilised, some of the underlying tensions between governments remain.

### III THE SOUTH AUSTRALIAN MURRAY-DARLING BASIN ROYAL COMMISSION

In July 2017 an ABC *Four Corners* investigation identified matters of non-compliance with the *Basin Plan*, particularly in New South Wales and Queensland.<sup>11</sup> Amongst other things, the program alleged 'misappropriation, maladministration and misconduct in the New South Wales Government'.<sup>12</sup> Shortly after the broadcast, the Turnbull Government ordered a review by the Murray-Darling Basin Authority ('MDBA') as well as an independent review of 'compliance and enforcement regimes for water management in the Murray-Darling Basin'.<sup>13</sup> The report from these reviews noted a 'lack of transparency in NSW, Queensland and Victoria', highlighting that '[f]or NSW and Queensland, water compliance is bedevilled by patchy metering, the

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<sup>9</sup> Clark (n 7) 138.

<sup>10</sup> *Royal Commission on the Utilisation of the River Murray Waters* (Progress Report, May 1890) iii.

<sup>11</sup> 'Pumped', *Four Corners* (Australian Broadcasting Corporation, 2017) <<https://www.abc.net.au/4corners/pumped/8727826>>.

<sup>12</sup> *Murray-Darling Basin Royal Commission* (Final Report, January 2019) 647.

<sup>13</sup> Murray-Darling Basin Authority, *The Murray-Darling Basin Water Compliance Review* (Independent Panel Report, November 2017) 99.

challenges of measuring unmetered take and the lack of real-time, accurate water accounts.’<sup>14</sup>

The report sparked outrage in South Australia. In response to the findings of the report, the South Australian Premier, Jay Weatherill, said: ‘What [the report] documents is theft by the upstream states, theft by New South Wales and Queensland of water that should be put back in the river to restore the river to health’.<sup>15</sup> The Premier announced a royal commission to investigate the ‘water theft’ by the upstream states in the Murray-Darling Basin.<sup>16</sup> Prominent Sydney barrister, Bret Walker SC, was appointed Commissioner and the Murray-Darling Basin Royal Commission formally commenced its work on 23 January 2018. The Commissioner spent the next 12 months examining the operation of the *Water Act* and the implementation of the *Basin Plan*, delivering his 750-page report to the Governor of South Australia on 29 January 2019.<sup>17</sup>

The Commissioner noted that the passing of the *Water Act* was a ‘world first’ insofar as it recognised the environmental degradation that had been caused to the Basin and sought to address it:

If the core achievement of the *Water Act* was preceded by anything similar anywhere else in the world, or for that matter emulated since, this Commission did not discover it. It looks as if the political success of 2007 is a deserved distinction for this country. *It has its special and defining quality in the combination of a legislated acceptance of a basal fact about environmental degradation, a legislated requirement that it be redressed, and a legislated insistence that the administration of the statutory scheme to do so must be based on science.*<sup>18</sup>

However, the Commissioner’s report was less complimentary about the operation and implementation of the *Water Act* and *Basin Plan*, noting that ‘[k]ey aspects of the *Basin Plan* have not been enacted or implemented in accordance with the objects and purposes of the *Water Act*’.<sup>19</sup>

The Commissioner called into question the approach taken by the MDBA in determining the amount of water that must be recovered in order to achieve an

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<sup>14</sup> Murray-Darling Basin Authority, *The Murray-Darling Basin Water Compliance Review* (Water Compliance Review, November 2017) 14.

<sup>15</sup> Malcolm Sutton, ‘Murray-Darling Basin: “Striking Variations” in Compliance as Review Criticises NSW and Qld’, *ABC News* (online, 25 November 2017) <<https://www.abc.net.au/news/2017-11-25/mdb-review-scathing-assessment-of-nsw-and-qld/9193362>>.

<sup>16</sup> Australian Associated Press, ‘South Australian Royal Commission to Investigate Murray-Darling “Water Theft”’, *The Guardian* (online, 26 November 2017) <<https://www.theguardian.com/australia-news/2017/nov/26/south-australian-royal-commission-to-investigate-murray-darling-water-theft>>.

<sup>17</sup> *Murray-Darling Basin Royal Commission* (n 12).

<sup>18</sup> *Ibid* 17 (emphasis added).

<sup>19</sup> *Ibid* 53.

environmentally sustainable level of take from the Basin. The *Water Act* requires the MDBA to prepare a Basin Plan.<sup>20</sup> The Basin Plan must include the ‘maximum long-term annual average quantities of water than can be taken, on a sustainable basis, from ... the Basin water resources as a whole’.<sup>21</sup> The long-term average sustainable diversion limit (‘SDL’) must reflect an environmentally sustainable level of take (‘ESLT’).<sup>22</sup> To determine the ESLT the MDBA adopted what has been described as a ‘triple bottom line’ approach, taking into account environmental, economic and social outcomes. This approach is supported by legal advice from the Australian Government Solicitor.<sup>23</sup> The Commissioner described reliance on that advice as ‘erroneous’ and concluded that the MDBA’s approach in determining the ESLT was contrary to the *Water Act*:

The determination of an ESLT, and the setting of a SDL that reflects it, do not involve political compromise under the relevant provisions of the *Water Act*. They are to be based on the ‘best available scientific knowledge’. Socio-economic considerations, ideology and realpolitik are not involved in this process if it is to be lawful. Best available scientific knowledge is neither secret nor classified. It is available to the scientific community, and the broader public. It involves processes and actions that represent science — that is, that are capable of being reviewed, checked and replicated.<sup>24</sup>

If the Commissioner’s conclusions about the proper construction of the *Water Act* are correct, it would have implications for how much water is required to be recovered for the environment. Based on the evidence before the Royal Commission, the Commissioner concluded that water recovery for the environment of between 3,980 GL and 6,980 GL was necessary to achieve an ESLT and to give effect to what he considered to be the correct interpretation of the *Water Act*.<sup>25</sup> This is a much higher range of water recovery than the 2,750 GL agreed to by Commonwealth Water Minister Tony Burke in 2012 when approving the *Basin Plan*.<sup>26</sup>

In highlighting what he perceived to be the improper construction of the *Water Act*, the Commissioner’s report provides a guide as to how the existing *Basin Plan* could be challenged on the basis that ‘[k]ey aspects of the *Basin Plan* have not been enacted or implemented in accordance with the objects and purposes of the *Water Act*’.<sup>27</sup>

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<sup>20</sup> *Water Act 2007* (Cth) s 19(3).

<sup>21</sup> *Ibid* s 22 item 6.

<sup>22</sup> *Ibid* s 23(1).

<sup>23</sup> Australian Government Solicitor, ‘The Role of Social and Economic Factors in the Basin Plan’, *Department of the Environment and Energy* (Legal Advice, 25 October 2010) <<https://web.archive.org/web/20120325113941/www.environment.gov.au/minister/burke/2010/pubs/social-economic-advice-ags.doc>>.

<sup>24</sup> *Murray-Darling Basin Royal Commission* (n 12) 53.

<sup>25</sup> *Ibid* 53, ch 4.

<sup>26</sup> *Murray-Darling Basin Royal Commission* (n 12) 200.

<sup>27</sup> *Ibid* 53. See also ch 5.

However, with the Labor Weatherill Government losing the 2018 state election, it seems unlikely that South Australia will seek to mount a legal challenge any time soon.

In addition to a challenge to the *Basin Plan* on the basis that it does not comply with the *Water Act*, the Commissioner's report also notes that there is some constitutional uncertainty regarding the Commonwealth's legislative power to implement the *Water Act* in the absence of a referral of power from the states. The Commonwealth was never provided with a constitutional head of legislative power that expressly relates to the regulation of the Basin.<sup>28</sup> Instead, the Commonwealth relies upon a number of heads of legislative power to support the *Water Act*, including external affairs (s 51(xxix)), trade and commerce (s 51(i)), and corporations (s 51(xx)), as well as a referral of legislative power from states (s 51(xxxvii)). The Commissioner noted the uncertainty should a state revoke their referral of legislative power provided to the Commonwealth:

Should a Basin State revoke its referral of legislative power to the Commonwealth that in part currently underpins the *Water Act* and the *Basin Plan*, it will be a complex constitutional question as to whether all of the *Water Act* or *Basin Plan* would continue in force.<sup>29</sup>

This raises interesting questions as to the validity of the *Water Act* should any state follow through with their previous threats to withdraw the referral of power to the Commonwealth.<sup>30</sup>

Furthermore, if the *Water Act* and *Basin Plan* were not able to continue in force there is further uncertainty as to what law might exist (if any) to define the rights of the states. This question is not new, and was one that Clark considered in his article in the *Review* in 1983. In the event of a dispute between the states Clark noted that

[t]he question arises, then, whether South Australia would be better off to resile from the Agreement and seek to assert her common-law rights, both as to a reasonable quantity and reasonable quality.<sup>31</sup>

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<sup>28</sup> Although, this idea was considered at length during the Australian Constitutional Convention Debates in the 1890s: see John M Williams and Adam Webster, 'Section 100 and State Water Rights' (2010) 21 *Public Law Review* 267.

<sup>29</sup> *Murray-Darling Basin Royal Commission* (n 12) 52. See also ch 2.

<sup>30</sup> It was stated by Andrew Cripps, Queensland Minister for Natural Resources and Mines, that 'the Newman Cabinet was considering the possibility of withdrawing the State Government's 2008 referral of power to the Commonwealth to manage water resources in the Murray-Darling Basin catchment in Queensland.': Andrew Cripps, 'Queensland Concerns Still Not Addressed in Basin Plan' (Media Statement, 2 July 2012) <<http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=79726>>.

<sup>31</sup> Clark (n 7) 137.

This, of course, presupposes that there are some underlying ‘common-law rights’ that South Australia can draw upon. As Clark acknowledged, there is a risk that the High Court might not recognise the existence of such rights.<sup>32</sup> Furthermore, even if such rights do exist, there is a question of whether the rights would provide more water to South Australia or result in better environmental outcomes for the Basin. There is uncertainty as to the substantive legal principles that underpin such an interstate common law right. Would, for example, it be based on a doctrine of ‘equitable apportionment’ (as is the case in the United States)?<sup>33</sup> Or should rights be allocated on a ‘first in time’ basis?

While legal questions concerning the distribution of water between states have been given extensive consideration in the United States, the states of Australia have not resorted to the courts to resolve interstate water disputes. As the Commissioner noted:

Historically, South-Eastern Australia has largely avoided the litigious bitterness and economic strife that can be seen, say, in the water struggle among some of the United States of America. But it would be naïve in the extreme not to acknowledge the continuing upstream-downstream tensions affecting South Australia’s place in the present administration and future stewardship of the Basin’s water resources.<sup>34</sup>

The existence of such rights in the absence of an intergovernmental agreement is highly speculative and uncertain.<sup>35</sup> The fact that for over a century South Australia has not litigated this issue despite numerous opportunities might tell us something about just how speculative and uncertain such a case would be. In addition, litigation would be a high-stakes game: if the High Court were to rule against the existence of any such interstate water rights, South Australia’s negotiating position would be crippled. Despite these legal uncertainties, the very threat of legal action might still be an important and powerful tool in the negotiating process.

Given the recent change in government in South Australia, it seems unlikely that these legal questions will be tested anytime soon. However, if history is any guide, they will no doubt continue to play a role in determining how best to regulate the waters of the Basin.

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<sup>32</sup> Ibid.

<sup>33</sup> Adam Webster, ‘Sharing Water from Transboundary Rivers in Australia — An Interstate Common Law?’ (2015) 39(1) *Melbourne University Law Review* 263, 276–9.

<sup>34</sup> *Murray-Darling Basin Royal Commission* (n 12) 38.

<sup>35</sup> Ian A Renard, ‘The River Murray Question: Part III — New Doctrines for Old Problems’ (1972) 8(4) *Melbourne University Law Review* 625; Adam Webster, ‘Sharing Water from Transboundary Rivers: Limits on State Power’ (2016) 44(1) *Federal Law Review* 25.

#### IV NAVIGATING THE FUTURE

If litigation is not the answer, how do we resolve the tensions over the waters of the Basin? As the Commissioner noted in his report, the answer must lie in cooperative federalism: ‘the reform that is the *Water Act* clearly calls for and requires a whole of Basin co-operative approach to its regulation’.<sup>36</sup> The starting point must be to identify an environmentally sustainable level of take that reflects the available scientific evidence. The challenge, of course, is to shift from interested parties (states, irrigators, environmentalists) jockeying for the best deal for their own interests to a position where all parties are focused on ensuring the long-term environmental sustainability of the river.

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<sup>36</sup> *Murray-Darling Basin Royal Commission* (n 12) 52.