Use rights to water in the Murray-Darling Basin

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Contests over the regulation of inland waterways are among the decisive chapters in the history of the common law.[1] Litigation between riparian owners has historically brought tensions between conservation and development into focus. Reforms to the management of surface and ground water in the Murray-Darling Basin since 2000 and particularly the *Water Act 2007 (Cth)* introduce new difficulties reconciling economic and environmental objectives. This new scheme invests the Murray-Darling Basin Authority (MDBA) with important powers and responsibilities to ensure that economic and environmental uses of water in the Basin are reconciled. Whether the MDBA is fit for purpose – a question which proceedings now before the NSW Supreme Court are likely to test[2] – will be a major determinant of the success of this scheme.

The history of water rights in the Basin illuminates the provenance of the current scheme and the tensions it operates to contain. The industrial revolution was powered first by water – mills built over dams on rivers and streams supplied energy to early manufacturing and mining. Development occasioned contests between riparian landowners jealous of interference with the flow of water across their properties. The privileges of quiet enjoyment of the undisturbed flow of water across one's property by 'artificial' diversion vied with imperatives to development and utility to set the legitimate bounds of extractive activity.[3] When the House of Lords finally addressed riparian issues in 1859, Lord Kingsdown held water rights to be 'one of the most important questions that ever came under the consideration of a court of justice'.[4]

By around 1860 the position in the law of England was broadly settled. There was no property in water itself, which is *publici juris*, but the common law limited the uses to which landowners could put water without transgressing the rights of their upstream or downstream neighbours: riparian owners enjoyed rights to reasonable use of water flowing through or across their land, subject to reciprocal duties of non-interference with other users' enjoyment of the common resource.[5]

Difficulties reconciling riparian rights which economic imperatives tackled in England more or less successfully proved less tractable in the courts of the Australian colonies. By the time of federation, 'the question of the rights of riparian owners in this country, where the conditions are so totally different from the condition of things in England,' had come to seem 'a source of almost insuperable difficulty.'[6] As Alfred Deakin recognised, English solutions could not work for Australia.[7]

The main problem was the relative scarcity of water. Irrigation was unnecessary in Britain but would be crucial in Australia. The careful balances between conservation and utilitarian exploitation struck in England were more difficult to attain under conditions of periodic scarcity. Legislatures eventually intervened to prevent riparian owners from suing one another, taking old common law rights to the use of water flowing across riparian land and vesting those rights in the Crown.[8]

Across successive generations in Australia from the 1880s, colonial and state legislatures encouraged irrigation in the Murray-Darling Basin. Entitlements to take water from the waterways (taking the form of exemptions from a general prohibition on the use of water for irrigation, concessions in effects against the Crown's monopoly over the use of surface and later ground water) were widely granted for that purpose.

Later, and especially since the 1980s, these licences would be capped volumetrically: first, by fixing an irrigator's standing annual 'entitlement', and then by implementing a system of 'allocations' against these entitlements, where government decided from time to time what proportion of annual entitlement an irrigator could take in a given year, depending on the availability of water. Entitlements now also vary by reliability – some classed high-reliability or high security give entitlement to priority over others classed low-reliability or general security. Rarely, irrigators with low reliability entitlements received very little water.

The imposition of these limits to extraction reflected concerns about the sustainability of extractive practices now established across the Murray-Darling Basin. Too much water was being taken from the rivers and aquifers. These concerns intensified across the 1990s. Not enough water was reaching critical wetlands, including the Coorong at the mouth of the Murray in South Australia. The Living Murray Initiative aimed to restore stream flows sufficient to maintain the health of the river and the ecosystems it supports. Successive intergovernmental agreements resolved to do more to protect the water resources of the Murray-Darling Basin against overuse. Victoria and New South Wales passed legislation further regulating take for irrigation.[9]

The *Water Act 2007* (Cth) inaugurated a new chapter in the management of the Murray-Darling Basin. Using a combination of Commonwealth and referred state power, Parliament erected a framework for capping diversions for irrigation and restoring water to the environment. The Water Act was shaped by the intergovernmental Murray-Darling Basin Agreement. Both documents provided for the devise and implantation of the Basin Plan, a scheme for reducing the take from Basin waterways to an environmentally-sustainable level.

The scheme of the Water Act is subtle. Leaving water in the river to preserve the health and vitality of the Basin under the increased stresses of climate change seems intuitively simple. The reality is more complex. The Basin is now a 'plumbed landscape',[10] augmented by generations of capital investment in weirs and other

works, and intricately regulated such that saving the system cannot be a mere matter of taking less water out. Natural cycles of the watering and drying cannot simply be reinstated. They must now be reengineered in tandem with the systems of town, stock and irrigation supply.

The Water Act therefore does not in terms *restore* water to the environment, in the sense of leaving water to flow across the Basin into the sea east of Adelaide, as it would have done but for the growth of irrigation across the Basin. Rather, it overlays the extant irrigation scheme with new provision for the use of water 'for the environment'.[11] Environmental flows have been sought to be protected not simply by re-acquiring and cancelling irrigators' licences to take water[12] but rather by the creation of Commonwealth and state statutory bodies to acquire, own and manage water on behalf of the environment.[13]

On this approach, water acquired for environmental purposes ('held environmental water', under the Water Act) is treated interchangeably with water held authorised for use for all other purposes, including irrigation. Environmental water holders have no formal priority over any other water access entitlement holder. Their water stands to be delivered for use in the same way as any other irrigator's. Statutory agencies now water floodplains and wetlands by mechanisms developed for irrigators to raise crops.

Direct abrogation of irrigators rights has thus been avoided. Instead of being expropriated, irrigators have been incentivised to sell their rights to governments through the markets which the Water Act created. But this outcome was only achieved at the cost of creating new species of rights to use surface water, new tensions between riparian owners across the Basin, and new scope for contestation between different uses of the common resource. In particular, differences in the way irrigators and environmental holders use water put their respective interests in tension. Irrigators need relatively small amounts of water delivered to specific sites.

Environmental water holders need substantial flows across the system, including big volumes for the Lower Lakes, Coorong and Murray Mouth – far from the big storages east of Albury. This means that the plumbing needs refinement and the plumbers need to retool and upskill. Because delivering water uses water ('conveyance', in the argot) the bulk operations needed to support environmental watering have the potential to diminish the volume of water that would otherwise be available for irrigation if not managed competently.

The Water Act is premised and depends upon the MDBA (which now controls the mainline plumbing and employs its plumbers) being up to these tasks. It recognises that irrigators' livelihoods and the attainment of environmental objectives may be jeopardised if it is not. Statutory power to operate dams, weirs and sluices usually carry with them duties of care to avoid harm to persons affected by the operation of those works that is reasonably foreseeable.[14]

The MDBA's appointed statutory role is (among other matters) to manage the Murray storages and the Basin more broadly to deliver water (through the states) to the irrigators and environmental users who depend upon it. The Water Act posits that economic and environmental interests are compatible and can be complementary, and confers power and responsibility to ensure that outcome on the MDBA. Its performance to date is not encouraging.[15] But as the statutory controller of a system of great historical ingenuity and dexterity, upon which the attainment of pivotal economic and environmental objectives depend, it is imperative that the MDBA is up to its tasks and held to account if it is not.

Relations between riparian owners have always been difficult, especially in periods when priorities as between conservation and economic activity are changing. Those old difficulties are recreated by the advent of the statutory environmental water holders as in effect riparian owners with use rights to rival those of irrigators. But durable and mutually beneficial resolutions of these difficulties have always been achievable. There is no reason why things should be otherwise on the MDBA's watch. **BN**

ENDNOTES

1 See generally Joshua Getzler, *A History of Water Rights at Common Law* (Oxford University Press, 2004) ch 1; Morton Horwitz, *The Transformation of American Law 1780 – 1960* (Harvard University Press, 1977), ch 1.

2 See for an overview *Doyle's Farm Produce Pty Ltd v Murray-Darling Basin Authority (No 2)* [2021] NSWCA 246, [25]-[32]. The writer is briefed for the plaintiffs in those proceedings.

3 Horwitz, pp. 34-42; Getzler, pp. 22-42.

4 *Chasemore v Richards* 7 H.L.C. 349, 390; 11 E.R. 140, 156; cited in Getzler, *Water Rights at Common Law*, p. 42.

5 *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, 173 [55] (French CJ, Gummow and Crennan JJ); 188-9 [109] (Hayne, Kiefel and Bell JJ), citing *Embrey v Owen* (1851) 6 Ex 353 [155 ER 579].

6 *Hanson v The Grassy Gully Gold Mining Co Ltd* (1900) 21 LR (NSW) 271 at 275.

7 Second Reading Speech of Mr Alfred Deakin, Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 June 1886, pp. 440-441.

8 *Hanson* at 275; see *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [54], [72], [116].

9 *Water Act 1989* (Vic); *Water Management Act 2000* (NSW)

10 Margaret Simons, 'Cry Me a River: The Tragedy of the Murray-Darling Basin', *Quarterly Esssay* (Issue 77, December 2020), p. 5.

11 See e.g., *Water Act* Part 2AA.

12 As could likely have been done without any requirement for 'just terms': *ICM Agriculture*, [84], [147]-[150].

13 Commonwealth Environmental Water Holder, established by Part 6 of the *Water Act 2007* (Cth); Victorian Environmental Water Holder, established by Part 3AA of the *Water Act 1989* (Vic) with effect from 1 July 2011; NSW Department of Primary Industry and the Environment, with responsibility under Division 2 of Part 1 of the *Water Management Act 2000* (NSW).

14 *Caledonian Collieries Limited v Spiers* (1957) 97 CLR 202, 220; *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, 85; *Cox Bros (Australia) Ltd v Commissioner of Waterworks* (1933) 50 CLR 108, at 119-121; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 30.

15 Murray-Darling Basin Royal Commission Report, 29 January 2019, p. 188, where the Commission found that in determining the amount of the environmentally-sustainable level of take from the Basin the MDBA had acted unlawfully, including by failing to take into account the best available science.