By DE Fisher

INTERJURISDICTIONAL WATER ISSUES in AUSTRALIA

Challenges for the future

For more than a hundred years, water rights were granted in accordance with the legislation of the states and territories. Until recently, this legislation conferred a relatively unlimited discretion on the relevant regulatory institutions. Over the past 15 years, the Commonwealth has taken a greater interest in how water resources should be managed: first by formulating and funding policies and strategies through COAG, and then by enacting the *Water Act* 2007. This Act has created a much more prescriptive regime for planning and managing Australia's water resources while at the same time entrusting its operational implementation to the states and territories. This has the potential to create tensions between the legal regimes of the Commonwealth and those of the states and territories. This article seeks to examine some of these issues.

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As a fugacious resource, water recognises neither administrative nor jurisdictional boundaries. Until recently, the role of the Commonwealth has been limited to ensuring the implementation of its policy initiatives by funding and participating in managing specific projects in accordance with political compacts with the states and territories (hereafter 'states'). But this has changed. Since 2007, the Commonwealth has been involved directly and formally in determining how certain water resources are managed – particularly those in the Murray-Darling Basin. Since the Constitution of the Commonwealth confers no power directly upon the Commonwealth in relation to water, the way in which water resources are governed remains essentially a matter for the states. Has this also changed? This article attempts to answer this question and to analyse the practicalities of the relationship between the laws of the Commonwealth and those of the states in relation to water.

COMMONWEALTH INVOLVEMENT – A BRIEF HISTORY

The first involvement by the Commonwealth in the management of Australia's water resources was its participation in the River Murray Waters Agreement of 1914 between New South Wales, Victoria, South Australia and the Commonwealth. The agreement was intended to bring about the 'economical' use of the waters of the River Murray and its tributaries for irrigation and navigation. The objective of the agreement was extended in 1987 to promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of the water, land and environmental resources of the Murray-Darling Basin. In 1992, Queensland became a party to the agreement. Each basin state on becoming a party to the agreement enacted legislation approving the agreement in terms similar to the most recently enacted *Murray-Darling Basin Act* 1993 (Cth). These arrangements were essentially political compacts between the participating jurisdictions. The agreements scheduled to the legislation formed the broad strategic framework within which the water resources of the area were managed. However, it was the laws of the states that effectively governed the management of the water resources in the states. In other words, there was no relevant Commonwealth law that impacted upon how water resources in particular areas were managed.

Section 96 of the Constitution of Australia enables the Commonwealth Parliament to grant financial assistance to any state on such terms and conditions that the Parliament thinks fit. During the second half of the 20th century, this proved to be a significant way for the Commonwealth to influence the management of Australia's water resources. The arrangements for the provision of financial assistance have varied over the years. In some instances, an agreement between the Commonwealth and a state or an agency of a state in relation to a specific project was approved by Commonwealth legislation. Generic legislation – namely the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth) – enabled financial assistance to be paid by the Commonwealth to a state in accordance with an agreement in relation to a particular project. The agreement was not part of the legislation. Similarly, the *Natural Heritage Trust of Australia Act* 1997 (Cth) set up the Natural Heritage Trust and the accompanying Natural Heritage Trust of Australia Reserve, with original funds of $1.1 billion. This enabled the Commonwealth to use these funds to engage in activities for any purpose of the Reserve or to make grants of financial assistance to the states for any purpose of the Reserve. Water resources were among the beneficiaries of these arrangements including, for example, the Murray-Darling 2001 Project concerned with the rehabilitation of the Murray-Darling Basin. In all of these instances, however, the law that applied to the planning and implementation of the projects, supported by the financial assistance of the Commonwealth, was the law of the state or the territory.

During the 1990s, the Commonwealth – perhaps as a result of major developments in international environmental law – began to take a direct interest in how Australia's water resources were managed. The general direction of change was towards sustainable use and development of water resources. One way of achieving the desired policy objectives was to create arrangements for trading in water rights and to encourage their use. Reform of state water laws was necessary. This began towards the end of the 1990s and has been an ongoing process ever since. This culminated in the Intergovernmental Agreement on a National Water Initiative 2004. It proposed a system of governance for the sustainable >>

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use and development of all water resources in Australia. This was to be achieved by an appropriate set of planning, regulatory and market arrangements.

THE *WATER ACT* 2007 (CTH)

In 2007, the Commonwealth Parliament responded to this policy initiative by enacting the *Water Act* 2007 (hereafter 'the Act') with particular application to the water resources of the Murray-Darling Basin. For the first time, the Commonwealth became directly and formally involved in the management of Australia's water resources. It was no longer a matter of co-operative management. The Commonwealth is now authorised – indeed, mandated – to prepare a basin-wide plan for the Murray-Darling Basin. The Basin Plan (hereafter 'the Plan') creates not only the broad legal framework but also the specific legal rules relating to the water resources of the Murray-Darling Basin. The laws of the states about water resources are not directly affected, but their application will be affected by the provisions of the Plan when it comes into force. What is the emerging relationship and interaction between the laws of the Commonwealth and the laws of the states?

The Murray-Darling Basin Agreement (the 'Agreement') appears as Schedule 1 to the Act. The parties to the Agreement are the Commonwealth, NSW, Victoria, Queensland, South Australia and the ACT. It states the institutional, financial, operational and related rules for the management of the Murray-Darling Basin. It includes in broad terms the water entitlements of each of the four original states. The way in which the entitlements of each of the states are managed is a matter in the first instance for the laws of the states but subject to the potentially overriding provisions of the Plan.

The purpose of the Agreement stated in article 1 is to:

> '... promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Murray-Darling Basin, including by implementing arrangements agreed between the contracting governments to give effect to the Basin Plan, the *Water Act* and state water entitlements'.

State water entitlements established by the Agreement are the basis upon which institutional and individual water entitlements within the states are managed in accordance with the Plan and the Act. While the Plan creates the strategic rules for the management of water resources, water resource plans accredited or adopted under the Act (hereafter 'water plans') are the source of water entitlements within the states. The implication of the stated purpose of the Agreement is that the Act and the Plan, in conjunction with the laws of the states, mandate how relevant water resources are managed. Is this implication consistent with the structure of the Act?

INTERACTION BETWEEN COMMONWEALTH AND STATE LAWS

Specific provisions

The relationship between the Plan and water plans for water-resource plan areas within the states is entirely dependent on the Commonwealth. The Plan is of no effect until it has been adopted by the Commonwealth minister. A water plan is either a water resource plan prepared by a state and accredited by the Commonwealth minister, or a water plan prepared by the Murray-Darling Basin Authority and adopted by the Commonwealth minister. Section 55(2) of the Act requires a water plan to be consistent with the Plan. Section 55(3) states:

> 'In determining whether the water resource plan is consistent with the relevant Basin Plan, regard must be had to the legislative framework within which the water resource plan operates.'

The reference to the legislative framework is presumably a reference to the statutory arrangements in force within the state in question. Consistently with this, s21(5) imposes an obligation in relation to the preparation of the plan. It is:

> 'The Basin Plan must ensure that there is no net reduction in the protection of planned environmental water from the protection provided for under the state water management law of a Basin State immediately before the Basin Plan first takes effect.'

For this purpose, 'planned environmental water' includes water directed at the achievement of environmental outcomes under the Plan, a water plan or a plan made under a state water management law. In this context, Commonwealth law cannot reduce the quantitative protection of environmental water afforded by state law.

The next issue is the legal effect of provisions in the Plan and water plans. Both contain enforceable legal rules. Sections 34(1) and 58(1) of the Act require the Murray-Darling Basin Authority and other agencies of the Commonwealth to perform their functions consistently with, and in a manner that gives effect to, the Plan and a water plan. However, under ss35(1) and 59(1), the obligation imposed upon state agencies and institutions or persons undertaking activities within states is different. The obligation placed upon a state agency, an operating authority, an infrastructure operator or the holder of a water access right is:

- not to do an act if the act is inconsistent with the Plan or with the water plan; and
- not to fail to do an act if the failure to do the act is inconsistent with the Plan or the water plan.

The criterion in each of these cases is consistency. Thus, the holder of a water access right granted in accordance with state laws must act consistently with the Plan and the water plan that are Commonwealth laws.

A person contravening a provision of the Act is liable to a range of enforcement mechanisms. These include injunctions, declarations, civil penalties, infringement notices, enforceable undertakings and enforceable notices. In particular, an enforcement notice may be issued under s165(1)(b) if a person has engaged in, is engaging in, or is likely to engage in conduct that has one of three outcomes:

- it would be inconsistent with the Plan or a water plan;
- it would prejudice the effectiveness or the implementation of the Plan or a water plan; or
- it would have an adverse effect on the effectiveness or the implementation of the Plan or a water plan.

A similar provision in s165(1)(b) relates to an omission rather than the commission of an act.

One of the powers available under s165(3) to the agency issuing the enforcement notice is the power to direct the person contravening the provision not to exercise water access rights, irrigation rights, or water delivery rights. These rights are rights conferred in accordance with the laws of the states and are exercisable in accordance with the laws of the states. Section 165(5) specifically states that an enforcement notice may be issued 'in relation to conduct, or an omission, even if that conduct or omission constitutes an offence against, or a contravention of, a law of a state or a territory'. By implication, therefore, one set of circumstances may constitute a breach of Commonwealth and state laws.

The National Water Initiative stated explicitly in clause 23 that the means for achieving the sustainable use and development of water resources included not only planning and regulatory arrangements, but also market arrangements. The Act reflects this. Trading in water rights is regulated by the laws of the states. Trading and dealing in water and in water rights is a function of the Commonwealth Environmental Water Holder ('CEWH') under s105(2) and (3), but only for the purpose of protecting or restoring the environmental assets of the Murray-Darling Basin. Operating rules made by the Commonwealth minister under s109 control how the CEWH trades and deals in water and water rights. These rules must not impose obligations on anyone other than the CEWH, nor have the effect of overriding or limiting the operation of a law of a state. In effect, therefore, these operating rules must not be inconsistent with those of a state.

The operating rules apply only in relation to trading and dealing in water rights. The operational activities associated with water need to conform with the laws of the state. This seems to be contemplated by the privilege conferred upon the CEWH by s110. This exempts the CEWH from the need to comply with state laws that, first, prevent a non-landowner from using water available under a water access right and, second, require a non-landowner to hold a licence to use the water. This exemption applies only to wetlands protected under the Ramsar Convention and its water-dependent ecosystems protected by the environmental protection legislation of the Commonwealth. However, it does not authorise the environmental watering of land without the consent of the owner of the land. These examples deal with the relationship between the laws of the Commonwealth and the laws of the states in specific circumstances. For example, failure to comply with the Plan or a water plan and the capacity of the Commonwealth to hold, deal in and operate water entitlements.

Generic provisions

The Act also contains a number of general provisions governing the relationship between the Commonwealth and state laws. The principle in s109 of the Constitution of the Commonwealth is clear. The law of a state is invalid to the extent that it is inconsistent with a law of the Commonwealth. The principle in the Act is equally clear. Section 250B(1) of the Act indicates that the Commonwealth water legislation is not intended to exclude or limit the concurrent operation of any law of a state. But this is subject to s109 of the Constitution.

The *Water Act* approaches the interaction between Commonwealth laws and state laws in three ways. This is the first. A provision of a law of a referring state may declare under s250C that a matter is to be an excluded matter in relation to the whole or a part of the Commonwealth water legislation. In this case, none of the relevant Commonwealth provisions applies in the state. This is the second. Regulations made by the Commonwealth under s250E may modify the operation of the Commonwealth water legislation so that one of two consequences arises. One consequence is that:

> 'Provisions of the Commonwealth water legislation do not apply to a matter that is dealt with by a law of a referring state specified in the regulations.'

Another is:

> 'No inconsistency arises between the operation of a provision of the Commonwealth water legislation and the operation of a provision of a law of a referring state specified in the regulations.'

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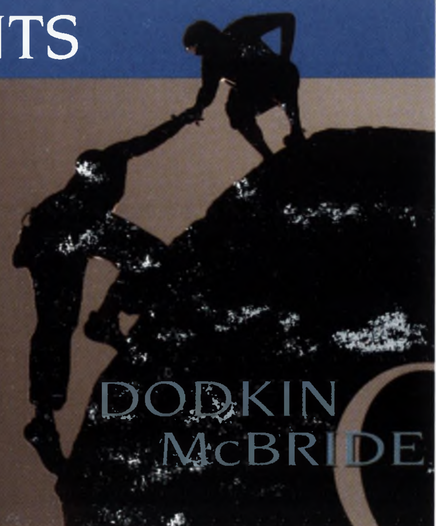

For example, the regulations may provide that a provision of the Commonwealth water legislation does not apply to a person or in circumstances specified in the regulations.

The third way in which the Act approached the interaction between Commonwealth and state laws is more complex. A law of a state may declare a provision to be a Commonwealth water legislation displacement provision for the purposes of s250D of the Act. There are two consequences. The provision of the Commonwealth water legislation – the displaced provision – neither prohibits the doing of an act nor imposes a liability for doing an act if the state provision specifically permits, authorises or requires the doing of the act. Second, the displaced provision does not operate in, or in relation to, the state to the extent necessary to ensure that no inconsistency arises between the Commonwealth provision and the state provision. These provisions apply only where the state laws and the Commonwealth laws are incapable of concurrent operation.

To summarise:

- The laws of a state and the laws of the Commonwealth are intended to operate concurrently.
- A provision of a state law may declare the whole or a part of the Commonwealth water legislation to be an excluded matter, in which case the relevant provision does not apply in the state.
- A state law may declare a provision of the Commonwealth water legislation to be displaced by a provision of a state law, in which case the provision of the Commonwealth water legislation is either of no effect or does not operate to the extent of the inconsistency.
- Regulations of the Commonwealth may modify the operation of the Commonwealth water legislation so that a provision does not apply, or so that no inconsistency arises between its operation and the operation of a provision of a state law.

An example is given in s40 of the Act of how the general provision in s250B might apply. Section 40 states:

> 'Without limiting s250B, if the Basin Plan provides for a maximum quantity of water that may be taken from the water resources of a particular water resource plan area, it is not intended to exclude or limit the concurrent operation of a state law that provides for the same or a lower maximum quantity of water that may be taken from those water resources.'

This example is perhaps intended to illustrate the object of the Act in s3(d)(i) to ensure the return to environmentally sustainable levels of extraction for water resources that are over-allocated or over-used. If the state imposes a lower maximum quantity of water that may be taken, then this is not inconsistent with this object of the Act. But the reverse would not necessarily be so. If the Plan provides for a lower maximum quantity of available water than the state plan, there would be an inconsistency between the state plan and the Plan, and the Plan would over-ride the provision of the state plan.

CONCLUSION

Despite this example in the Act, the Commonwealth laws and the state laws interact in a number of different ways. Some are specific, others are generic. Which law applies is a matter of considerable practical significance for those implementing these statutory arrangements, as well as for those affected by them. While the principle set out in s109 of the Constitution of the Commonwealth is clear – despite the difficulty in applying a test of consistency – the interaction between the two sets of laws is made more complicated because of the power given to the legislatures of the states to make declarations about the application of provisions of the Commonwealth water legislation and the power of the Commonwealth to make regulations about these matters. Despite its importance, it is difficult at this stage to predict what will happen in practice once the Basin Plan and the water resource plans – the Commonwealth laws – are in operation. ■

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