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History Repeating: The South Australian Royal Commission into the Murray-Darling Basin

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Introduction

In late-2017, then-Premier Jay Weatherill announced that South Australia would establish a Royal Commission to investigate 'water theft' from the Murray-Darling Basin in the upstream states.[1] The Premier's announcement came after the Murray-Darling Basin Water Compliance Review — conducted by the Murray-Darling Basin Authority and the Independent Review Panel — revealed lack of a culture of compliance with water licences in some regions in the upstream states, particularly in Queensland and New South Wales.[2] Prominent Sydney barrister, Bret Walker SC, was appointed Royal Commissioner and the Commission formally commenced its work on 23 January 2018.

The work of the Commission has given rise to important legal questions surrounding the construction of the *Water Act 2007* (Cth) and the powers of the Commissioner to summons persons to give evidence and produce documents. This article examines these issues and situates the work of the Commission in South Australia's 130-year battle with the upstream states over the waters of the Murray-Darling Basin.

A 'blue print' for a legal challenge

At the end of April 2018, the Royal Commission released its second issues paper. The issues paper focused on the legal construction of the *Water Act 2007* (Cth) and called into question the approach taken by the Murray-Darling Basin Authority (MDBA) in determining the amount of water that must be recovered in order to achieve an environmentally sustainable level of take from the Basin. The detailed analysis of the *Water Act 2007* in the issues paper provides any future litigant with a 'roadmap' for a legal challenge to the Basin Plan.

The *Water Act 2007* requires the MDBA to prepare a Basin Plan. The Basin Plan must include the 'maximum long-term annual average quantities of water that can be taken, on a sustainable basis, from the Basin water resources as a whole': see *Water Act 2007* (Cth) s 22, item 6. A long-term average sustainable diversion limit must reflect an environmentally sustainable level of take: see *Water Act 2007* (Cth) s 23.

The critical question raised in the issues paper was: what factors must be taken into account in determining the 'environmentally sustainable level of take' (ESLT) from the Basin? This is obviously important as it informs the determination of the long-term average sustainable diversion limit for the Basin and the amount of water that is recovered for the environment.

In the issues paper the Commissioner made the argument that 'the *Water Act*, properly defined, requires environmental considerations to be paramount, and that economic and social outcomes are irrelevant to the determination of the ESLT.'[3] The Commissioner reached the conclusion that the proper construction of the Act requires the ESLT to be determined 'solely on the basis of environmental criteria'.[4] Social and economic outcomes should be optimised within the Basin Plan only after setting the ESLT and are not relevant to determining the ESLT.

The Commissioner's construction of the *Water Act 2007* is not the approach that has been taken by the MDBA in interpreting the Act. The MDBA has taken a 'triple bottom line' approach – 'seeking equal environmental, social and economic outcomes' – in the development of the Basin Plan. The MDBA's triple bottom line approach is supported by legal advice from the Australian Government Solicitor.[5]

If Walker's analysis of the process for determining the ESLT is correct, it would have implications for how much water is required to be recovered for the environment, and would presumably require an increase in the volume of water recovered for the environment because any social and economic outcomes currently taken into account would need to be disregarded. As Walker noted, the MDBA's 2010 'Guide to the Basin Plan' advised that somewhere between 3,000GL and 7,600GL per year needs to be recovered in order to achieve an environmentally sustainable level of take based solely on environmental concerns.[6] The Commissioner's analysis of the proper construction of the *Water Act 2007* also has implications for the recent amendments to the Act[7] — which received support from the Coalition and Labor — that allow for a further 70GL reduction in the volume of water recovered for the environment. This further reduction might also be inconsistent with the Commissioner's construction of the Act.

The statutory construction question raised by the Commissioner has been identified previously, as he acknowledges in the paper.[8] While there has been an unsuccessful challenge to the *Water Act 2007* by irrigators on constitutional grounds,[9] the statutory construction point made by the Commissioner has not been put before a court. One can appreciate that irrigators would be unlikely to use Walker's argument to mount a legal challenge to the allocation of water by the MDBA, as if the Commissioner is correct, it could lead to more water being recovered for the environment and therefore even less water for irrigators.

Providing the Royal Commissioner with such broad terms of reference to examine 'any legislative or other impediments to achieving any of the objects and purposes of the Act and Basin Plan' has resulted in these issues being aired in public. One can only assume that the primary purpose of the South Australian Government in asking the Commission to identify these 'impediments' is to place political pressure on the upstream states and the Commonwealth. If South Australia were truly wanting legal advice on the validity of the *Water Act 2007*, a more obvious course of action would have been to brief Mr Walker and seek his legal advice, keeping the advice confidential. But a successful legal challenge to the Act and Basin Plan would only put South Australia back at the negotiating table. Renegotiating the Basin Plan could leave South Australia in an even worse position. This is a real possibility, given that the current Liberal-National Commonwealth Government has shown a desire to reduce the volume of water recovered for the environment.[10]

(Almost) a constitutional challenge

As part of the inquiry, the Commissioner has conducted a number of public hearings. The *Royal Commissions Act 1917* (SA) gives the Commission the power to summons persons to produce documents or to give evidence at a hearing. In May 2018 the Commission applied to the South Australian Supreme Court for leave to serve summonses upon the Chief Executive of the MDBA as well as other current and former employees of the MDBA to attend to give evidence to the Commission. The Commission also applied to the Court for leave to serve summonses upon the Secretary of the Department of Agriculture and Water Resources and the Proper Officer of the MDBA to produce documents to the Commission. The Supreme Court made orders granting leave to serve the summonses (pursuant to the *Service and Execution of Process Act 1992* (Cth)), and the Commission issued these summonses.

Shortly after the Commission issued the summonses, the Commonwealth commenced proceedings in the High Court. The proceedings raised two issues. First, whether as a matter of construction ss 10 and 11 of the *Royal Commissions Act 1917* permit the Commission to issue summonses to the Commonwealth, the MDBA (and its current and former officers and employees) or residents of other states. In short, the Commonwealth contended that the Act does not purport to bind the Commonwealth Executive. South Australia conceded that s 11(1) of the Act (which provides the Commission with power to punish for failure to comply with a summons) does not apply to the Commonwealth, a person being sued on behalf of the Commonwealth or residents of other states. However, it contended that the Commission still had the power to issue summonses to these people pursuant to s 10 of the Act.

The second ground upon which the Commonwealth objected to the issuing of the summonses is based upon the application of principle enunciated in *Commonwealth v*

Cigamatic Pty Ltd (in liq).[11] The Commonwealth contended that the *Royal Commission Act 1917* offended the *Cigamatic* principle in that it purported to modify or restrict the Commonwealth Executive's power to 'execute and maintain the law of the Commonwealth' and to 'administer departments of state', and also 'its prerogative against being compelled to submit to discovery'.[12]

The High Court was to hear the matter in October 2018. However, the hearing has now been vacated. The Royal Commissioner was faced with the practical difficulty that, in the event that the High Court ruled in favour of the Commissioner, there was insufficient time to reissue the summonses and hear the witnesses before the Commission is due to deliver its final report by 1 February 2019.[13] The new Liberal government in South Australia indicated it was unwilling to extend the reporting period of the Commission,[14] which resulted in the Commission withdrawing the summonses and the applicants thereby withdrawing the High Court proceedings seeking to challenge the summonses. The important questions of statutory construction and constitutional interpretation will remain unanswered.

South Australia's 130-year battle over the Murray

The current tensions between South Australia, the Commonwealth and the upstream states over the waters of the Murray-Darling Basin are nothing new. This is not the first time that South Australia has held a Royal Commission into the use of the waters of the River Murray. Furthermore, it is not the first time that a Royal Commission has examined some of the key legal issues surrounding the regulation of the waters of the Murray-Darling Basin.

As early as 1887, the South Australian Government appointed 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.

The 1887 Royal Commissioners became aware that the South Australian Attorney-General, Charles Kingston, had sought legal opinions from the Crown Solicitor, Charles Mann, as well as prominent Adelaide lawyers John Downer and Josiah Symon. These legal opinions were made available to the Royal Commissioners, who considered whether the South Australian Government should petition the Imperial Government to resolve the uncertainty over the colonies' rights to access the waters of the Murray.

These technical legal issues were swept to one side with the Australasian Federal Conventions in Adelaide and Melbourne and the drafting of the Australian

Constitution. It was hoped that the drafting of the Australian Constitution would provide an opportunity to resolve any legal and political differences. Alas, despite much time being spent during the Convention debates concerning the distribution of water from the Murray between the states, no provision for the sharing of water was made in the Constitution. Nevertheless, South Australians still held out hope that Federation, the establishment of the Commonwealth Government and the creation of the High Court might assist in settling the disputes over the waters of the Murray.

In 1902, the Premiers of New South Wales, South Australia and Victoria agreed to establish a joint Royal Commission to examine the issues surrounding the allocation of water from the River Murray. On 7 May 1902 three Commissioners – one from each State – were appointed

> to make a diligent and full enquiry concerning the Conservation and Distribution of the Waters of the River Murray and its Tributaries for the purposes of Irrigation, Navigation, and Water Supply, and to report as to the just allotment of the waters of the Murray basin to the use of each State.

While none of the three Commissioners were lawyers, seven leading legal scholars gave detailed evidence on the legal issues surrounding the regulation of the waters of the Murray-Darling Basin. In 1906, South Australia sought further legal advice, briefing Victorian Isaac Isaacs and South Australian Josiah Symon and Patrick Glynn. While much time and effort were put into understanding the legal issues, the dispute was resolved by negotiation and the River Murray Waters Agreement was signed in 1914.

Over the past 130 years South Australian Governments and Royal Commissions have, on a number of occasions, examined the legal issues in relation to the sharing of the waters of the Murray-Darling Basin. There have also been numerous threats by the South Australian Government to test these legal arguments before the courts. However, despite these threats, the tensions amongst the states and between the states and the Commonwealth over the Murray-Darling Basin have always been resolved by political agreement. While the South Australia Government has been quick to examine and assert its legal rights, the state has been more cautious in litigating these issues. The current Royal Commission appears to be another attempt by South Australia to exert some political (rather than legal) muscle.

South Australia: Legally, Politically and Geographically Challenged

Law, politics and geography place South Australia in a difficult negotiating position. Unlike in the United States, Australian courts have not had to address the question of whether states have a legal right to a share of the water from a river that flows through that state. As a result, South Australia has no 'fall back' legal position.

As the downstream state, not being able to assert a legal right or secure a political deal leaves South Australia in a weak position geographically – as history shows, it

is then at the mercy of the upstream states. While the former South Australian Premier Jay Weatherill seemed willing to confront some of these legal and political challenges, the change in government at the South Australian election makes it less likely that the State will use the Commissioner's 'blue print' to challenge the Basin Plan.

Sadly, the history of the Murray-Darling Basin dispute tells us we might have to wait until the next extreme drought event before governments seriously turn their mind to addressing the long-term environmental sustainability of the Basin.

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[1] '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>. This article draws upon an earlier blog post I have written on the South Australian Royal Commission: see Adam Webster, 'South Australia's Royal Commission provides 'blue print' to challenge Basin Plan' on AUSPUBLAW (21 May 2018) <https://auspublaw.org/2018/05/south-australias-royal-commission/>.

[2] *The Murray-Darling Basin Water Compliance Review* (Murray-Darling Basin Authority, 2017) 12-13, <https://www.mdba.gov.au/sites/default/files/pubs/MDB-Compliance-Review-Final-Report.pdf>.

[3] *Murray-Darling Basin Royal Commission: Issues Paper No 2* (30 April 2018) 5 <https://mdbrcsa.govcms.gov.au/sites/g/files/net3846/f/issues-paper-round_2-mdbrc.pdf?v=1525066265>.

[4] Ibid 14.

[5] Robert Orr and Helen Neville, *The Role of the Social and Economic Factors in the Basin Plan* (25 October 2010) <http://www.aph.gov.au/DocumentStore.ashx?id=dd6cb9d1-a591-48de-97aa-ec31cf91e259>.

[6] Murray Darling Basin Authority, Guide to the Basin Plan (Murray-Darling Basin Authority, 2010) 141 <https://www.mdba.gov.au/sites/default/files/archived/guide_pbp/Guide-to-proposed-BP-vol2-0-12.pdf>.

[7] *Water Amendment Act 2018* (Cth).

[8] Paul Kildea and George Williams, Submission No 15 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Provisiosn of the Water Act 2007*, 16 March 2011; Australian Network of

Environmental Defenders Offices, Submission No 16 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Provisions of the Water Act 2007*, March 2011; Anita Foerster, 'The Murray-Darling Basin Plan 2012: An Environmentally Sustainable Level of Trade-off?' (2013) 16 *Australian Journal of Natural Resources Law and Policy* 41.

[9] *Lee v Commonwealth* [2014] FCFCA 174 (18 December 2014).

[10] See, eg, *Basin Plan Amendment Instrument 2017 (No 1)*, which was to reduce the water recovered for the environment by 70 GL. When the instrument was disallowed by the Senate, the Government (with the support of Labor) passed the *Water Amendment Act 2018* (Cth) to provide for this reduction. The coalition government has also displayed a preference for trying to increase water available for the environment by supporting projects that seek to allow for more efficient water use rather than buying back water from farmers: see, eg, *Basin Plan Amendment (SDL Adjustments) Instrument 2017*. Whether these projects will achieve an increase in the amount of water available to the environment has been questioned: see Anne Davies, Head of Inquiry into Murray-Darling Basin Plan Questions its use of Science, *The Guardian* (online), 10 July 2018 < https://www.theguardian.com/australia-news/2018/jul/10/head-of-inquiry-into-murray-darling-basin-plan-questions-its-use-of-science>.

[11] (1962) 108 CLR 372 ('*Cigamatic*').

[12] Commonwealth of Australia, 'Plaintiff's Submission', Submission in *Commonwealth v Commissioner Bret Walker*, C7/2018, 6 August 2018, 21.

[13] Letter from Royal Commissioner Bret Walker to Attorney-General Vickie Chapman, 9 August 2018 <https://mdbrcsa.govcms.gov.au/sites/g/files/net3846/f/20180809_letter_to_hon_vickie_chapman.pdf?v=1533867454>.

[14] Letter from Attorney-General Vickie Chapman to Royal Commissioner Bret Walker, 10 August 2018 <https://mdbrcsa.govcms.gov.au/sites/g/files/net3846/f/correspondence_from_the_hon_vickie_chapman_mp.pdf?v=1534125787>.