

Briefing Note

Water Law and Policy Conference

ANU – December 2011

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Andrew Gregson
Chief Executive Officer

Background

The Conference was hosted by the Crawford School at the Australian National University on 1 December 2011. The program was arranged by the Australian Centre for Environmental Law and the ANU College of Law. It was attended by around 100 individuals from government, industry and academia.

Dr John Williams – The Key Points of the Draft Plan

(Dr Williams is a Member of the Wentworth Group and a Commissioner of the NSW NRC)

Academics are in furious agreement with themselves that more water is needed at the Murray mouth. Dr Williams mocked the Plan for not taking into account climate change at 2030. He argues for 60% to 80% of without development flows at end of system. He thinks that the inability to flood private property is “perverse”.

Alex Gardner – The Key Legal Issues for the Murray-Darling Basin Plan

(Associate Professor of the UWA and Adjunct Professor at ANU College of Law)

The short term goal is to return water to the environment and the long term goal is to optimise social and economic outcomes is his view of the *Act*. He believes that the two merge well.

The *Act* does not say how assets and functions should be identified or how volume required for ecosystem services should be determined. It is his view that the MDBA has been “creative” in so doing.

He has determined that there is no Environmental Watering Plan in the Draft and that this is contrary to the *Act*.

He says there’s no impediment in the *Act* to accepting South Australia’s efficiency quarantine argument.

He argues that the 2015 proposed review is no in accordance with the *Act* as it breaks the SDL requirements in half. (Interestingly, he quoted extensively from the “Plain English Summary” of the Draft which likely led to these flawed conclusions. It would be something for which he’d fail a student).

He asks “is it the intent of the *Act* that non-compliance will spell invalidity? He points to the Gwydir River Case to answer the question in the negative. The Project Blue Sky case provides a further answer such that a Court would likely not direct a regulation after it is made, but may direct what should be contained within it if challenged prior to being made. **Note that this may result in legal action sooner rather than later.**

A significant issue will be standing (who has the capacity to bring an action?). States clearly have (in the original jurisdiction of the High Court), licensees (or a representative group such as NSWIC) clearly have, but a public interest plaintiff may not (such as environmental NGOs). An environment or indigenous NGO would need to prove a special interest (and have it accepted).

Donald Rothwell – Australia’s International Obligations to Protect the MDB

(ANU College of Law)

The Tasmanian Dam case set the precedent in this field. Commonwealth legislation is valid. There is no implied nationhood power. There was no acquisition of property and there was no interference with State Government.

The ratification of a treaty is sufficient in the absence of legislation.

There is no general environmental power conferred in the Constitution – it must rely on external affairs.

Commonwealth legislation must be appropriate and adapted to the treaty – see *Richardson v Forestry Commission* and *Queensland v Commonwealth* 1989 HCA 36.

Treaties – Ramsar (16 in the Basin), World Heritage (Willandra Lakes), Bonn Convention (although Australia as a “range state” is unlikely), Convention of Biological Diversity. All give rise to power.

The key issues on Constitutional power are already resolved by the High Court.

Is everything in the Basin Plan consistent with external affairs? Is the broad, expansive intent of the Basin Plan legitimate as a core obligation pursuant to the treaties and conventions? Is Article 8 of the Bonn Convention sufficiently broad to encompass the scenario? These are questions for the Court.

John Williams – Can the High Court Save the Murray Darling?

(Professor of the Law School at the University of Adelaide and adviser to the SA Government)

Does the High Court have jurisdiction? A question as to a right to a river is likely to be between states. This is the original jurisdiction of the High Court.

Is there a matter? Section 75 is relevant – particularly 4. The mere fact of a dispute between states is not enough, though. The question is whether a dispute over water would be seen as a “matter”.

To be a matter, there must be the capacity for Court to provide a remedy. See Boundary Disputes Case between SA and VIC. A matter requires something that can

be determined on principles of law. If it is a political issue, it is beyond the jurisdiction of the Court – which was the decision in the Boundary Dispute Case. There was some consideration of the issue of whether a dispute analogous to dispute between individuals can qualify as a matter, but commentary since suggests that water is sovereign similar.

If there is an interstate riparian right, similar to individual right, then there is clearly a matter and therefore jurisdiction. So the question central to an SA challenge is whether there is an interstate sovereign right. Professor Williams believes there is. In a private conversation afterwards, I asked if SA had considered the ramifications of such a right on the current license regime. Such consideration has only been limited – and it seems likely that the issue is merely to drive political pressure for a negotiated outcome.

Section 100 – does it create a right or is it a limit on Commonwealth power? The question cannot be answered, but it is Williams' opinion that it is the former. The history of the section is about navigation at the expense of irrigation from NSW. He thinks the introduction of the word “reasonable” during negotiations over the Constitution imports the riparian right. A reasonable might also incorporate volume, manner or extraction and use. That is, it doesn't create a right in and of itself, but may import a pre-existing right (the riparian argument).

Section 92 and the 4% rule – are they compatible? It is excuse to the provisions from Victoria if they can give “good reason”. Victoria has argued it was to provide for adjustment over a reasonable time. SA argued that there was no underlying reason/justification for the rule. As the matter didn't come before the Court, it has not been determined.

SA has always maintained theirs is an interstate riparian right. They use a common law analogy. The framers of the Constitution made their view clear there was no interstate riparian before Federation as there was no jurisdiction and Federation destroyed it in any event. Inglis-Clarke argued otherwise - saying states gave up their right to settle dispute "by war" and establishing tribunals gave an opportunity for resolution.

SA believes the Court would have jurisdiction and that there has been a right since Federation (not created by 100). The question is what the right is. The High Court has the capacity to rise above politics, set boundaries and force States back to the bargaining table.

Andrew Macintosh – The Constitutional Protection of Water Rights

(Australian Centre for Environmental Law, ANU College of Law)

In providing just terms, the Constitution has the power to acquire property. To trigger the requirement, there must be a property right and there must be acquisition.

Andrew provided a recap of *ICM* and *Arnold*. The key issue is the proprietary nature. If the state has no proprietary interest (just a sovereign interest), then no interest has

been changed and hence there is no acquisition. Note that carbon units under Clean Energy Act Act might be interesting on this basis.

Tom Bonyhady – Prioritising the Environment? Weighing Eco/Social/Enviro Factors

(Professor and Director of the Australian Centre for Environmental Law)

Professor Bonyhady provided a most remarkable revisionist history of the Guide and Act so divorced from history as to be fascinating...

Janice Gray – Water Trading: An Overwhelming Success?

(Law School, University of NSW)

Ms Gray showed an unfortunate lack of understanding of the water market, arguing for it to be simplified.

Daniel Connell – The CEWH and Basin Plan

(Crawford School of Economics and Government)

The Basin Plan will be sidelined by other issues. The CEWH will be the only surviving aspect.

Dr Connell again quoted from the Plain English interpretation of the Plan to question the certainty of figures. It was again disappointing to see justification of a position from a document that *is not the Basin Plan*.

He noted that the Basin Plan is latest of 8 separate programs to divert water from productive to environmental use.

He criticised infrastructure investment as a means for obtaining water, noting his belief that Melbourne should not draw on Basin resources. He justified this position by noting that “South Australia is not permitted to purchase water for Adelaide.” He provided neither evidence nor justification of this assertion. He pointed to the Productivity Commissioner and the Victorian Auditor General when asserting that infrastructure investment was a subsidy for irrigators.

He asserted that “implementation of the Basin Plan does not commence until 2019 and it has a 5 year phase in”. Again, neither evidence nor justification was presented. He noted that it was “the best part of 10 years until it is implemented and it is a document that continually changes”.

Not yet satisfied with his festival of blatant assertion, Dr Connell went on to suggest that “tagged water will continue to support the areas it comes from” and that “most

CEWH water is likely to stay within the region of origin." When questioned on this, he dismissed the issue.

Tony Windsor

(Member for New England)

"If the Basin States don't agree, this is killed."

"I was the only one that voted against it". Xenophon says he did to.

"Do we want something to happen?"

"The worst outcome is no outcome."

Nick Xenophon

(Senator for South Australia)

He has met with and likes Craig Knowles and Rhondda Dickson.

He Likes the Productivity Commission report, noting that "buybacks are more effective"

He tried to move water security amendments for inclusion in the Carbon Farming Initiative. (Note that these are now covered, after some NSWIC work, in the Regulations).

He again notes that SA is "more efficient than anywhere" and should be excused from recoveries.

I asked if recognition of early adoption should be just SA or everywhere? He says it should be everywhere.