

## River Peoples Forum, Swan Hill

### The Water Act, Environmental Law and the Basin Plan – Dr Bruce Lindsay

---

Thank you for the opportunity to speak to you all here today.

I have been asked to talk to the legal framework applying to the Murray Darling Basin as well as contend with misconceptions about that framework. I would add briefly that the fate of the Basin is as much about the rule of law as it is about the ecological resilience or degradation of the Basin's river ecosystems.

I will assume everyone has heard of the Basin Plan, although everyone may not be familiar with all the detailed scheme of which it lies at the centre.

The Basin Plan is the principal, but not sole, legal mechanism operating under the Commonwealth Water Act to:

- Manage Basin water resources in the national interest.
- Give effect to international environmental treaties.
- In doing so promote and use Basin water resources in a way that optimises economic, social and environmental outcomes.
- Do all of this by addressing over-extraction and achieve an environmental sustainable level of take.
- Protect, restore and provide for the ecological values and services of the Murray Darling Basin.
- Subject to the above, maximise net economic returns to the Australian community.

These objects are reflected in the Basin Plan itself and the purposes for its preparation.

For the Murray River (Milloo, Millewa), as for other waterways in the Basin, the Basin Plan is as close as we have to a 'law of the river' under ordinary legislation.

The key legal mechanism built into the Water Act driving these objectives and intended to resolve tensions is the requirement to achieve an 'environmentally sustainable level of take' (ESLT). The Act intends to reduce diversions in order to enable the river (including its floodplains) to function ecologically as a river.

The ESLT is to be determined and implemented in accordance with 'best available scientific knowledge'. That is a prescription commonplace under US environmental law but rare in Australia.

The first, and perhaps fundamental, premise of this legal regime is that it is an environmental statute. It is intended primarily to achieve environmental outcomes through redressing the adverse impacts of river regulation. Balancing other factors, including economic ones, is to occur within that context.

That was the crucial finding of the 2019 South Australian Royal Commission into the Murray Darling Basin. Responding to the notion, or 'myth', that the Basin Plan was to be about 'balance' according to

a ‘triple bottom line’ accounting, the Commissioner referred to it as a ‘very unhelpful slogan’<sup>1</sup> whose use in setting the limits on water diversions was the ‘most pernicious of [its] polemical uses...’.<sup>2</sup>

The Royal Commission report on the Murray Darling Basin is and remains the defining legal and practical analysis of the management of Murray Darling Basin water resources under Water Act and Basin Plan. Everyone should read it.

It elaborates a tale of unlawfulness and failure of public administration. That tale is told over nearly 800 pages, by one of Australia’s leading public lawyers. There has never been a persuasive, of even genuine, official response to it. Certainly, it has never been rebutted.

The centrepiece of unlawfulness was not setting the limit of water extraction (or SDL) primarily according to environmental considerations and science. Flow on consequences include the unlawful bases of subsequent actions including preparation of water resource plans and construction of the SDL Adjustment Mechanism. As the Commissioner found, politics displaced law and science. If the law had permitted foundational decisions of Basin water management to be political then so be it. But that was not, and is not, the case.

Use of law and science intends decision-making to occur on a reasoned and transparent basis. That approach is world’s best practice. The Commissioner found it absent. Nothing in the meantime appears to have changed in any fundamental or even serious way.

If the Basin Plan had been prepared lawfully and implemented properly, planned redistribution of water from consumptive uses to the environment would be more significant and dramatic than currently occurring – if say, as Richard Beasley (formerly senior counsel for the Royal Commission) has argued, the SDL was set at around 5000GL.<sup>3</sup> This could have been done in an orderly way. Water rights buy-backs have been viewed as the best and fairest way to do that. It is a form of structural adjustment, a process commonplace in other industries since the 1980s and, in the face of climate change, an outcome likely to occur across many industry sectors (such as coal and energy).

For the Murray Darling Basin, much of that approach was shelved and we ended up with excessively complicated and tortuous efforts designed mainly to obscure the main task (redistributing water to the environment and remedying over-extraction) and very expensively to entrench ‘business as usual’. That is not to say nothing has changed, such as developing environmental watering and creating more efficient irrigation, but a decade of intervention under the Basin Plan does appear to be shuffling deck chairs. Jamie and Matt’s work with the Wentworth Group leads the way on the science and revealing the facts on the ground such as:

- Observed actual river flows by the late 2010s were well below what was expected and planned;<sup>4</sup>

---

<sup>1</sup> Walker South Australian Royal Commission into the Murray Darling Basin: Final Report (2019) (‘SA Royal Commission Final Report’), 18

<sup>2</sup> Ibid, 20

<sup>3</sup> Richard Beasley SC *Dead in the Water: A Very Angry Book About the Our Greatest Environmental Catastrophe... The Death of the Murray-Darling Basin* (Allen and Unwin, 2021). Or between 3980 GL to 6980 GL according to the Commissioner: see *SA Royal Commission Final Report*, 53

<sup>4</sup> WWGCS *Water Flows in the Murray Darling Basin: Observed versus Expected* (2019), <https://wentworthgroup.org/wp-content/uploads/2019/02/MDB-flows-summary.pdf>

- Actual environmental water delivery is far below overall watering needs of key flood-dependent ecosystems;<sup>5</sup>
- Excessive reliance on highly uncertain floodplain re-engineering, minus solutions to getting large flow events down the rivers (or in other words re-engineering human activities rather than nature which is often termed ‘constraints relaxation’), is producing environmental triage by default, i.e. outside of policy or principle consistent with the Water Act;<sup>6</sup>
- There is inadequate environmental and water information on which to base decisions;<sup>7</sup>
- Governments resort to the more expensive and inefficient approach of obtaining environmental water through infrastructure upgrades rather than limiting water rights;<sup>8</sup>
- Resilience or adaptation capacity of the river ecosystems to climate change continues to decline markedly.<sup>9</sup>

If transformation is underway for river environments (as no doubt it is), we need to be very clear of the basis on which that occurs. And let’s be clear: the legal basis is set by the *Water Act 2007* (Cth) and, in its lawful construction, the Basin Plan. This requires not only far greater return of water to the environment and to Country, but re-thinking implementation of the law.

From its starting point as an impressive exercise of federal governance of the Murray Darling Basin, the Basin Plan has been characterised by an unravelling of its implementation. Matt and Jamie have referred to this as a ‘step down’ in recovery of water for the environment.<sup>10</sup> ‘Unravelling’, I think, better reflects the less than orderly process, dominated by politics and major industrial interests – also known as regulatory capture and rent-seeking.<sup>11</sup> ‘Unravelling’ started with the failure to set a Basin-wide Sustainable Diversion Limit (SDL) according to science and law. It has continued through the long-winding road of downward ‘adjustment’ of environmental water recovery (SDLAM), the virtual impossibility of South Australia getting its water share (450GL), foot-dragging inertia on ‘constraints management’, and the often impenetrable nonsense of water resource planning.

In the final report of the South Australian Royal Commission, Commissioner Walker took particular aim at the Commonwealth institutions with principal responsibility for implementation of the Water Act and the Basin Plan, the Murray Darling Basin Authority (MDBA). Noting that they refused to attend and give evidence at the Royal Commission, the Commissioner received largely uncontested evidence on the MDBA’s conduct including its approach to critical technical and scientific questions such as accounting for climate change in the future of the Basin. His findings were repeatedly scathing and

---

<sup>5</sup> Chen et al ‘A trickle, not a flood: environmental watering in the Murray-Darling Basin, Australia’ (2020) *Marine and Freshwater Research* <https://doi.org/10.1071/MF20172>

<sup>6</sup> Colloff and Pittock ‘Mind the gap! Reconciling environmental water requirements with scarcity in the Murray Darling Basin, Australia’ (2022) 14 *Water* 208 <https://doi.org/10.3390/w14020208>

<sup>7</sup> Ibid

<sup>8</sup> Grafton and Williams ‘Rent-seeking behaviour and regulatory capture in the Murray-Darling Basin, Australia’ (2020) 36 *International Journal of Water Resources Development* 2-3 485

<sup>9</sup> Colloff et al ‘Adaptation services of floodplains and wetlands under transformational climate change’ (2016) 26 *Ecological Applications* 4 1003

<sup>10</sup> Colloff and Pittock ‘Mind the gap! Reconciling environmental water requirements with scarcity in the Murray Darling Basin, Australia’

<sup>11</sup> Grafton and Williams ‘Rent-seeking behaviour and regulatory capture in the Murray-Darling Basin, Australia’

forensic. He refers to the MDBA's 'ongoing negligence' and 'dereliction of its duties',<sup>12</sup> its 'deplorable judgment',<sup>13</sup> and its 'maladministration'.<sup>14</sup> If only implementation of the Water Act was akin to handing out a few Cartier watches someone might have resigned or been sacked.

No-one is saying design and implementation of laws remedying a century or so of over-exploitation of rivers is going to be straightforward. Or easy. Or without tension and conflict. The idea of doing so through law, public institutions, with billions in public funds and over time was to make serious change palatable, civil and, to a degree, fair. Serious change in the Basin intended achieving an ecologically sustainable pathway, based on science, and in the face of climate change. We should expect these endeavours to be undertaken in good faith, honestly and transparently.

On that note, I want to make reference to Basin Plan implementation measures currently underway on the Murray floodplain. In Victoria, these are the bundle of environmental works projects collectively referred to as the Victorian Murray Floodplain Restoration Project (VMFRP). These are floodplain re-engineering projects designed to get water into floodplain ecosystems in the absence of naturalised flooding. They are akin to earlier Living Murray works projects. There is a great deal of boosterism around these projects, given their capacity to revive stressed floodplain ecosystems at least in part. They are to undergo environmental assessment over the next 12 months or so. Most importantly, they are a component of the SDL Adjustment Mechanism, which is ultimately intended to reduce the amount of water to be returned to the Basin environment – from an already unlawful, inadequate base. The Murray projects are to contribute around 12% of that reduction. The VMFRP projects are in effect part of an elaborate offset mechanism, a 'highly uncertain experiment with the environment'<sup>15</sup> as the Commissioner put it, and inconsistent with the requirements of the Water Act.

The fact that these projects are part of the SDL Adjustment Mechanism is almost never referred to in the official VMFRP material. The scoping requirements for the environmental assessment of these projects largely ignores that fact. Their assessment will be broken up and taken as separate works not considered as integral to the SDL offset mechanism. That is dishonest and inappropriate. Leaving aside the pros and cons (or net effect) of each project within their specific development 'footprint', they are collectively intended to raise the diversion limit in the Basin, the consequence of which risks, in the long run, the decline and collapse of large sections of river floodplain ecosystems outside of those 'watered' by works projects. This poses a 'balkanisation' of floodplain forests and woodlands.

Focusing attention on positive ecological outcomes from individual inundation projects deflects attention from the much bigger picture, which is what is occurring across the entire southern Murray Darling Basin through the Adjustment Mechanism.

Even absent fundamental overhaul of the SDL Adjustment Mechanism, the VMFRP should be the subject of something like a strategic environmental assessment. At a minimum that should occur for the entire Murray floodplain. Preferably, it should account for the entire southern Basin. Even so, it is hard to imagine the SDL Adjustment Mechanism could be easily rehabilitated.

It is important to remember that water management choices are decisions on large-scale ecosystem re-engineering, with very high degrees of uncertainty and risk, potentially leading to reinforcing losses.

---

<sup>12</sup> Walker SA Royal Commission Final Report, 56

<sup>13</sup> Ibid, 59

<sup>14</sup> Ibid, 54.

<sup>15</sup> SA Royal Commission Final Report, 57

Under climate change, wetlands are buffers and we are making decisions on how or to what degree we are compromising their condition and shifting carbon sinks in floodplain wetlands to sources of carbon emissions.

In 2007, the Federal Parliament made the decision to protect and repair the environment of the Murray Darling Basin. To do so is in the national interest and contributes to Australia's standing in the world. It is a task we have long needed to get back on track. It is time for the new Federal Government to step up and do that.

Dr Bruce Lindsay

Senior Specialist Lawyer

Environmental Justice Australia

2 September 2022