

12. A Sustainable Murray–Darling Basin: The legal challenges

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Introduction

The range of legal instruments informing how the Murray–Darling Basin (MDB) is managed is extensive. Some provide guidance; a number indicate strategies and policies; some assume the form of protectable rights and enforceable duties. What has emerged is a complicated and sophisticated web of interacting normative arrangements. These include

- several international agreements including those concerning wetlands, biodiversity and climate change
- the Constitution of the Commonwealth
- the *Water Act 2007* of the Commonwealth
- the *Murray–Darling Basin Agreement* scheduled to the Act
- State water entitlements stated in the Agreement
- Commonwealth environmental water holdings under the Act
- the Murray–Darling Basin Plan
- water-resource plans under the Act or State or Territorial water legislation
- State and Territorial water legislation
- water entitlements and water rights under State or Territorial water legislation.

It is particularly significant that many of these instruments are to an increasing extent incorporating protectable rights and enforceable duties applicable to both the public and the private sectors. This is the inevitable consequence of what the National Water Initiative (NWI) set out to achieve—namely: a nationally compatible market, and a regulatory and planning-based system of managing surface and groundwater resources that optimises economic, social and environmental outcomes.

Constitutional Perspectives

The constitutional validity of each of the provisions of the *Water Act* depends upon one or more of a number of sources of legislative capacity. These include

- matters referred to the Commonwealth by a State
- trade and commerce among the States
- trading corporations
- external affairs.

The Act carefully states the source of legislative power for each set of provisions. The exercise of the external affairs power involves the enactment of a law that constitutes the implementation by Australia of an obligation imposed on it by an international agreement. Hence, the substance of the international obligation indicates the scope of the provision able to be enacted by the Commonwealth. The market-based rules and the trading rules are sourced in the interstate trade and commerce power and the trading corporations power. The matters referred by the relevant States to the Commonwealth include: first, the powers, functions and duties conferred on Commonwealth agencies that relate to MDB water resources and are conferred by or under the *MDB Agreement*; and second, the management of basin water resources to meet critical human water needs (*Water Act 2007* [Cwlth], s. 18B[9] ‘referred subject matters’).

These matters relate to the water resources but not the natural resources of the Basin. How the natural resources of the Basin are managed is likely to be a reflection of Australia’s international obligations implemented through the external affairs power. While there is nothing to prevent a referring State from terminating its reference, the Act specifically enables a referring State by a provision of a law to declare a matter to be an excluded matter in relation to the Act. While there is no certainty in these matters, there is a potentially close relationship between international agreements to which Australia is a party, the Constitution, and specific provisions in the Act, the *MDB Agreement* and the Basin Plan.

The Enforceability of Instruments

The capacity of a provision in an instrument to be implemented and enforced depends upon its status within the legal system and the form in which the instrumental provision is expressed. A specific international obligation is enforceable in the relevant international forum. It supports the exercise of the external affairs power by the Commonwealth if the conditions indicated by the High Court are satisfied. A provision in the Act is enforceable in accordance

with the procedures stated in the Act and provided the provision satisfies the conditions for a judicially protectable right or a judicially enforceable duty. The Act is a legislative instrument with that status.

But what is the status of the *MDB Agreement* and of the Basin Plan? The Agreement as a schedule to the *Water Act* is part of the Act and prima facie has the status of legislation. The Agreement is formally amended when the instrument that amends the schedule is registered as a legislative instrument.¹ This by implication confirms that the Agreement itself is a legislative instrument. The *Water Act* (s. 33[1][a]) itself states that the Basin Plan is a legislative instrument. While the Act, the Agreement and the Plan might well be legislation in this sense, in practice, it will be the nature and function of the relevant provision and the form in which it is expressed that will determine whether and to what extent the provision is able to be enforced. Does the provision state a purpose or object, a principle, a strategy or policy, a procedure, a power, a right or a duty? The Act, the Agreement and the Plan (in prospect) are replete with examples of all of these.

The Objects of the Act

One of the objects of the *Water Act* (s. 3[b], [c]) is to give effect to relevant international agreements and in so doing to promote the use and management of the Basin's water resources in a way that optimises economic, social and environmental outcomes. In addition, and without limiting the scope of this object, there are three particularly relevant objects (*Water Act 2007*, s. 3[d]). The first is to ensure the return to environmentally sustainable levels of extraction for water resources that are over-allocated or overused. The second is to protect, restore and provide for the ecological values and ecosystem services of the Basin. The third—subject to the first two—is to maximise the net economic returns to the Australian community from the use and management of the Basin's water resources. The use of the expression 'subject to' means that the maximisation of net economic returns is conditional upon the return to environmentally sustainable levels of extraction. Significantly, the optimisation of economic, social and environmental outcomes is linked to giving effect to relevant international agreements, whereas the return to environmentally sustainable levels of extraction is not so linked. In addition, it is noteworthy that optimisation involves a qualitative judgment while maximisation involves a quantitative judgment. In any event, the object of the Act that most closely resembles a duty is to ensure the return to environmentally sustainable levels of extraction.

¹ *Murray–Darling Basin Agreement*, art. 5(2) as included in Schedule 1 to the *Water Act 2007* (Cwlth).

The Purpose and Development of the Plan

The purpose of the Basin Plan is linked to the objects of the *Water Act*. In addition, however, the Plan is expressly required to provide for

- the establishment and enforcement of environmentally sustainable limits on the quantities of surface water and groundwater that may be taken from basin water resources (*Water Act 2007*, s. 20[b])
- the use and management of the Basin's water resources in a way that optimises economic, social and environmental outcomes (s. 20[d]).

These are expressed in such a way that they are tantamount to obligations. While the provision in relation to environmentally sustainable limits is in effect a specific obligation, the provision in relation to the optimisation of economic, social and environmental outcomes is formulated as a goal or a result.

The development of the Plan is itself controlled by the Act. In developing the Plan there is an obligation to act on the basis of the best available scientific knowledge and socioeconomic analysis (*Water Act 2007*, s. 21[4][b]), and there is a duty to have regard, among others, to

- the consumptive and other economic uses of basin water resources (s. 21[4][c][ii])
- social, cultural, Indigenous and other public-benefit issues (s. 21[4][c][v]).

Consequently, economic, social, cultural and Indigenous issues are of mandatory relevance in developing the Plan.

The Content of the Plan

A wide range of matters must be included in the Basin Plan. These include the long-term average sustainable diversion limits (SDLs) and temporary diversion limits (*Water Act 2007*, s. 22[1], Items 6, 7). It is specifically provided that a long-term average SDL for the Basin's water resources, for the water resources of a particular water-resource plan area or for a particular part of those water resources must reflect an environmentally sustainable level of take (*Water Act 2007*, s. 23[1]). This itself appears to be a reflection of the stated object of the Act to return to environmentally sustainable levels of extraction (s. 3[d][i]). The cumulative effect of these provisions is for SDLs to ensure a return to environmentally sustainable levels of extraction. These specific provisions are directed at environmental sustainability rather than the trilogy of environmental, economic and social sustainability.

Temporary diversion limits are linked to what is described as a temporary diversion provision (s. 22[1], Item 7). The purpose of a temporary diversion provision is to provide for a transitional period to minimise social and economic impacts when the long-term average SDL is lower than the long-term average quantity of water that has in fact been taken (s. 24[1]). The Act accordingly contemplates that the establishment and enforcement of environmentally sustainable limits are likely to have social and economic impacts. These are therefore not only relevant in the development of the Plan, but also addressed through the mechanism of a temporary diversion provision.

The Relationship Between Objects, Purposes and Obligations

The *Water Act* does not give explicit priority to any of the three outcomes: economic, social or environmental. Each provision in the Act, however, must be given effect not only according to its own terms but also in the context of the provisions in the Act stating the objects of the Act and the purpose and content of the Basin Plan. For example, the specific provisions relating to SDLs have effect according to their own specific terms but in the context of the optimisation of economic, social and environmental outcomes.

Although these statements of objects and purpose are not in the form of traditionally enforceable rules, they perform a critical function in the overall system of governance. These statements inform and direct how decisions are to be made at all levels within the system, including those about SDLs and temporary diversion limits. But environmentally sustainable limits, long-term or temporary, are established only in accordance with the specific requirements set out in the Act—not an easy task.

The overall but formally unstated goal is ecologically sustainable development. It brings together the economic, the social and the environmental factors involved in decision making. It is a simple idea but difficult to implement in practice. The ecologically sustainable development of the water resources and natural resources of the Basin is the outcome expected—but not required—by this integrated set of normative arrangements. What is the relationship between these objects, these purposes and these requirements? Compliance with specific requirements stands at the threshold to the optimisation of economic, social and environmental outcomes. Such compliance is almost a condition to be satisfied before attention turns to optimisation of outcomes.

Sustainable Diversion Limits

Assuming that the ultimate goal of these arrangements is the ecologically sustainable development of the water resources as well as the natural resources of the Basin, how is this to be done? One of the specific objects of the Act (s. 3[d][i])—already discussed—is to ensure the return to environmentally sustainable levels of extraction for water resources that have been over-allocated or overused. The principal method for doing this is the inclusion in the Basin Plan of long-term average SDLs. The determination of such a limit—also already discussed—is required to reflect an environmentally sustainable level of extraction (*Water Act 2007*, s. 23[1]). The term ‘reflect’ is unusual in this context. It probably means to return to an environmentally sustainable level of extraction—the terms used in the relevant statement of objects of the Act. Without question, the reference is to environmental sustainability. In this respect, the Plan is concerned only with environmental sustainability.

The requirements for a water-resource plan for a water-resource plan area are different. A water-resource plan for a water-resource plan area must include requirements in relation to

- the long-term annual diversion limit for the water resources of the water-resource plan area (*Water Act 2007*, s. 22[3][b])
- the sustainable use and management of the water resources of the water-resource plan area within that diversion limit (s. 22[3][c]).

The water-resource plan thus must address the sustainable use and management of the water resources of the relevant area in general but in the context of the SDLs stated in the Plan. Those in the Plan are intended to bring about a return to an environmentally sustainable level of extraction. But the water-resource plan is directed at the sustainable use and management of the water resources in general without any specific reference to environmental sustainability. This presumably means the use and management of water resources in ways that are economically and socially sustainable, as well as environmentally sustainable. This raises the issue of how water resources are to be managed so as to optimise simultaneously economic, social and environmental consequences.

The *Guide to the proposed Basin Plan* (MDBA 2010) indicates how this is done. An environmentally sustainable level of extraction is one that will not compromise the environmental-water requirements of key environmental assets, key ecosystem functions, the productive base, and key environmental consequences for the water resource (MDBA 2010:103). In setting this level, the economic, social and environmental consequences are stated to be optimised and the net economic returns maximised (p. 103). The Guide (pp. 106, 107) indicates how the optimisation of economic, social and environmental results is to be achieved. There are three aspects.

- To meet key environmental outcomes at the Basin level.
- To satisfy the environmental requirements of each catchment at the catchment level.
- To minimise social and economic impacts on basin communities and industries (MDBA 2010:101).

This approach to optimisation picks up the concepts and terms underpinning the Act. The minimisation of social and economic impacts is undoubtedly relevant. For this purpose, impacts are defined as predicted consequences. The Act is directed at the optimisation not only of environmental but also of economic and social outcomes. For this purpose, outcomes are intended consequences. In this way, optimisation of these outcomes goes beyond the minimisation of social and economic impacts and in the direction of the achievement of economic, social and environmental outcomes. But, SDLs for the Basin’s water resources are directed at environmentally sustainable levels of extraction—a specific and narrower focus. In any event, environmental sustainability in this sense is a critical part of these overall arrangements. It is within this framework that economic sustainability and social sustainability need to be accommodated within a framework of environmental sustainability. This is an extremely difficult task, which is replete with conflicting interests.

Critical Human Water Needs

The way in which critical human water needs (critical needs) are incorporated within this framework for the governance of the Basin’s water resources demonstrates the interdependence of these several instruments. The *Water Act* makes what might be described as a statement of policy—although it is described as a fact—in relation to the preparation of the Basin Plan. In such terms, the Plan must be prepared having regard to the fact that the Commonwealth and the States have agreed

- that critical human water needs are the highest-priority water use for communities who are dependent on basin water resources
- in particular, that to give effect to this priority in the River Murray system, conveyance water will receive first priority from the water available in the system (*Water Act 2007*, s. 86A[1]).

It is accordingly the policy of the Commonwealth and the Basin States to give the highest priority to satisfying critical needs in managing the water in the River Murray system. This policy is implemented by the imposition of a duty that the Basin Plan must include a statement of the amount of water required in each referring basin State (but not Queensland) to meet these critical needs (s. 86B[1]).

The Plan must in addition address the possibility that there will be insufficient water to meet these critical needs. This includes a duty to specify the conditions for the commencement of Tier 2 or Tier 3 water-sharing arrangements in place of Tier 1 water-sharing arrangements among the Basin States (*Water Act 2007*, ss. 86D, 86E). It is neither the Act nor the Plan but the *MDB Agreement* that describes the States' water-sharing arrangements.² When Tier 2 and Tier 3 water-sharing arrangements are in place, the distribution of waters to the Basin States is governed by the schedule for water-sharing required to be prepared by the MDBA and approved by the Ministerial Council. This schedule must be prepared on the basis that the highest priority is to be given to the satisfaction of critical needs (MDB Agreement, art. 135[8][a], [b]). There is an additional statement of policy in the Agreement but not apparently reflected in the Act—namely, each state-contracting government will be responsible for meeting critical needs in its State and will decide how water from its entitlement is used (MDB Agreement art. 135[8][c]). Critical needs are thus met in accordance with the arrangements in the Act, the Basin Plan, the *MDB Agreement* and the water-sharing schedule that is part of the Agreement. These arrangements specify a range of relevant duties. It is, however, the responsibility of each State to meet critical needs and to decide how its water entitlement is to be used. This responsibility is circumscribed by the accompanying sets of rules in these instruments.

State Water Entitlements

What has emerged so far is a set of rules of various kinds that relates to the direction of these governance arrangements, the matters required to be addressed by the Basin Plan, and the rules according to which water must be shared among the Basin States to ensure critical needs are met. The State water-sharing arrangements included in the *MDB Agreement* represent potential restrictions upon the States' entitlements to water conferred by the Agreement itself. A State water entitlement is described as the entitlement of a State to water determined in accordance with the relevant part of the Agreement (MDB Agreement art. 2 'State water entitlement'). The relevant part includes the State water-sharing arrangements already discussed. The focus now returns to the entitlements of the Basin States rather than the restrictions on these entitlements.

The Agreement specifies the monthly quantities of River Murray water that South Australia is entitled to receive (MDB Agreement art. 88). In addition, South Australia may store any part of its monthly entitlement for the purpose of meeting the critical needs of the SA community in the upper River Murray

² *Murray–Darling Basin Agreement*, arts 131–4 as included in Schedule 1 to the *Water Act 2007* (Cwlth).

storages provided this does not affect the availability for New South Wales or Victoria (art. 91). The Agreement confers upon New South Wales and Victoria an entitlement to use the specified amounts of water at the several locations in the river systems described in the Agreement (arts 94, 95). New South Wales and Victoria are, however, under a duty to provide in equal proportions South Australia’s entitlement from the water available under these arrangements to New South Wales and Victoria (art. 96).

The Operational Management of the Basin’s Water Resources

The responsibility for the operational management of the waters distributed in accordance to these entitlements lies with the MDBA and the agencies of the States. But the operational management of these entitlements is regulated by a complex set of rules in the *MDB Agreement*. These relate in particular to rules for water accounting, the periods of special accounting and for accounting for South Australia’s storage right (*MDB Agreement*, arts 105–30). These entitlements are subject to the range of rules related to critical needs already discussed. What is significant about the nature of these entitlements is this: South Australia is entitled as the downstream State to receive water from the upstream States and to store water in storages located in the upstream States. New South Wales and Victoria as upstream States are entitled to use water from the specified locations in the upstream States. On the face of it, these entitlements are in the form of protectable rights, but their exercise is subject to the range of duties imposed upon the Basin States and the MDBA in relation to the operational management of these entitlements. What is important is that these comprise sets of entitlements that correlate with sets of duties.

The Agreement makes it clear that, whatever the actual entitlements of a State are on a day-to-day basis, the responsibility for managing these entitlements on a day-to-day or indeed a longer basis lies with the States. While the *Water Act*, the Basin Plan and the *MDB Agreement* might be seen as the overarching elements of this system of governance, they are intrinsically linked to the arrangements for managing water resources within the States. This raises the very specific and rather difficult question of the relationship between these overarching arrangements and the rules for managing water resources in the States.

The legal arrangements in the States and Territories vary substantially in terms of detail. This might in certain circumstances be critical; however, the broad pattern across the States and Territories is similar. The right to control water and water resources is vested in the State or the Territory. For the most part,

access to and use of such water requires authorisation either directly by the legislation or by a grant under the legislation. Once a water right exists or has been conferred in these ways, its exercise is subject to the relevant rules in the legislation, in the plans and in support of the market arrangements introduced as part of this overall governance framework. For example, the right of an agriculturalist to receive water for irrigation from an irrigation infrastructure operator is subject in the first instance to the rules that comprise the law of the State or Territory but also to the rules set out in the Basin Plan, which is part of the overarching framework. The relationship between these various sets of rules needs to be examined from two perspectives. One arises in the context of the potential liabilities of the holders of water rights under the legislation of the States and Territories. The other arises in the context of environmental water rights held by the Commonwealth Environmental Water Holder (CEWH), and this will be considered first.

Commonwealth Environmental Water Holdings

One of the functions of the CEWH is to manage the Commonwealth's holdings (*Water Act 2007*, s. 105[1][a]). These are water-access rights, water-delivery rights, irrigation rights and interests in such rights held by the Commonwealth (s. 108[1]). The management of these holdings includes buying, selling and dealing in water and in water rights and in making water available from these holdings (s. 105[2][a], [b], [d]). There is a specific duty to manage these holdings in accordance with the environmental watering plan (part of the Basin Plan), any other relevant plan, any operating rules and any environmental watering schedules to which the CEWH is a party (s. 105[4]).

The broad purpose of the environmental watering plan is to protect and restore the environmental assets of the Basin (s. 28[1][d], [e]), and the functions of the CEWH are directed at the protection and restoration of the environmental assets of the Basin and other areas outside the Basin where the Commonwealth holds water (s. 105[3]). Specifically, the CEWH is under a duty not to dispose of water or of environmental-water holdings during a water-accounting period unless the water or the holding is not required to meet the objectives of the environmental watering plan, any other relevant plan or any applicable environmental watering schedules (s. 106[1]). Rights in relation to environmental water may be held by anyone—not only by the Commonwealth. The common restriction is for them to be used to achieve environmental objectives. The same rules apply to the operational management of environmental water, whether the rights are held by the Commonwealth or by someone else. The Commonwealth is, however, in a privileged position in one respect (s. 110). It is exempt from the laws of a Basin State that

- prevent a non-landowner from using water available under a water-access right
- require a non-landowner to hold a licence to use the water.

This exemption applies only to water used to protect declared Ramsar Convention wetlands or water-dependent ecosystems that support species or ecological communities protected by the environmental protection legislation of the Commonwealth. Subject to these exceptions, the same rules apply to all holders of rights in relation to environmental water.

Enforcement Criteria

The *Water Act*, the Basin Plan and its associated water-resource plans confer rights and impose duties upon a range of public-sector and private-sector decision makers and operators. The rules relating to the formulation and content of plans are directed mostly at the Commonwealth and its agencies. Some of the rules—particularly those in the plans—are directed at the private sector to the extent that the plans confer rights, provide for the conferment of rights, impose duties or provide for the imposition of duties. These rights and duties tend to be operational rather than managerial. How to comply with these duties depends upon how the duty is formulated and the standard or criterion it incorporates. The range of standards or criteria is considerable. To whom do they apply?

In principle, everyone is subject to the rules of law that apply in the particular circumstances in question. The *Water Act* (s. 12[1]) specifically states that it binds the Crown in each of its capacities. Neither the Crown—an agency of the Commonwealth—nor an agency of a State is, however, liable to be prosecuted or subjected to civil proceedings for a civil penalty (s. 12[2]). But agencies of the Commonwealth or of a State of certain kinds are not granted this immunity. The kinds of agency not exempt from this immunity—and liable to prosecution—are companies or body corporates in which the Commonwealth or a State has a controlling interest or an agency of a State appointed for a public purpose but operating primarily on a commercial basis (s. 12[4]). Broadly, therefore, agencies operating as corporations in a commercial context are exposed to the full range of enforcement mechanisms.

Then there are the compliance criteria applying to the rules in the Basin Plan, in a water-resource plan and to critical needs. First, there are the criteria for compliance with the rules in the Basin Plan and in a water-resource plan. The obligation imposed upon the MDBA and the other agencies of the Commonwealth is to perform their functions and exercise their powers consistently with and in a manner that gives effect to the Basin Plan (*Water Act 2007*, s. 34[1]). This does not apply to the preparation of the Basin Plan itself (s. 34[2]). The criteria

are twofold. The first is consistency with the Basin Plan and the second is in a manner that gives effect to the Basin Plan rather than to give effect to the Plan itself.

Different compliance criteria apply to these institutions and persons

- the Basin Officials Committee
- an agency of a basin State
- an operating authority
- an infrastructure operator
- the holder of a water-access right (*Water Act 2007*, s. 35[1]).

Again, there are two compliance criteria. The first is not to do an act if the act is inconsistent with the Basin Plan (s. 35[1][a]). The second is not to fail to do an act if the failure to do that act is inconsistent with the Plan (s. 35[1][b]). Again, the test is consistency. But in this case, it is restricted to an act or failure to do an act. There is thus one set of criteria for the Commonwealth and its agencies and another set for the other group of persons.

The compliance criteria in relation to critical human water needs are the same but the subject of their application is different. The criteria in relation to the MDBA and other agencies of the Commonwealth are consistency with the matters included in the Basin Plan and in a manner that gives effect to the matters included in the Plan (*Water Act 2007*, s. 86G[1]). In relation to the other agencies and persons, it is only consistency. In this case, it is consistency between the act of the person in question and the matters included in the Plan (s. 86H[1]). The compliance criteria in relation to critical needs do not apply to the performance of a function or the doing of an act or a failure to do an act where that affects State water-sharing arrangements (ss. 86G[2], 86H[4]). The only circumstance in which these compliance criteria apply in relation to critical needs is where one of two conditions is satisfied

- where the Ministerial Council has agreed to the Basin Plan applying to the act or failure
- where the provisions of the Basin Plan required to deal with critical needs have been taken to be a schedule to the *MDB Agreement* in accordance with the Agreement (*Water Act 2007*, ss. 86G[2], 86H[4]).

The test of consistency with the Basin Plan and the test in a manner that gives effect to the Plan afford a degree of flexibility in their application. In other words, there is no clear and absolute duty to comply with the rule. While such tests are not unprecedented, it has never been easy to be certain about their application in practice. It is possible that the meaning of the test of consistency will become an issue. This is because it is the test that applies to operating

authorities, infrastructure operators and holders of water-access rights. They might be in the private sector or the public sector. It is likely that the rights conferred upon them and the duties imposed upon them originated in instruments granted under the laws of the State or the Territory. These rights and duties might be inconsistent with the rules stated in the Basin Plan. Under the *Water Act*, the holder of a water-access right is under a duty not to do an act if the act is inconsistent with the Plan. To do so would activate some of the enforcement mechanisms available under the Act.

Enforcement Mechanisms

So much for duties and compliance criteria in respect of these duties. Who has the capacity to protect these rights and enforce these duties? The *Water Act* (s. 137) confers the responsibilities for doing so upon either the MDBA, the Australian Competition and Consumer Commission (ACCC) or the relevant minister. One set of enforcement mechanisms applies to a contravention of the Act, of the regulations under the Act, and of water-charge rules or water-market rules (s. 136). The enforcement mechanisms are

- injunctions granted by the court
- declarations made by the court
- civil penalty orders made by the court
- sanctions imposed by the court in criminal proceedings
- infringement notices
- enforceable undertakings (*Water Act 2007*, ss. 140–64).

These enforcement mechanisms are of general application and reflect the traditional approach to enforcement.

Enforcement notices are directed quite specifically at the management of the water resources of the Basin (*Water Act 2007*, s. 165). Specifically, this includes the Basin Plan and water-resource plans. The power to issue an enforcement notice is conferred upon the MDBA. It is available if there has been a contravention or there is likely to be a contravention of a provision of the Act relating to the management of the Basin's water resources in general. The power is also available in circumstances that reflect the compliance criteria already discussed in relation to the Plan and water-resource plans. That is where a person's conduct is inconsistent with the Basin Plan or a water-resource plan, is prejudicing its effectiveness or implementation, or is having an adverse effect on its effectiveness or implementation. In addition, it is available if the person is omitting to perform an act contrary to the compliance criteria of consistency or effectiveness (*Water Act 2007*, s. 165[1]).

It is non-compliance with the compliance criteria that lies at the foundation of the power to issue an enforcement notice. An enforcement notice enables the MDBA to direct a person to take the actions specified in the notice for all or any of a range of purposes (*Water Act 2007*, s. 165[2]). These include the remediation of any adverse consequences on the health or continued availability of basin water resources (s. 165[2][c]). More specifically, the MDBA is authorised to direct a person not to exercise some or all of the water rights that the person holds (s. 165[3]). The sanction for a breach of an enforcement notice is a civil penalty (s. 166).

While the Act enables members of the public to take part in the planning processes, there appears to be no provision for them to take part in enforcement proceedings. Accordingly, if a member of the public feels aggrieved by a decision made under the Act then the only option, it would appear, is to raise the issue in judicial review proceedings. Given the nature of judicial review proceedings, this could be difficult. The applicant needs to show standing and that there is an issue capable of adjudication by the court. On the face of it, this might be the only way in which a person issued with an enforcement notice may seek a determination of its validity. In effect, the Act provides for enforcement but not dispute resolution.

The Applicable Law

The final question is what law applies to any particular set of circumstances: the law of the Commonwealth or the law of the State or Territory? The principle embedded in the Constitution is clear. The law of a State is invalid to the extent that it is inconsistent with a law of the Commonwealth. This assumes that each law is otherwise valid. The principle behind the *Water Act* is equally clear. The Act of the Commonwealth is not intended to exclude or limit the concurrent operation of any law of a State (*Water Act 2007*, s. 250B[1]). It is a matter of some practical importance. A water right granted by a State may have attached to it a quantity of water determined in accordance with a State water plan. The quantity of water so determined might not be the same as the quantity of water determined in accordance with a water-resource plan in conjunction with the Basin Plan under the Act of the Commonwealth. How is this resolved? The Act deals with it in a number of different ways.

First, if a law of a referring State declares that a provision of a State law displaces a provision of a Commonwealth law, then the provision of the Commonwealth law does not prohibit the act or impose any liability if the provision of the State law specifically permits, authorises or requires the doing of the act (*Water Act 2007*, s. 250D[3], [4]). Second, the operation of a provision of the Commonwealth

law is restricted to the extent necessary to ensure that no inconsistency arises between the provisions of the Commonwealth and State laws (s. 250D[5]). Third, the Act authorises the enactment of regulations that modify the operation of the Act itself so that a provision of the Commonwealth law does not apply to a matter dealt with by a law of a referring State or that no inconsistency arises between the two (s. 250E). Fourth, the provisions of the Commonwealth Act do not apply if a provision of a law of a referring State declares the matter to be an excluded matter for this purpose (s. 250C). Otherwise, the intention is for the law of the Commonwealth and the law of the State to have concurrent operation.

The *Water Act* itself provides an example. 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 (s. 40). In other words, the purpose of the provision in the Basin Plan is effectively achieved by the relevant provisions of a State law. There are, however, likely to be a number of situations when the solution might not be so simple. While the Act itself addresses the issue of the relevant law to be applied, the answer to any particular problem will be found in a very careful analysis of the detailed provisions of all of the relevant legal instruments operative under both Commonwealth and State or Territory law.

Conclusion

The achievement of the objects of the *Water Act 2007* will depend to some extent upon how this complicated and interrelated set of normative arrangements is realised, interpreted, implemented and enforced by those who formulate and implement the plans, exercise the rights conferred on them and discharge the duties imposed on them. It will be the public sector and the private sector working together that ensures success or not. The structure that has emerged is—as intended by the National Water Initiative—a combination of plans, regulation and market mechanisms. Regulation has always been a feature of water-resources governance. To some extent, plans have also been a feature of the system. To this there has been added markets. These markets are themselves regulated. So there is now a complex amalgam of protectable rights and enforceable duties across the spectrum of these three functions. How one function is performed will have an impact upon the performance of the other functions and vice versa. There is now a rule-based system rather than an administration-based system. The rules apply to the private sector or to the public sector or to both. Most of these rules have been formulated in ways that are potentially enforceable through the legal system.

The optimisation of economic, social and environmental outcomes is one of the goals—intended consequences—of these arrangements. This is no easy task, even in legal terms. Another of the goals is—almost in the form of a duty—to return to environmentally sustainable levels of extraction for water resources that have been over-allocated or overused. The Basin Plan is critical in this respect. It must include the maximum long-term annual average quantities of water that can be taken on an environmentally sustainable basis from the Basin’s water resources as a whole and from the water resources or particular parts of the water resources of each water-resource plan area. This is a threshold responsibility and once this has been determined then the optimal economic, social and environmental outcomes can be identified and then achieved. In performing all of the functions, consideration of economic, social and environmental impacts—predicted consequences—is mandatory.

The simultaneous achievement of these three outcomes in this way will be achieved or not by bringing together all the individual structural elements of the system in a rational and coherent way. Individual rights are affected. The way in which these rights are exercised is restricted. The commercial value of these rights might be reduced. Contraventions of the rules are sanctioned. There might be unexpected economic, social and environmental consequences. It is a structure that has been created by the legislature. The legislature has seen fit to move from an administration-based system to a rules-based system. Coming to grips with this system is the major challenge facing the sustainable governance of the Murray–Darling Basin.

Reference

Murray-Darling Basin Authority (MDBA) 2010, *Guide to the proposed Basin Plan. Volume 1: Overview*, Murray–Darling Basin Authority, Canberra.