

Submission to the Productivity Commission Murray–Darling Basin Plan: Implementation Review 2023

30 July 2023

Tell me in a nutshell

The Basin Plan is unfortunately not fully implemented. Much of this comes down to significant governance deficiencies that are a serious risk to the Murray–Darling Basin. Whilst these governance issues have been expressly identified as a risk in peer reviewed journals, this recent research has specifically identified the means of how to fix them. The comprehensive reforms identified are crucial to the protection and restoration of the Basin.

Introduction

I am delighted to use my relevant professional expertise¹ to provide a submission to the Productivity Commission in relation to a matter of critical significance for Australia.

I believe my recent published article on this topic in the Australasian Journal of Water Resources, with a specific focus on the Murray–Darling Basin and whether current laws and governance arrangements are sufficiently implemented, is a relevant, recent review for the purposes of the Terms of Reference.

The paper is called '*Water governance, the rule of law and regulating risks to the Murray–Darling Basin*' and is linked at the end of this Submission (**Paper**).

Summary

To fully implement² the Basin Plan and water resource plans, there must be greater alignment with best practise water governance.

The purpose of the Basin Plan is to implement the Water Act by achieving '*additionality*' (i.e. adding water to the stressed river system) and, among other things, to '*protect, restore and provide for the*

¹ See '*About the author*' and Annexures at the end of this Submission.

² Naturally, the crux of the Productivity Commission's Implementation Review is whether the Murray–Darling Basin Plan and associated water resource plans have been implemented. While it would be curious that 'compliance' and 'enforcement' are largely out of scope of the terms of reference, as looking at whether a law has been complied with and enforced is integral to 'implementation' (i.e. Was it rolled out? Is the law achieving what it was designed to?). I understand that compliance and enforcement can each be (and have been) looked at in such depth that the focus on 'implementation' more broadly may be warranted.

ecological values and ecosystem services of the Murray-Darling Basin. The consequences of failure to achieve this purpose have been described as catastrophic.³

To address the implementation shortcomings that exist, notwithstanding the clear purpose and content of the water laws, the governance review and reform that has been proposed in the Paper must be continued and best practise water governance reform must be comprehensively enshrined.

Recognition of First Nations within the Basin Plan and water resource plans

The Indigenous water justice section of the Paper introduces this topic and recognises First Nation rights as a cornerstone of good water governance. It is argued in the Paper that UNDRIP principles can and should be incorporated into water governance reforms. First Nations interests are special and a failure to properly manage water in a way that is congruent with such interests can be unlawful.⁴ Importantly, much of the water regulation, Basin Plan included, only ever requires the government to *'have regard to'* Indigenous interests, which legally can mean little to nothing in practice. This is insufficient, not least because good water governance requires *equitably* balancing stakeholder interests.

Dispossession of Aboriginal water is not only a feature of Australia's past but unfortunately remains ongoing.⁵ For example, in 2021 new floodplain harvesting allocations were granted to almost exclusively non-Indigenous interest holders;⁶ section 4.4 of the Paper speaks further to the consequences of granting new extractive rights. In sum, there are clear ways First Nations interests can and must be embedded within the regulatory framework of the Basin.

Further comments

In the interests of brevity, I make the following points, which speak to some of the key questions proposed in the Call for Submissions.

New risks change ability to accredit – the governance deficiencies referred to in this Submission must be addressed. Section 21(4) of the *Water Act 2007* (Cth) says that the Minister must, [in adopting the Basin Plan], act on the basis of the *best available scientific knowledge* (emphasis added) and socio-economics analysis and take into account the principles of ecologically sustainable

³ Beasley, R. 2021. *Dead in the Water. A Very Angry Book About Our Greatest Environmental Catastrophe . . . the Death of the Murray–Darling Basin*. Australia: Allen & Unwin.

⁴ Consider laws that require equality before the law with respect to race (sections 9(1A) and 10 of the *Racial Discrimination Act 1975* (Cth) regarding indirect discrimination and equality before the law, respectively); consider state Human Rights Acts, for example, section 28 of the *Human Rights Act 2019* (Qld), which says that *'Aboriginal people hold distinct cultural rights and to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition ... and conserve and protect the environment and productive capacity of ... waters ... and that Aboriginal peoples have the right not to be subjected to ... destruction of their culture.'*; consider other sources of human rights that Australia is a signatory to, such as 'Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the right to an adequate standard of living and the right to health (together interpreted to include 'the right to water')'; consider children's rights to their cultural heritage and freedom of religion.

⁵ Hartwig, L., S. Jackson, and N. Osbourne. 2020. *Trends in Aboriginal Water Ownership in New South Wales, Australia: The Continuities Between Colonial and Neoliberal Forms of Dispossession*. Land Use Policy 99:1–13. doi:10.1016/j.landusepol.2020.104869.

⁶ *Submission to the Inquiry into the NSW Government's Management of Floodplain Harvesting*, Wentworth Group of Concerned Scientists, dated 13 August 2023.

development. I argue that the Paper and the related Risks Paper⁷ constitute part of the best available scientific knowledge. Our understanding of risk in the Basin has developed since the Basin Plan was made and now it is clear that one of the most significant risks to the Basin is missing opportunities to align to best practise water governance. It is not legally available to the Minister to sign off on the Basin Plan until these issues are fulsomely addressed.⁸

Inspector-General of Water Compliance – While the establishment of the office of Inspector-General of Water Compliance constitutes a governance reform that has occurred since the previous five-year assessment, it is fundamentally insufficient, as explained in the Paper.⁹

Enhanced Compliance – The compliance and enforcement piece, missing in depth from the Terms of Reference, requires an independent Natural Resources Access Regulator (NRAR), like NSW, across Basin jurisdictions. NRAR has had some excellent compliance outcomes over time and in order to achieve ‘implementation’ of the Water Act and Basin Plan, such independent agencies and outcomes will be crucial.

Enhance Administrative Law recourse – Consider seeking Attorney-General or Australian Law Reform Commission coordination and support for enhanced administrative law recourse with respect to matters of such national, cultural, and economic significance, as current administrative law does not provide meaningful legal protection for such a special public resource. This will be key to ensuring the law is implemented: that is, ensuring there can be a legal consequence (enforcement) if agencies do not operate in accordance with the law (compliance), by making sure the aims of the Water Act are rolled out through the Basin Plan and other instruments.

Conclusory remark

I am positive about the prospects for improvement in water administration following this five-year assessment and thank the Productivity Commission for the opportunity to provide this Submission.

About the author

Kate Chipperfield is a practising in-house corporate lawyer, formerly of the Environmental Defenders Office Freshwater team. With direct legal counsel experience within a major water supply authority and a deep interest in the health of the environment and justice more broadly, Kate is uniquely positioned to comment on the administration of water law in Australia. Kate also holds an Economics degree from the University of Queensland.

Author availability

Please contact the Author if you would like to speak about – or further – any aspect of this Submission.

⁷ Jamie Pittock, Samantha Corbett, Matthew J. Colloff, Paul Wyrwoll, Jason Alexandra, Sara Beavis, Kate Chipperfield, Barry Croke, Patrick Lane, Andrew Ross & John Williams (2023): *A review of the risks to shared water resources in the Murray–Darling Basin*, *Australasian Journal of Water Resources*, 27:1, 1-17, DOI: 10.1080/13241583.2023.2190493.

⁸ See section 5.4 of the Paper regarding law reform.

⁹ See sections 4.6 and 5.4 of the Paper.

Links & Annexures

1. **Paper** – Kate Chipperfield & Jason Alexandra (2022): *Water governance, the rule of law and regulating risks to the Murray–Darling Basin*, Australasian Journal of Water Resources, <https://doi.org/10.1080/13241583.2022.2161143>
2. **Risks Paper** – Jamie Pittock, Samantha Corbett, Matthew J. Colloff, Paul Wyrwoll, Jason Alexandra, Sara Beavis, Kate Chipperfield, Barry Croke, Patrick Lane, Andrew Ross & John Williams (2023): *A review of the risks to shared water resources in the Murray–Darling Basin*, Australasian Journal of Water Resources, 27:1, 1-17, <https://doi.org/10.1080/13241583.2023.2190493> – this paper assesses our current understanding of risks in the Basin, compared with what we used to know.
3. **Department of Climate Change, Energy, the Environment and Water Letter**, received 1 March 2023 – this letter acknowledges the Paper and shows that the Minister will be aware of these matters.