

## Contents

2015 . Vol 30 No 6&amp;7

- page 130 **Introduction — Natural resources management special issue**
- page 131 **Metering, Measurement and Water Policy Reform**  
*Cameron Holley and Darren Sinclair UNSW AUSTRALIA AND THE AUSTRALIAN NATIONAL UNIVERSITY*
- page 136 **Enhancing access to the courts to improve Western Australia's water resources**  
*Sarah Mansfield HENRY DAVIS YORK LAWYERS and UNIVERSITY OF WESTERN AUSTRALIA*
- page 141 **Briefing note: what you need to know before the Commonwealth Marine Reserves Review report is released**  
*Lauren Butterly AUSTRALIAN NATIONAL UNIVERSITY*
- page 146 **Application of the Adaptive Water Governance Project to Management of the Lake Eyre Basin and its connections to the Great Artesian Basin**  
*Barbara Cosens UNIVERSITY OF IDAHO COLLEGE OF LAW AND WATERS OF THE WEST PROGRAM*
- page 153 **More than waterbirds: Application of the Ramsar Convention on Wetlands in Australia**  
*Jamie Pittock THE AUSTRALIAN NATIONAL UNIVERSITY*
- page 158 **The progress of Aboriginal water rights & interests in the Murray Darling Basin in NSW: An essential element of culture**  
*Dr Virginia Marshall*
- page 164 **Economic benefits of coal? A glance at Coal and health in the Hunter: Lessons from one valley for the world**  
*Tomas Hurley CORRS CHAMBERS WESTGARTH*
- page 171 **Genuine and effective community consultation requirements in the NSW resources projects sector**  
*Rebecca Davie and Claire Smith CLAYTON UTZ*
- page 176 **Case note: The Environment Centre Northern Territory (NT) Inc v The Minister for Land Resource Management**  
*Carley Bartlett*

**Co-consulting Editors:**  
**The Hon Justice Rachel Pepper**,  
Land and Environment Court of New South Wales  
**Rachel Walmsley**, Policy and Law Reform Director, Environmental Defenders Office New South Wales

**Commissioning Editor:**  
**Guy Dwyer**, Lawyer,  
Ashurst Australia

**Editorial Board:**  
**Dr Rachel Baird**, Environmental Lawyer and Compliance Consultant  
**Ruth Beach**, Lawyer and Mediator  
**Dr Philippa England**, Senior Lecturer, Griffith University  
**Jessica Feehely**, Principal Lawyer, Environmental Defenders Office (Tasmania)  
**Robyn Glindemann**, Counsel, Clifford Chance  
**Dr Hanna Jaireth**, IUCN World Commission on Environmental Law  
**Louise Lee**, Associate, Corrs Chambers Westgarth  
**Meg Lee**, Managing Associate, Allens  
**Elizabeth McKinnon**, General Counsel, Australian Conservation Foundation  
**Claire Smith**, Partner, Clayton Utz  
**Andrew Walker**, Barrister, Victorian Bar

---

# Introduction — Natural resources management special issue

Welcome to this special issue of the *Australian Environmental Review (AER)*.

Over the past 100 years, natural resource management has evolved to the extent that the focus has shifted from the traditional linear model of managing a resource to maintain a maximum yield or utility. Think *North Pacific Fur Seal Convention* 1911 which was aimed at managing the commercial harvest of fur seals and avoiding hostilities in the carve up. The model for natural resource management is now so complex that inputs are drawn from a range of social sciences as regulators examine new methods and frameworks in the pursuit of achieving the right balance between use now, and ensuring the resource continues in perpetuity for future generations.

Stakeholder groups and their interests are a further consideration for both regulators and proponents advocating the use of a particular natural resource. It is not just your archetypal residents' action group that seeks information and consultation; fishermen, farmers, schools, indigenous communities, industry and professional protesters can all be stakeholders. In fact it is increasingly difficult to exclude anyone from the stakeholder fold. Add to this the requirement for "genuine and effective consultation" and the task of reaching common ground on natural resource management might seem insurmountable. However in the recent NSW Supreme Court decision in *Metgasco Ltd v Minister for Resources and Energy*, Button J held that the Minister's delegate incorrectly took into account an irrelevant consideration, that being the results of the consultation, rather than focusing upon the attributes of the consultation itself. In summary, as Clare Smith and Rebecca Davie observe in

their paper which reviews the Metgasco decision, "fact that significant stakeholders (in this case, many members of the local community) remain opposed to a project does not preclude a finding that the proponent has undertaken genuine and effective consultation".

Further complicating matters is that the management of some resources, take water for example, often crosses Commonwealth, state and territory borders meaning that buy in is required from varied governments to agree to cross-jurisdictional management regimes for the benefit of the resource. Several papers in this issue examine the challenge not only of integrated management across jurisdictional borders but also across the resource. For example, Professor Barbara Cousins highlights that there is no integration in the governance of groundwater and surface water resources in the Lake Eyre Basin. Lauren Butterly refers to the term "paper parks", meaning an area which is declared a park on paper but has no effective protection, in reference to the delays brought on by ongoing government review of the management of Commonwealth marine reserves.

There is a wealth of knowledge and analysis in the papers in this special natural resources issue. I encourage you to read beyond your industry specific niche when you open your *AER* and read the full issue. I am confident it will enhance your appreciation of the sheer breadth of issues in the mix of natural resource management and like me, offer many new insights.

**Dr Rachel Baird**  
*Editorial Board Member*  
*Australian Environment Review*

# Metering, Measurement and Water Policy Reform

*Cameron Holley and Darren Sinclair* UNSW AUSTRALIA AND THE AUSTRALIAN NATIONAL UNIVERSITY

With the abolition of the National Water Commission (NWC) in 2015, there is growing opinion that water has fallen off the national agenda.<sup>1</sup> Since the passing of the Basin Plan 2012 (Cth), and the breaking (for many) of the millennium drought, there has been little public debate. However, water reform continues, with state governments rolling out and embedding the key National Water Initiative (NWI) pillars of water markets, water allocation plans and water regulation. One of the critical, but often underexplored, NWI actions is enhanced water metering. This is crucial to the NWI because it seeks to establish reliable, credible and robust information on water use to provide a foundation for water trading, compliance, enforcement and sustainable water management.<sup>2</sup> This article addresses two major recent policy developments in this area:

- the National Framework for Non Urban Water Metering (the National Framework); and
- the NSW Metering Project.

## Why metering policy matters

In its most basic form, metering is a way to measure water extraction (via flow and/or volume) with the data produced assisting users and regulators to base their decisions on sound information about consumption.<sup>3</sup> While metering has a long history in Australia in urban<sup>4</sup> and non-urban contexts, this article focuses on the latter. Accounting for 65% to 70% of Australia's total water consumption, non-urban water extraction poses distinct challenges for metering due to highly variable installation configurations, and a multiplicity of extraction sites and operating conditions.<sup>5</sup>

Various metering technologies have been implemented in non-urban contexts. However their application has been patchy and uneven.<sup>6</sup> While surface water use has often been metered, the monitoring of groundwater extraction remains limited (or completely absent).<sup>7</sup> The accuracy of many current water meters is also said to be "not high due to their age, lack of maintenance and improper installation".<sup>8</sup> Although there is little data available, reports of existing meter recording errors range from +20% to -30% and +3% to -18%, and suggest "worn or faulty meters tend to record less water than is actually extracted".<sup>9</sup> This can mean the volume

of water diverted may exceed entitlement volumes, and undermine overarching goals of fair and efficient water use.<sup>10</sup> More generally, the lack of accurate meters (whether over or under recording) is a significant impediment to the operation of Australia's water markets and their ability to guide water to the highest value uses.<sup>11</sup> Recognition of these issues and the need for policy reform has been slow. It is only in the last decade that there have been nationally coordinated attempts to improve the adequacy, consistency and reporting of non-urban metering.<sup>12</sup>

## What the metering reforms entail

The Council of Australian Governments introduced the National Framework in 2010 to address inconsistencies in water measurement between Australian jurisdictions. It applies to all meters regardless of ownership (except for resource monitoring purposes).<sup>13</sup> The aim is for national standards to improve meter accuracy (with an *in situ* +/- 5% error limit).<sup>14</sup> The actual priorities and targets for upgrading meters and installations are left to State Implementation Plans (SIPs), however, several requirements must be adhered to, including laboratory verification prior to installation, and certification after installation, of the +/- 5% error limit, and regular audits to that effect thereafter.<sup>15</sup>

Key requirements of the National Framework are that meters are to have the capacity for telemetry (the sending of metered data wirelessly to a database that can be accessed remotely) and that meters must be "pattern approved" by the Australian Government's National Measurement Institute and installed in accordance with ATS4747.

Implementation of the National Framework has been substantially delayed, in part because of difficulties having meters certified to the required standard. According to the National Water Commission, pattern approved meters recently became available.<sup>16</sup> However prior to this (and until pattern approved meters become widely available) interim standards guide the purchase and installation of new meters.<sup>17</sup>

State governments must address National Framework requirements in their SIPs and water legislation, including making provision for the mandatory use of approved meters and installations, testing meters in response to

complaints relating to accuracy, providing information about meters for inspection and/or auditing purposes, cost recovery from users of state or water service provider-owned meters and offences and penalties for failing to comply with the above requirements. Meters with a capacity of 5000 ML/yr or more are to be subject to annual compliance checks by the government, whereas meters less than 5000ML/yr are subject to this only at least once every 5 years (ie, approximately 20% each year).<sup>18</sup> Obligations for self-auditing apply to both.

All non-urban meters are to comply with the National Framework standards by 1 July 2020 (unless otherwise exempted).<sup>19</sup> Any meter installed after 30 June 2010 must comply with the national standards; and any meter installed prior to 1 July 2010 shall be replaced with a compliant meter by 1 July 2020.<sup>20</sup> Notably, any meter installed in good faith to state interim standards may continue to be used until the end of its life, or lesser period, as determined by the relevant government authority.<sup>21</sup> Unless otherwise provided for in a SIP, all existing non compliant meters shall be upgraded progressively according to the significance of the metering installation (largest bulk water meters by June 2014, smaller bulk water meters and non irrigation meters by June 2016, meters not in irrigation, and all other existing meters by the end or their expected life or June 2020, whichever comes first).<sup>22</sup> Funding for these reforms is intended to come from user-pays, state and Commonwealth funds.

A parallel and complementary development to the National Framework is the NSW Metering Project.<sup>23</sup> Utilising over \$200 million of Commonwealth funding, this initiative aims to achieve efficiency gains of 120,000 ML with the resulting transfer of almost 75,000 ML of entitlements to the Commonwealth Environmental Water Holder.<sup>24</sup> Commencing in 2012, and finishing in 2018, the NSW Metering Project aims to install or upgrade meters to regulated, unregulated and groundwater water sources in the NSW Murray Darling Basin (MDB) (2500 on unregulated, unregulated water sources, 5000 to largely replace metering on groundwater and 4000 additional meters on regulated river systems).<sup>25</sup> With the initial roll out occurring in places such as the Murray River,<sup>26</sup> and Hawkesbury-Nepean,<sup>27</sup> as well as a related initiative in the Murrumbidgee, the NSW Metering Project is intended to improve water accounting, protect the security of entitlements, and improve the ability to implement water-sharing arrangements.<sup>28</sup>

The National Framework and current NSW Interim Standards (which enable the purchase and installation of new meters until the National Framework is fully operational<sup>29</sup>) will apply to new meters installed under the NSW Metering Project.<sup>30</sup> Importantly, the NSW Metering Project proposes that the vast majority of new meters will be connected to a centrally controlled

telemetry system that will provide real-time information on water extraction throughout the MDB.<sup>31</sup>

## The challenge of and prospects for implementing metering reforms

As with similar developments in electricity,<sup>32</sup> the installation and/or replacement of water meters pose considerable policy and implementation challenges. As the NWC notes: “The extent and accuracy of water metering [has] improved through the implementation of NWI commitments, but extending metering to all significant water users will require considerable ongoing effort”.<sup>33</sup>

The sheer scale of the task is significant itself, with 44,052 new meters required nationally, and 46,802 existing meters requiring an upgrade (out of a total of 145,778 extraction points).<sup>34</sup> In NSW, only 65% of rural water extractions in the NSW MDB were metered as of 2010.<sup>35</sup> However initial audits found that the majority of existing NSW meters did not meet the proposed standards.<sup>36</sup> There are also likely to be practical hurdles associated with water meter upgrades, as new, often unproven technologies are rolled out in different local circumstances and areas.<sup>37</sup>

Arguably, the most significant challenge is fostering buy-in from water extractors.<sup>38</sup> Good policy development requires consideration of impacts, engagement of affected parties and efforts to minimise adverse outcomes.<sup>39</sup> As such, the NSW Metering Project seeks to “engage stakeholders in the planning and implementation of the project”.<sup>40</sup> Nevertheless, as experience with electricity smart metering has shown, the reforms may produce anxiety and apprehension.<sup>41</sup> For example, although meters can improve water management in the long-term, there may be increased short-term costs.<sup>42</sup> Of course, regulatory bodies may (and will) draw on their financial resources and legislative powers to effectively compel users to upgrade their meters. In doing so, however, they risk fostering political opposition, fuelling adversarialism and undermining community engagement.<sup>43</sup> This, in turn, may lead industry groups to oppose the proposed reforms. Indeed, the NSW Irrigators’ Council have expressed concerns regarding the level of consultation, inequitable sharing of cost and benefits across users and systems, and no “ground truthing” of information underlying key assumptions of the NSW Metering Project.<sup>44</sup>

Further, water users who are unreceptive to new or upgraded meters pose a potential risk to ongoing meter maintenance. For example, under NSW water laws, it is an offence to fail to ensure the proper operation of any metering equipment or water takes when metering equipment is not operating properly or is not operating.<sup>45</sup> Under the NSW Metering Project, it is proposed that WaterNSW and DPI Water<sup>46</sup> will own, operate and

maintain government-installed meters, with extractors paying an annual charge to cover maintenance costs. Even so, the regulatory authorities arguably lack sufficient resources to adequately check meters or respond to non-compliant behaviour.<sup>47</sup> In this context, maximising user buy-in and minimising recalcitrance will help ensure meters are properly maintained and wider water compliance.

Finally, the provision of accurate metering with real-time data access (through telemetry) has the potential to enhance on-property water management and efficiency through improved farm management practices. Water users' acceptance of and support for new/upgraded metering will be crucial to exploiting such benefits.<sup>48</sup>

### The level of support for new/upgraded meters

Given these important policy developments and implementation challenges, the level of support (or buy-in) from water users towards metering was ascertained by a recent survey (22% response rate) and interviews. In particular, the article's authors questioned over 4000 landholders in NSW on views and experiences with monitoring, metering and management. In short, there was broad acknowledgment of the positive role of metering in managing water sustainably, as well as the importance of having, and support for, accurate and well-maintained equipment. This is consistent with government policy views and the underlying rationale of metering reforms.<sup>49</sup>

The findings also revealed substantial support for telemetry, so long as water users (not just government) could access real-time data. In particular, many water users were of the view that the combination of improved metering and real time data could improve the detection of illegal water extractions, discourage meter tampering and thereby ensure better compliance and equitable water extraction, and improve on-property water management.

However, the findings suggest a potential disconnect between government policy reforms and water user perceptions — many users were confident that their meters are already effective so it does not necessarily follow that they would support their replacement by new, government owned or mandated meters. This was because many water users felt they were likely to bear the cost (either up front or over time). Some interviewees expressed a fear that meters would be used to reduce allocations and/or increase water prices. Many also reported considerable uncertainty about the meter standards being imposed and the ability to account for local conditions.

Overall, survey respondents in regions with more highly developed irrigation systems and greater experi-

ence with meters were more positive about the need for accurate metering and the benefits to on-property water management.

### Options for enhancing water user buy-in

With timelines out to the end of this decade, there is still a long way to go in upgrading meters. The overall tenor of survey and interview responses suggests there is considerable scope for metering reforms to proceed with the support and engagement of a majority of water users. Despite this optimistic conclusion, there are several lingering barriers, including issues of cost, placement, standards and regional variation. At the time of writing, DPI Water had released a "water take measurement strategy" discussion paper that aims to account for some of these lessons learned in recent years.<sup>50</sup> However, any reforms addressing these concerns (in NSW or other states) will need to ensure improved and continued stakeholder buy-in, including providing clear information on metering standards and meter benefits, addressing concerns on meter costs, developing a focused communication and consultation strategy, accommodating regional variation and practical meter location challenges, and integrating and supporting the further roll-out of telemetry.

*Cameron Holley*  
UNSW Australia

*Darren Sinclair*  
UNSW Australia and The Australian National University

*This article is based on earlier work appearing as: Cameron Holley and Darren Sinclair, "Non-Urban Water Metering Policy: Water Users' Views On Metering And Metering Upgrades In NSW" (2013) 16(2) Australasian Journal of Natural Resources Law and Policy 101–131.*

---

### Footnotes

1. National Water Commission (Abolition) Bill 2015 (passed by the Senate on 14 May 2015); K Stoeckel and H Abrahams, "Water reform in Australia The National Water Initiative and the role of the National Water Commission" in K Hussey and S Dovers (eds), *Managing Water for Australia: the Social and Institutional Challenges* CSIRO Publishing, 2007; Australian Government, National Water Commission (NWC), *Australia's Water Blueprint: national reform assessment 2014*, 3–4.
2. NSW Government, NSW Office of Water, *NSW Sustaining the Basin Program, Metering project, Socio-economic assessment*, (2010); NWI, [80].
3. *National Water Initiative*, [87]; Australian Government, National Water Commission (NWC), *The National Water Initiative - Securing Australia's Water Future: 2011 Assessment* (2011) (NWC Assessment) 10.

4. A number of reforms have occurred in this sector, including recent attempts to adopt a consistent national framework for smart meters in water. See, eg, Sydney Water, *National Smart Metering Program — Discussion Paper for the Requirements Work Stream* (2009) 4.
5. Commonwealth of Australia, Department of the Environment, *National Framework for Non-urban Water Metering — Final Regulatory Impact Statement Policy Paper* (2009) (*National Framework for Metering*) 1 available online at <http://www.environment.gov.au/resource/national-framework-non-urban-water-metering-final-regulatory-impact-statement>; Department of the Environment, Water Heritage and the Arts, *National Framework for Non-urban Water Metering Regulatory Impact Statement* (2009) (*Regulatory Impact Statement*) 3.
6. For example Poh-Ling Tan, C Baldwin, I White and K Burry “Water Planning in the Condamine Alluvium, Queensland: Sharing information and Eliciting Views in a Context of Overallocation” (2012) 474 *Journal of Hydrology* 38–39; R Grafton and D Peterson “Water trading and pricing”, in K Hussey and S Dovers (eds), *Managing Water for Australia: the social and institutional challenges* CSIRO Publishing, 2007, p 81.
7. C McKay and A Gardner “Water Accounting Information and Confidentiality in Australia” (2013) 41(1) *Federal Law Review* 127, 134–135.
8. *Regulatory Impact Statement*, above n 5, 3; A Hamblin “Policy Directions for Agricultural Land Use in Australia and other Post-industrial Economies” (2009) 26(4) *Land Use Policy* 1195, 1198.
9. *Regulatory Impact Statement*, above n 5, 3; Department of Primary Industries Water, *NSW Water Take Measurement Strategy, Discussion paper, Water take measurement in NSW, a way forward*, July 2015, 2.
10. *Regulatory Impact Statement*, above n 5, 3.
11. NSW Government, S Raft and G Hills *NSW Sustaining the Basin Program: NSW Metering Project Business Case* (2010) (*Metering Business Case*) vi.
12. *National Framework for Metering*, above n 5, 7.
13. K Roberts, *NSW Interim Water Meter Standards; National Framework for Metering*, above n 5, 2–3.
14. *National Framework for Metering*, above n 5, 1.
15. *National Framework for Metering*, above n 5, 4. NWC, above n 1, 57. All jurisdictions except the Northern Territory have developed final or draft implementation plans. See for example NSW Government, NSW Department of Primary Industries, Office of Water, *NSW metering implementation plan*, (2013).
16. NWC, above n 1, 57.
17. It was anticipated that in the initial stages of the roll out the number of meters that are pattern approved will be small. Department of Environment, *Non-urban Water Metering Industry Capacity Building* <http://www.environment.gov.au/water/rural-water/srwui/non-urban-water-metering/industry-capacity-building>; NSW Government, NSW Department of Primary Industries, NSW Office of Water *NSW Interim Water Meter Standards for Closed Conduit Metering (2013) (Closed Circuit Interim Standards)* 1; NSW Government, NSW Department of Primary Industries, NSW Office of Water, *NSW Interim Water Meter Standards for Open Channel Metering (2013) (Open Channel Interim Standards)*.
18. *National Framework for Metering*, above n 5, 6–7, 16–17.
19. *National Framework for Metering*, above n 5, 19.
20. *National Framework for Metering*, above n 5, 20.
21. *National Framework for Metering*, above n 5.
22. *National Framework for Metering*, above n 5, 21.
23. *Metering Business Case*, above n 11, vi. See generally NSW Office of Water, *Sustaining the Murray Darling Basin*, 28 August 2013 <<http://www.water.nsw.gov.au/Water-management/Water-recovery/Sustaining-the-Basin/default.aspx>>.
24. *Metering Business Case*, above n 11, iii.
25. Above; K Hodgkinson, The Hon “NSW Secures \$500 Million For Landmark Water Savings Push” media release (10 June 2012).
26. State Water, *NSW Murray River Pilot Metering Project*, 28 August 2013 [www.statewater.com.au](http://www.statewater.com.au).
27. Department of Sustainability, Environment, Water, Population and Communities, *The Hawkesbury Nepean River Recovery Package*, 28 August 2013 [www.environment.gov.au](http://www.environment.gov.au). Final reports are available at: NSW Office of Water, *Hawkesbury-Nepean River Recovery Program*, 28 August 2013 [www.water.nsw.gov.au](http://www.water.nsw.gov.au).
28. See eg, *Southern Valleys Metering Project* [www.statewater.com.au](http://www.statewater.com.au); *Metering Business Case*, above n 23, iii.
29. *Closed Circuit Interim Standards*, above n 17, 1.
30. *Open Channel Interim Standards*, above n 17, 1.
31. Above, iii.
32. See for example, Australian Energy Market Operator, *National Smart Metering Program* 28 August 2013, [www.aemo.com.au](http://www.aemo.com.au).
33. *NWC Assessment*, above n 3, 10.
34. *Regulatory Impact Statement*, above n 5, 8.
35. This metering primarily covers the larger users in the major regulated river systems, major alluvial aquifers and the unregulated Barwon-Darling River. *Metering Business Case*, above n 11, 1.
36. NSW Government, NSW Office of Water, *NSW Sustaining the Basin Program: Metering Project Socio Economic assessment* (2010) (*Metering Socio Economic Assessment*) i.
37. MP McHenry, “Technical and Governance Considerations for Advanced Metering Infrastructure/smartmeters: Technology, Security, Uncertainty, Costs, Benefits, and Risks” (2013) 59 *Energy Policy* 834, 838.
38. G Syme and B Nancarrow “The Social and Cultural Aspects of Sustainable Water Use” in L Crase (ed) *Water Policy in Australia* (RFF, 2008) 19; Australian Government, Department of the Prime Minister and Cabinet, *Guide to Implementation Planning* (2012); Katie Burke, Kate Morris and Leona McGarigle, *An Introductory Guide to Implementation* (CES, 2012) 19.
39. Syme and Nancarrow, above n 38, 19.
40. *Metering Socio Economic Assessment*, above n 36, ii.

41. McHenry, above n 37, 834–835.
42. Above.
43. *Open Channel Interim Standards*, above n 17; *Metering Business Case*, above n 11.
44. NSW Irrigators Council, A Gregson, *Position Paper, NSW State Priority Project for Metering* (2011) 2 <<http://www.nswic.org.au/pdf/Briefings/110913%20-%20Metering.pdf>>.
45. *Water Management Act 2000* (NSW) ss 91H, 91J.
46. For further on these bodies see WaterNSW, <http://www.waternsw.com.au>; DPI Water, <http://www.water.nsw.gov.au>.
47. Note that over the last 2 years, DPI Water’s compliance and monitoring capabilities have been augmented through the employment of 11 new staff (particularly monitoring officers) funded by the Australian Government under the National Framework for Compliance and Enforcement Systems for Water Resource Management. In addition, the implementation of a change management plan has resulted in a number of staff taking on a broader regulatory role. See also Cameron Holley and Darren Sinclair, “Compliance and Enforcement of Water Licences in NSW: Limitations in Law, Policy and Institutions” (2012) 15(2) *Australasian Journal of Natural Resources Law and Policy* 149, 169–171, 177–178.
48. *Metering Socio Economic Assessment*, above n 36, 20.
49. *Metering Business Case*, above n 11, v.
50. Department of Primary Industries Water, above n 9, 1.

---

# Enhancing access to the courts to improve Western Australia's water resources

*Sarah Mansfield HENRY DAVIS YORK LAWYERS and UNIVERSITY OF WESTERN AUSTRALIA*

## Introduction

In Western Australia (WA), legislation is being drafted to improve the management of the state's scarce water resources.<sup>1</sup> This legislation will seek to ensure that there is a sufficient quantity of water available to satisfy the demands of WA's population and environment.

Ensuring that there is an adequate volume of water, while necessary, is not sufficient. It is also important to protect the quality of our water resources. This paper suggests reforms which have the potential to improve the quality of WA's water resources, and enhance access to justice.

## Background

The quality of water resources is the subject of legislation which regulates water access rights, pollution, contamination, land development and land management.<sup>2</sup> As is the case in every state and territory in Australia, in WA there are a number of regulators with the ability to fine, revoke privileges, issue notices and prosecute those who degrade the quality of WA's water resources. In WA, regulators include the Department of Environment Regulation (DER),<sup>3</sup> Local Governments,<sup>4</sup> the Commissioner of Soil and Land Conservation and Department of Agriculture and Food<sup>5</sup> and the Minister for Water.<sup>6</sup>

The common law relating to breach of statutory duty, riparian rights, nuisance, and negligence also has the potential to enable individuals adversely impacted by poor water quality to take action.

Notwithstanding the variety of tools available to protect WA's water resources, those resources are, and are continuing to be, degraded. Inland water resources in south west coast are classified as "very poor", with insufficient data available in relation to the resources in the south-west and north-west plateaus.<sup>7</sup> Only about 30% of the WA's major rivers are in good condition. Monitoring and management of inland waters is considered inadequate.<sup>8</sup>

Against this background, the case is made of reforms to assist those impacted by poor water quality to access the courts. The proposed reforms would most directly assist individuals wishing to enforce their private rights,

but the benefits do not stop there. The proposed reforms also have a broader public benefit, as they have the potential to improve water quality, to the benefit of us all.

## Current involvement of the courts in WA

It is rare for the regulators in WA to prosecute those of who pollute or degrade water resources. There have only been seven prosecutions under the Rights in Water Irrigation Act 1914 (RIWI Act) since 2003.<sup>9</sup> The DER is a more active prosecutor than the Minister for Water, with five prosecutions commenced under the Environmental Protection Act 1986 (EP Act) in the 12 months preceding March 2015.<sup>10</sup> However, the number of prosecutions which related to water pollution is unknown.<sup>11</sup>

Reasonable minds may differ on the approach to be taken by the regulators. It is also acknowledged that the regulators use administrative tools to enforce legislative compliance, such as fines, letters of warning and notices.<sup>12</sup> This partly explains the low number of prosecutions.

What is more curious is the low number of civil proceedings in relation to water pollution in WA. While it is dependent on the particular circumstances, a number of causes of action are potentially available to those adversely impacted by water pollution. The potential causes of action include:

- **Breach of statutory duty under the RIWI Act**  
Section 5E of the RIWI Act expressly provides a broad class of individuals with standing to commence civil proceedings against those who breach their statutory duty to comply with s 5C of the RIWI Act. This potentially assists those who are adversely impacted by the unlawful diversion or degradation of a water resource.
- **Breach of statutory duty under the EP Act**  
It is arguable that water pollution arising from a contravention of the EP Act can give rise to the cause of action of breach of statutory duty. Unlike the RIWI Act, the EP Act does not expressly provide for a cause of action for breach of statutory duty. However, the case of *Cohen v City of Perth*<sup>13</sup> would support such an action.

The decision of *Cohen v City of Perth* related to a



breach of the prohibition against unreasonable noise in the EP Act. Section 79 of EP Act (which only relates to noise pollution) enables three persons (or in some circumstances less than three persons) to commence a civil prosecution in relation to the emission of unreasonable noise. However, Mr Cohen's claim against the City was founded on the torts of breach of statutory duty, nuisance and negligence. While the aspects of s 79 which allow a civil prosecution were discussed, it was not pivotal to the court's finding that Mr Cohen had an action for breach of statutory duty against the City.<sup>14</sup> As such, the peculiarities of s 79 of the EP Act do not preclude *Cohen v City of Perth* from applying to forms of pollution other than noise pollution.

- **Common law relating to riparian rights**

In WA, a riparian owner continues to be entitled to "the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality".<sup>15</sup> Conduct which causes water to be "sensibly different"<sup>16</sup> can constitute an interference with riparian rights and give rise to a cause of action.<sup>17</sup> This is the case even if financial damage has not been suffered.

- **Private nuisance**

The tort of private nuisance arises where a person substantially and unreasonably interferes with another person's right to use and enjoy land. The impact must "... be material and unreasonable, having regard to what is reasonable in the locality, allowing for reasonable 'give and take' and disregarding any peculiar delicacies of the plaintiff".<sup>18</sup>

To make out a claim in nuisance, it is necessary to establish that the:

- defendant's conduct is not a reasonable use of his own land;<sup>19</sup> and
- affected party's right to use and enjoy land has been materially and adversely interfered with.<sup>20</sup>

The tort of nuisance is frequently the primary cause of action in cases involving water pollution, as well as other forms of environmental harm. For example, in *Lawrence v Kempsey Shire Council*,<sup>21</sup> the plaintiff successfully sued in nuisance after the defendant caused sewerage to enter a creek, which adversely impacted grazing land.

- **Negligence**

It is accepted that neighbours owe each other a duty of care.<sup>22</sup> As such, the first element of negligence generally easily satisfied in cases involv-

ing environment harm caused by works on adjoining land. However, the remaining two elements of negligence may render it less helpful to an affected party than the test of nuisance. The reasons for this include:

- to establish negligence, there must be fault (or a breach of duty), by the defendant. Whereas in nuisance, it is not necessary to establish fault, although there is generally some form of unreasonable conduct involved; and
- damage is an essential element of negligence. To establish nuisance, it is not necessary to show that harm has resulted. Rather, all that is required is an unreasonable interference.

While the tort of negligence can be more difficult to establish than nuisance, if pollution arises as a consequence of activities undertaken without due care and skill, it can also assist those affected by that pollution.<sup>23</sup>

Even though legislation and the common law provide the affected parties with causes of action, it is rare for proceedings to be commenced in WA. There is no reported decision regarding an action commenced under s 5E of the RIWI Act. The decision of *Cohen v City of Perth* is the only published decision regarding a civil claim arising from a breach of the EP Act, although there appears have been a recent, although unsuccessful, claim for damages relating to environmental harm in the Magistrates Court of WA.<sup>24</sup>

Claims based on the common law of nuisance and negligence are marginally more common, with two published decisions identified in the last 10 years in WA.<sup>25</sup> It is noted that it is possible that claims are being commenced and settled, in which case a just remedy may be procured without need for a final hearing.

Even so, having regard to the poor quality of WA's water resources, the number of civil claims arising from the degradation of water resources appears to be small.

The low number of civil claims related to water pollution is particularly curious given the potential impacts of water pollution. The quality of water resources is particularly relevant to farmers. They depend on access to clean water to sustain their livestock and crops. If a water resource becomes polluted, costs will be incurred to treat the pollution and transport clean water. Livestock and crop losses can also result. The value of land near a watercourse may be diminished if the resource becomes polluted. This will particularly be the case if the resource is unsightly, emits an odour or adversely impacts the development potential of the site.

### **Why are those who are impacted by poor water quality not accessing the courts?**

The following factors appear to have deterred affected parties from commencing legal proceedings:

- **Costs of expert evidence**

To establish a cause of action relating to water pollution, expert evidence is invariably required to address questions relating to who and what caused the degradation of the water resource and the extent of the degradation. This question can be a difficult and expensive to answer, particularly when you are dealing with natural resources, which are impacted by natural events and multiple users.

The cost of obtaining an initial expert report alone can be difficult for private individuals to justify, meaning that they are unable to pass this necessary first step. It can also highlight the likely future costs associated with obtaining the level of expert evidence required for a full hearing.

- **Role of the regulator**

Invariably affected parties would prefer that the regulator took enforcement action, rather than incurring the costs associated with litigation themselves. This is particularly the case where the regulator can seek orders that compensation to be paid to those affected by water pollution.<sup>26</sup> The potential for the regulator to take action can discourage individuals from commencing legal proceedings, as they query why they should have to.

- **Liability to pay legal costs**

The legal costs associated with proceedings can also prevent an affected party from litigating. This risk can be a very significant deterrent if the proceedings are to be commenced in the Supreme Court, rather than any of the lower courts, where the costs are invariably greater.

An action which seeks less than \$75,000 in damages can be commenced in the Magistrate's Court.<sup>27</sup> However, in situations involving ongoing water pollution, the affected party is likely to also seek an injunction to stop the offending conduct. In fact, in previous decisions injunctions have been the primary remedy, with only a modest amount of damages awarded. For example, in *Cohen v City of Perth*, Mr Cohen was only awarded \$1000 in damages,<sup>28</sup> in circumstances where he was substantially successful in the proceedings.

If an injunction is sought by the affected party, it is often necessary for proceedings to be commenced in the Supreme Court. The lower courts only have "... an ancillary or auxiliary power to be exercised in the determination of claims otherwise

within the jurisdiction of the court". They do not have "the jurisdiction of the court to grant equitable relief where that relief is really the principal relief sought".<sup>29</sup>

In addition to being liable to pay for their own legal and expert costs, a prospective plaintiff should also be advised that:

- even if they are successful in the proceedings, they are likely to recover only a portion of their legal costs; and
- if they are unsuccessful, or fail to accept an offer of compromise in certain circumstances, they may be liable to pay the defendant's costs.

These factors discourage proceedings against those who have degraded the quality of a water resource. This can result in the affected individuals suffering amenity and financial losses without any effective remedy. It invariably also means that no action is taken to prevent and rehabilitate harm to water resources by the polluter.

## Potential reforms

Against this background, it is argued that reforms addressing the factors which are dissuading affected parties from taking action to protect water resources are warranted. These reforms could involve the following measures:

- allowing any person (and not just those with standing at common law) to commence proceedings to restrain and remedy breaches of laws protecting water quality;
- modifying the general rule of "costs follow the event" in certain circumstances, including where the proceedings are commenced in order to protect a water resource and the individual derives little financially from the proceedings;
- providing a specialist and un intimidating forum, in which clear guidance is given regarding the parties' responsibilities, making it possible for litigants to represent themselves and reducing the expenditure associated with civil procedure; and
- compulsory mediation at an early stage, to assist the parties to resolve the dispute at an early stage, and thereby avoid the costs of a full hearing.

In New South Wales (NSW), a regime similar to that outlined above is in place. The Land and Environment Court of NSW has the power to make orders restraining and remedying breaches of the Protection of the Environment Operations Act 1997 (NSW) (POEO Act), on the application of any person.<sup>30</sup> In proceedings of this kind, the general rule is that costs follow the event. However, the court has a discretion to not to make an

order for the payment of costs against an unsuccessful applicant, if it is satisfied that the proceedings have been brought in the public interest.<sup>31</sup>

Reforms which encourage litigation can be met with trepidation, as it is feared that they will “open the floodgates”, result in an increase in baseless litigation, delay and drain the limited resources of the courts. It is also often said that rather than spending money on litigation, it would be better to remediate the environmental harm.<sup>32</sup>

The NSW experience demonstrates that allowing the private sector to enforce compliance with environmental laws does not result in a flood of litigation. In 2013, there was only one decision of the Land and Environment Court regarding the civil enforcement of the POEO Act,<sup>33</sup> in which the applicant (who was a local government) was successful. In 2013, the majority of the civil enforcement actions<sup>34</sup> were commenced by local governments and were settled before the need for a full hearing.<sup>35</sup>

The proposed reforms do not seek to provide a new cause of action. Affected individuals and the regulators are likely to already have grounds to commence proceedings in response to activities which degrade water resources. As such, the reforms are not adding to “green tape” by imposing a new burden on polluters. Rather, the proposed reforms promote compliance with existing requirements. In this way, the reforms promote the polluter pays principle and access to justice.

## Conclusion

Reforms which make it easier for private individuals to take action against those who degrade WA’s water resources will assist the individuals adversely impacted by water pollution. Such reforms also have the potential to deter conduct which pollutes, and encourage prompt and effective action to remedy water pollution, possibly without proceedings actually having to be commenced. In this way, the proposed reforms have the capacity to improve the quality of WA’s valuable water resources.

**Sarah Mansfield**

Senior Associate, Henry Davis York Lawyers  
Masters of Law student, University of Western Australia

---

## Footnotes

1. The Western Australian government has given approval to start drafting the new Water Resources Management Bill following public support of the Position Paper released in September 2013 by the Department of Water. See <http://www.water.wa.gov.au/Future+water/Water+reform/default.aspx#1>.

2. In Western Australia, the Environmental Protection Act 1986, Contaminated Sites Act 2003; Planning and Development Act 2005 and the Soil and Land Conservation Act 1945.

3. Who enforces the Environmental Protection Act 1986 and Contaminated Sites Act 2003.

4. Who enforces the Planning and Development Act 2005.

5. Who can, together with the Minister for Agriculture, enforce the Soil and Land Conservation Act 2003.

6. Who enforces the Rights in Water Irrigation Act 1914.

7. State of the Environment 2011 Committee *Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities* (2011) ch 2.2, available at <http://www.environment.gov.au/science/soe/2011-report/4-inland-water/2-state-and-trends/2-2-water-quality#assessment4-2>.

8. Environmental Protection Authority of WA, *State of the Environment Report 2007*, available at <http://www.epa.wa.gov.au/AbouttheEPA/SOE/2007/Pages/default.aspx>.

9. S Robertson “Regulatory Framework for Monitoring and Enforcing of Water Access Rights in Western Australia”, *The University of Western Australia Law Review* (2014) 37(2) at 225, referring to Director of the Magistrates Courts, Report of Department of Water Prosecutions in the Western Australian Magistrates Court (2010).

10. Government of Western Australia, Department of Environment Regulation, *Quarterly reporting — Quarter 2 2014–15*, available at <http://www.der.wa.gov.au/images/about/quarterly-reports/Q2-Quarterly-Report-2014-15.pdf>.

11. In Western Australia, prosecutions under the Environmental Protection Act 1986 are generally commenced in the Magistrate’s Court, which does not publish its decisions.

12. Above n 10.

13. *Cohen v City of Perth* [2000] WASC 306; BC200007981.

14. Above n 13, at [150].

15. *John Young & Co v Bankier Distillery Co* [1893] AC 691 at 698, note that riparian rights are preserved by s 9 of the RIWI Act.

16. *Lawrence v Kempsey Shire Council* (1995) 87 LGERA 49; BC9504607 p 54.

17. *Jones v Llanrwst Urban District Council* [1911] 1 Ch 393 at 402.

18. *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482; (1948) 65 WN (NSW) 218 at [158].

19. *Gales Holdings Pty Ltd and Tweed Shire Council* [2013] NSW CA 382.

20. Above n 18.

21. *Lawrence v Kempsey Shire Council* (1995) 87 LGERA 49; 6 BPR 14,111; (1995) Aust Torts Reports 81-344; BC9504607.

22. *Hargrave v Goldman* (1963) 110 CLR 40; BC6300490; *Leakey v National Trust for Places of Historical Interest or Natural Beauty* [1980] QB 485 and *Robson v Leischke* [2008] NSWLEC 152; BC200803063.

23. *Thorpes Ltd v Grant Pastoral Co Pty Ltd* (1955) 92 CLR 317; BC5500630.

24. *Dincer v Giancristofrao* [2015] WADC 49; BC201540094.
25. *Anne Elizabeth Conti v John Michael Chenery* [1998] WASC 245 and *Conti v Chenery* [2001] WASC 107; BC200101993, both cases relate to claims of nuisance and farm dams. The procedural decision of *Elwood v Pioneer Concrete (WA) Pty Ltd* [2002] WASC 32; BC200200706 is also noted, in which leave to amend pleadings to include a claim in nuisance and breach of statutory duty was granted. Leave to appeal the decision was not granted by the Court of Appeal in *Pioneer Concrete (WA) Pty Ltd v Elwood* [2005] WASC 48; BC200501108. A final decision on the substance of the claim has not been identified. It is also noted that the Magistrate's Court does not publish its judgments and a search of its records has not been carried out.
26. Should the DER successfully prosecute, it may seek orders for compensation to be paid to those impacted by the offence under s 99Y of EP Act.
27. Section 6 of the Magistrates Court (Civil Proceedings) Act 2004.
28. Above n 13, at [182].
29. *Valana Pty Ltd v Clipmaster Enterprises Pty Ltd* [2007] WADC 109; BC200740108 at [21].
30. Sections 252 and 253 of the Protection of the Environment Operations Act 1997 (NSW).
31. Rule 4.2(1) of the Land and Environment Court Rules 2007.
32. For example, concerns along these lines were raised in response to a proposal that the decisions of the Contaminated Sites Committee could be reviewed by the State Administrative Tribunal. See DER (2015) Review of the Contaminated Sites Act 2003, pp1 to 25.
33. *Wollondilly Shire Council v Foxman Environmental Development Services Pty Ltd (No 5); Foxman Environmental Development Services v Wollondilly Shire Council* [2013] NSWLEC 68; BC201302956.
34. These statistics include actions for the civil enforcement of planning laws, as well as the POEO Act.
35. Land and Environment Court Annual Review 2013, available at [http://www.lec.justice.nsw.gov.au/Documents/2013\\_annual\\_review.pdf](http://www.lec.justice.nsw.gov.au/Documents/2013_annual_review.pdf), accessed 4 June 2015.

# Briefing note: what you need to know before the Commonwealth Marine Reserves Review report is released

*Lauren Butterly* AUSTRALIAN NATIONAL UNIVERSITY

## Introduction

In the coming weeks, the report of the Marine Reserves Review (the MRR) will be provided to the Commonwealth Government. The overarching aim of the MRR is to review the network of marine reserves that were announced in June 2012 by the then Labor Government. This network was said to be the “world’s largest network of marine reserves”.<sup>1</sup> It increased the number of marine reserves from 27 to 60 and added 2.3 million square kilometres of marine area, taking the total of Australia’s marine reserve network to 3.1 million square kilometres (more than one third of Commonwealth waters).<sup>2</sup> The MRR is reviewing, in consultation with stakeholders, the “science supporting” the proposed zones and zoning boundaries.<sup>3</sup>

One issue that should be clear from the start is that the MRR is *not* considering the Great Barrier Reef Marine Park.<sup>4</sup> The MRR has also excluded the South-East Commonwealth Marine Reserves Network (stretching from eastern SA, across Victoria, up to the far south coast of NSW, around Tasmania, and incorporating the Macquarie Island Marine Reserve) as the Management Plan for this network was proclaimed prior to the Liberal Government being elected.<sup>5</sup>

## How does it affect you?

- Save for the exclusions referred to above, the MRR is reviewing the zones and zoning boundaries within the Commonwealth marine reserves network. The outer boundaries of the marine reserves will remain the same as originally proposed.
- The report to the Commonwealth Government is likely to suggest changes to the zones and zoning boundaries that were proposed in the management plans that were originally going to come into effect in 2014.
- Suggested amendments to zoning or zoning boundaries may mean changes to areas in which fishing and other activities would have been banned or permitted under the previous management plans.

## Marine reserves and the law

Marine reserves are relatively new in Australia, with the first being declared in 1974 near Green Island in Queensland.<sup>6</sup> They have often been controversial for reasons including paucity of scientific data, the “amorphous” boundaries of the ocean and the mobility of marine species, as well as social (often recreational) and economic issues.<sup>7</sup> The Commonwealth Government has responded to this challenge by developing large marine bioregional plans. These plans “describe the marine environment and conservation values of each marine region, set out broad biodiversity objectives, identify regional priorities and outline strategies and actions to address these priorities”.<sup>8</sup> The bioregional plans were finalised in 2012 after a planning process which included public consultation.<sup>9</sup> It was noted that these bioregional plans give “new impetus for the implementation of *Australia’s Oceans Policy* by streamlining the planning process and providing greater guidance about marine environment conservation priorities”.<sup>10</sup> *Australia’s Ocean Policy* (released in 1998) outlines an integrated framework, in which marine reserves are just one part of the broader marine management regime.<sup>11</sup>

Also in 1998, the Commonwealth Government (in partnership with state and territory governments) committed to establishing a National Representative System of Marine Protected Areas (MPAs).<sup>12</sup> This was in line with the World Summit on Sustainable Development, which in 2002 called for “marine protected areas consistent with international law and based on scientific information, including representative networks by 2012”.<sup>13</sup> This was part of the broader context of the *Convention on Biological Diversity* (CBD) and the *Jakarta Mandate on Marine and Coastal Biodiversity* (arising from a conference of parties to the CBD in 1995).<sup>14</sup> A National Representative System of MPAs “aims to contain a comprehensive, adequate and representative sample of Australia’s marine ecosystems”.<sup>15</sup>

Commonwealth marine reserves can be proclaimed over Commonwealth waters pursuant to the Environment Protection and Biodiversity Conservation Act 1999

(Cth) (EPBC Act).<sup>16</sup> Generally, Commonwealth waters are from the three nautical mile mark to the outer limit of Australia's Exclusive Economic Zone (200 nautical miles).<sup>17</sup> Waters inside the three nautical mile mark are the responsibility of the states and the Northern Territory.<sup>18</sup> The states and the Northern Territory can, and have, proclaimed their own marine reserves.<sup>19</sup> Some of these marine reserves have been controversial and have attracted high levels of media attention and public involvement in debate.<sup>20</sup>

Perhaps the highlight of some of the media attention was the fisherman caught "trying to herd Kingfish into a different zone" to avoid newly implemented marine no-take zones (or sanctuaries) in South Australia.<sup>21</sup> This was followed up by a media release on the SA Government National Parks website which clarified that herding fish, so they could be caught outside the no-take zone, was not allowed and stated that "there has been some confusion as to what was actually allowed".<sup>22</sup> This example certainly leaves you wondering what exactly herding fish must have looked like, but it also draws attention to another important issue — only some zones within marine parks are strict "no-take" zones.

Returning to Commonwealth marine reserves, pursuant to the EPBC Act, each marine reserve is categorised as having one or more zones. There are six possible zones which are based on the International Union for the Conservation of Nature (IUCN) categories:

- sanctuary or wilderness area;
- marine national park;
- national monument;
- habitat protection or recreational use;
- protected landscape/seascape; and
- special purpose or multiple use.<sup>23</sup>

Within sanctuary and wilderness zones, habitats, ecosystems and native species should be conserved in as undisturbed a state as possible and public access should be limited to the extent it is consistent with these principles.<sup>24</sup> Marine national park zones are more flexible; while still aiming to protect and manage the natural condition of the area, they generally allow for "environmentally and culturally compatible spiritual, scientific, educational, and recreational visitor opportunities".<sup>25</sup> However, fishing, including recreational fishing, is still not allowed in this zone. Beyond these zones, different levels of activities are permitted, which are specific to the particular marine reserves. If we take the South-East Commonwealth Marine Reserves Network (referred to in the introduction), which has a finalised management plan, it has a mix of sanctuary, marine national park, habitat protection, recreational use, special purpose zones and multiple use zones.<sup>26</sup> Commercial fishing, for

example, may be (subject to the correct approvals), carried out in habitat protection zones and multiple use zones.<sup>27</sup>

Pursuant to s 346(1) of the EPBC Act, when a marine reserve is proclaimed, the name of the reserve, the purposes for which the reserve is declared, the depth of the seabed that is included and an IUCN category need to be identified. Once a Commonwealth marine reserve is proclaimed, the Director of National Parks must then develop a management plan for the reserve.<sup>28</sup> It is these management plans that really provide the details about what can and cannot be done within a marine reserve. Management plans have a maximum life of 10 years.<sup>29</sup> Section 367 of the EPBC Act identifies the mandatory content of management plans which includes activities that are to be prohibited or regulated in the reserve (and the means of prohibiting or regulating them). This links back to s 354 of the EPBC Act, which lists activities that may *only* be carried out under a management plan. This includes activities such as killing, injuring, taking and trading native species, excavating and taking any action for commercial purposes. The management plans then go through a process of invitation to comment on the proposal to prepare a draft plan, releasing of the draft plan and a further invitation to comment.<sup>30</sup> The Director must then provide it to the Minister for approval and if it is approved it becomes a disallowable instrument.

### What were the "original" marine reserves (and associated management plans)?

With much fanfare, in 2012 the Gillard Government announced the "largest addition to the conservation estate in Australia's history".<sup>31</sup> Forty new marine reserves were proclaimed (and four existing reserves were amended to incorporate "Commonwealth Marine Reserve" in the name of the reserves — making 44 in total). There was one large marine reserve: the Coral Sea Commonwealth Marine Reserve (off the coast of Queensland, beyond the Great Barrier Reef). The other marine reserves were within one of four "networks" (clusters of marine reserves):<sup>32</sup>

- South-West — from the eastern end of Kangaroo Island in SA to Shark Bay in WA.
- Temperate East — from the southern boundaries of the Great Barrier Reef Marine Park to Bermagui in southern NSW (also includes the waters surrounding Lord Howe and Norfolk Islands).
- North — includes the Commonwealth waters of the Gulf of Carpentaria, Arafura Sea and the Timor Sea extending as far west as the WA border.
- North-West — west from the WA border, down to Kalbarri (just south of Shark Bay).

Management plans were developed under the EPBC Act and were due to come into effect in July 2014. In June 2013, the then Opposition attempted a disallowance motion but was very narrowly (by one vote) unsuccessful.<sup>33</sup> A Fisheries Adjustment Assistance Package for some commercial fishers was also announced alongside the new marine reserves.<sup>34</sup> This was produced after consultation, including a “national workshop”.<sup>35</sup>

Following the election, in December 2013, the newly elected Liberal Government put forward the Environment Protection and Biodiversity Conservation (Commonwealth Marine Reserves) Proclamation 2013 (Cth) (the 2013 Proclamation). Pursuant to the 2013 Proclamation:

- the proclamation of the 44 new marine reserves in 2012 was revoked;
- all of the instruments which were made under the 2012 proclamation; including the new management plans, were set aside; and
- the same 44 marine reserves were “re-declared” as Commonwealth reserves.

The effect of this was:

- the 44 reserves were still marine reserves and the IUCN categories remained unchanged, for the time being; and
- new management plans would have to be prepared for these marine reserves.

The Explanatory Statement noted that until new management plans were prepared, there would be transitional arrangements which would “involve no change relative to the arrangements that would have applied prior to the Proclamation made in November 2012”.<sup>36</sup>

That was in December 2013. At the time of writing (September 2015), we are still in the same place on a practical level, “on the water”, in relation to marine reserves. The term “paper parks” has been mentioned — meaning an area which is declared a park on paper but has no effective protection.<sup>37</sup> Ministers and representatives of the Commonwealth Government heavily promoted the new marine reserves at the IUCN World Parks Congress in November 2014. This led to environmental groups pointing out that in effect, they were “suspended”.<sup>38</sup>

## The MRR

In the Explanatory Statement to the 2013 Proclamation, the government “committed to review the scientific basis underpinning the reserves and undertake further community consultation and, following these activities, to develop new management arrangements”. It was nearly a year later when the terms of reference and the

chairs for the MRR were announced in September 2014.<sup>39</sup> With respect to the purview of the MRR, it was noted that the government “has reproclaimed the outer boundaries of the Commonwealth Marine Reserve networks and the Coral Sea, so our focus is on their zonation and internal management”.<sup>40</sup> The Fisheries Adjustment Assistance Package has been placed on hold while the MRR takes place.<sup>41</sup>

The MRR has two types of panels:

- The expert scientific panel is reviewing the science supporting the marine reserves. The expert scientific panel will produce its own separate report.<sup>42</sup>
- The bioregional advisory panels (one for each network and one for the Coral Sea Commonwealth Marine Reserve) are facilitating enhanced consultation with stakeholders. Pursuant to the terms of reference, the bioregional advisory panels were to consult “across sectors including: industry, recreational users, community groups, tourism, Indigenous communities, environmental interest groups and other parties as appropriate”.<sup>43</sup> The bioregional panels are to report on areas of contention and options to address these, recommendations for improving social and economic considerations in decision-making and suggestions for ongoing engagement of regional stakeholders.<sup>44</sup>

When the review was announced, it was estimated that the panels would report to the government in mid-2015.<sup>45</sup>

Written submissions were invited from November 2014 until the end of March 2015 and there was also an online survey.<sup>46</sup> The MRR received over 13,000 written submissions and more than 1800 online survey responses.<sup>47</sup> Regional consultations took place in multiple locations for each of the networks (for example, for the South-West network, consultations took place in Adelaide, Busselton, Fremantle and Perth). There were over 170 meetings.<sup>48</sup> From this, the bioregional panels have developed a range of possible options for zones and their boundaries. These will now be evaluated “for the extent to which they improve conservation and/or socio-economic outcomes, and for practicality” and by the expert scientific panel.<sup>49</sup> Then these options will be taken to affected stakeholders in each region. The co-chairs of the bioregional panel estimated in mid-May 2015 that the process of finalising the options would take 4-6 weeks. Once these options have been finalised, the report to government will be drafted. Updates have since been provided in July and August stating that the report is currently being drafted and noting the huge task associated with reviewing the large number of submissions.<sup>50</sup>

## Conclusion

The aims of the MRR are to be commended — ensuring the science is as accurate as possible and that there has been suitable and effective consultation. The MRR co-chairs also noted that, where relevant, they have taken into account “past submissions from the initial establishment of the reserves and the development of the set-aside management plans”.<sup>51</sup> However, the length of time during which the marine reserves are effectively inactive will be, and has already been, very substantial. Once the report is transmitted to government and made public (as the terms of reference require), the government will then consider the development of new management plans. This will then require public consultation in line with the EPBC Act. Further, given the history of controversy surrounding marine reserves, and the inherent factors which contribute to this, there is little doubt that the outcome of the MRR will spark some controversy. This will take time to work through. It will be interesting to see the range of contributors to the submissions, online survey and regional consultations, as this will play a part in the response to the report.

Certainly, a large array of stakeholders will be keenly awaiting the release of the report in coming weeks. Yet, the report will only be the beginning of what could be another long process.

### **Lauren Butterly**

Associate Lecturer, ANU College of Law  
PhD Candidate, UNSW Law Faculty  
Honorary Fellow, UWA Law School

---

## Footnotes

1. The Hon Tony Burke MP “Gillard government creates the world’s biggest marine reserves network” media release, 14 June 2012, [www.environment.gov.au](http://www.environment.gov.au).
2. Above n 1 and The Hon Tony Burke MP “Gillard Government proclaims the final network of Commonwealth marine reserves” media release, 16 November 2012 <http://environment.gov.au>.
3. Commonwealth Government “Marine Reserves Review — Terms of Reference” (2014) <http://www.environment.gov.au/system/files/pages/931ca952-fdd2-4e14-a512-0a5278d22c71/files/commonwealth-marine-reserves-review-terms-reference.pdf>.
4. There is a map outlining where the MRR does and does not apply: Commonwealth Government, “About the Commonwealth Marine Reserves Review” [www.environment.gov.au](http://www.environment.gov.au).
5. The Heard Island and McDonald Islands Marine Reserve is also excluded. Above, n 4.
6. B Jessup and T Power “Marine Parks and Reserves” in Rachel Baird and Donald Rothwell (eds), *Australian Coastal and Marine Law* Federation Press, 2011, p 264.
7. Above n 6, pp 265–268.
8. Commonwealth Government, Department of the Environment *Marine bioregional plans* [www.environment.gov.au](http://www.environment.gov.au). The plans are prepared under s 176 Environment Protection and Biodiversity Conservation Act 1999 (Cth).
9. Commonwealth Government, Department of the Environment *About marine bioregional plans* [www.environment.gov.au](http://www.environment.gov.au).
10. Commonwealth Government, Department of the Environment *Marine Bioregional Planning: A new focus for Australia’s marine planning* [www.environment.gov.au](http://www.environment.gov.au).
11. Commonwealth Government, Department of the Environment *Caring, understanding, using wisely: Australia’s oceans policy vol 1* (1998) [www.environment.gov.au](http://www.environment.gov.au).
12. Commonwealth Government, Department of the Environment *Goals and principles for the establishment of the National Representative System of Marine Protected Areas in Commonwealth waters* [www.environment.gov.au](http://www.environment.gov.au).
13. World Summit on Sustainable Development *Plan of Implementation of the World Summit on Sustainable Development*, A/CONF.199/20, 4 September 2002, <http://www.un-documents.net>, cl 32(c). Also see above n 3.
14. Commonwealth Government, Department of the Environment *Guidelines for Establishing the National Representative System of Marine Protected Areas Guidelines* (1998) [www.environment.gov.au](http://www.environment.gov.au), p 3 and Commonwealth Government, Department of the Environment *Strategic Plan of Action for the National Representative System of Marine Protected Areas: A Guide for Action by Australian Governments* (1999) <http://www.environment.gov.au/system/files/resources/3a269c60-4fc0-4bc4-aa8b-3fd7bbf3e145/files/nrsmpa-strategy.pdf>, p 14.
15. Above n 14 (Guidelines), p 4.
16. EPBC, s 344(1)(b)(i). See generally Pt 15, Div 4.
17. EPBC, s 24. For a further explanation of the different maritime zones, see D Rothwell “The International Legal Framework” in R Baird and D Rothwell (eds), *Australian Coastal and Marine Law* Federation Press, 2011, pp 27–31.
18. See above n 17.
19. For a discussion of the marine reserves legislation in the different states and the Northern Territory see above n 6, pp. 279–289.
20. See for example: B Neindorf and T Jeanes “South Australia’s marine park’s sanctuary zone liberal amendment bill has been defeated by one vote in the House of Assembly” *ABC Rural*, 18 September 2014 [www.abc.net.au](http://www.abc.net.au).
21. ABC News (no specific author) “Fishermen caught trying to herd Kingfish into a different zone to avoid marine sanctuary”, 16 October 2014 [www.abc.net.au](http://www.abc.net.au).
22. National Parks South Australia “No herding fish in Sanctuary Zones”, media release, 17 October 2014 [www.environment.sa.gov.au](http://www.environment.sa.gov.au).
23. See, for example, the South-East: Commonwealth Government, Department of the Environment *South-East Commonwealth Marine Reserves Network - Zoning and activities* [www.environment.gov.au](http://www.environment.gov.au). For more general information: Commonwealth Government, Department of the Environment *World Conservation Union (IUCN) protected area categories 2008*



- www.environment.gov.au. Also see EPBC Act, s 367(1)(a) and Environment Protection and Biodiversity Conservation Regulations 2000 (Cth), sch 8.
24. Above n 23.
  25. Above n 23.
  26. Above n 23.
  27. Commonwealth Government *South-East Commonwealth Marine Reserves Network - Management - User Information* available at: [www.environment.gov.au](http://www.environment.gov.au), see p 44 (Table 5.4).
  28. EPBC Act, s 366.
  29. EPBC Act, s 373.
  30. EPBC Act, s 368.
  31. Above n 1. Also see: Environment Protection and Biodiversity Conservation (Commonwealth Marine Reserves) Proclamation 2012 (Cth) (now repealed).
  32. A map can be found at: above, n 4.
  33. Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 2013, 5115–5153.
  34. The Hon Tony Burke MP “Fisheries Adjustment Assistance Package to support the creation of marine reserves”, media release, 16 November 2012 <http://environment.gov.au>.
  35. Above n 34.
  36. Explanatory Statement, *Environment Protection and Biodiversity Conservation (Commonwealth Marine Reserves) Proclamation* 2013.
  37. L Butterly and B Richardson “Marine park review looks set to repeat past mistakes”, (2014) *The Conversation* <https://theconversation.com/>.
  38. P Hannam “Abbott government blasted for stalling on marine parks” (2014) *Sydney Morning Herald*, 14, [www.smh.com.au](http://www.smh.com.au).
  39. The Hon Greg Hunt MP and Senator the Hon Richard Colbeck “Review of Commonwealth marine reserves begins”, joint media release, 11 September 2014, [www.environment.gov.au](http://www.environment.gov.au).
  40. Commonwealth Marine Reserves Review “Join the conversation about Commonwealth Marine Reserves”, Media Release, 28 November 2014 [www.environment.gov.au](http://www.environment.gov.au).
  41. Commonwealth Government, Department of the Environment *Fisheries Adjustment Assistance Package* [www.environment.gov.au](http://www.environment.gov.au).
  42. Above n 3.
  43. Above n 3.
  44. Above n 3.
  45. Above n 39.
  46. Above n 40.
  47. C Buxton and P Cochrane (Co-Chairs of the Bioregional Advisory Panels), *Chairs’ Update April 2015 Commonwealth Marine Reserves Review*, 1 April 2015 [www.environment.gov.au](http://www.environment.gov.au).
  48. C Buxton and P Cochrane, *Chairs’ Update February 2015 Commonwealth Marine Reserves Review*, 11 February 2015, [www.environment.gov.au](http://www.environment.gov.au) and C Buxton and P Cochrane *Chairs’ Update 19 May 2015 Commonwealth Marine Reserves Review*, 19 May 2015 [www.environment.gov.au](http://www.environment.gov.au).
  49. Above n 48, (19 May 2015 update).
  50. C Buxton and P Cochrane *Chairs’ Update 24 July 2015 Commonwealth Marine Reserves Review*, 24 July 2015, [www.environment.gov.au](http://www.environment.gov.au) and C Buxton and P Cochrane *Co-Chairs’ Update 6 August 2015 Commonwealth Marine Reserves Review*, 6 August 2015, [www.environment.gov.au](http://www.environment.gov.au).
  51. Above n 48, (19 May 2015 update).

---

# Application of the Adaptive Water Governance Project to Management of the Lake Eyre Basin and its connections to the Great Artesian Basin

*Barbara Cosens* UNIVERSITY OF IDAHO COLLEGE OF LAW AND WATERS OF THE WEST PROGRAM

## Introduction

This article summarizes the results of a study performed by the author as a Visiting Professor in Public Sector Policy and Management with the Goyder Institute and Flinders University. The report has now been published online by the Goyder Institute.<sup>1</sup> The study applies the findings of the Adaptive Water Governance Project (AWG Project),<sup>2</sup> a project made possible through support from the NSF funded National Socio-Environmental Synthesis Center, SESYNC titled “Adaptive Governance in Regional Water Systems to Manage Resilience in an era of Changing Climate”. The AWG Project focuses on the role of law in achieving water governance that is capable of facilitating management, adaptation and transformation in the face of climate change. The study for the Goyder Institute and Flinders University applied the AWG Project to water management in South Australia and specifically to the Lake Eyre Basin and its linkages to the Great Artesian Basin. Although tailored to these specific basins, the results may be applicable to certain aspects of Australian and South Australian water law and management in general.

## The Adaptive Water Governance Project

The AWG Project assessed the resilience of six North American water basins (Figure 1); Anacostia, Columbia, Klamath, Everglades, Middle Rio Grande, and Platte. The results of these six assessments and an introductory article were published in March 2015 in the first *Natural Resources & Environmental Law Edition of the Idaho Law Review*.<sup>3</sup> Application of the AWG Project to a specific basin such as the Lake Eyre Basin begins with a basin characterization that builds on methods developed by Walker and Salt,<sup>4</sup> and by the Resilience Alliance,<sup>5</sup> by focusing more directly on social-water interaction and the role of governance. The application then identifies potential drivers of change and legacy impacts of development and social interaction that may constrain options going forward. It concludes with analysis of the legal framework and authority for water management.

Analysis of the legal framework begins with the recognition that water management is not designed for adaptability, but for societal goals such as growth or environmental protection. Thus the AWG Project has developed guidelines for review of the legal authority and management structure that allow for adjustment within and tailored to the existing framework while maintaining the chosen goal of basin management (Table 1). The guidelines for legal review focus on the political and administrative structure for basin water management, the capacity to adapt and participate within that structure, and the processes required to ensure such aspects as legitimacy, stability, and dispute resolution when adjusting management for adaptation. Application of these guidelines must be tailored to the specific basin and require an understanding of its development and management history.

## The Lake Eyre and Great Artesian Basins

The Lake Eyre Basin is one of the largest internally draining basins in the world covering 1.14 million square kilometres or roughly 15% of Australia including much of Australia’s outback, and includes portions of South Australia, New South Wales, Queensland, and the Northern Territory. It is located in the driest portion of Australia and its surface water flows are among the most variable in the world. The basin’s terminal lake, Lake Eyre, or Kati Thanda as it is known to the traditional owners of the land, the Arabana people, is 15.2 metres below sea level and is the fifth largest terminal lake in the world.<sup>6</sup> The Lake Eyre Basin is underlain by and connected to portions of the Great Artesian Basin, a massive groundwater basin underlying 22% of Australia. The Great Artesian Basin supports highly vulnerable isolated groundwater dependent ecosystems at features referred to as mound springs. Current discharge from the Great Artesian Basin reflects the remnants of an earlier, wetter climate and is anticipated to decline over time.<sup>7</sup>

The Lake Eyre Basin is sparsely populated and its rivers remain free flowing, thus it represents the first application of the AWG Project to a relatively undeveloped water system. The primary legacy effect of human

development of water in the Lake Eyre Basin is the thousands of bores developed in the late 1800's and early 1900's to tap into the Great Artesian Basin for pastoral use.<sup>8</sup> Efforts are underway to cap and control bore flows as pressures within the Great Artesian Basin aquifers decline, but many remain free flowing. Indigenous peoples including the Arabana continue to have strong ties to the basin as well as claims to native title to lands and waters.<sup>9</sup> The impact of colonization and lack of recognition of native title to land and waters until recent years has had a lasting impact on the capacity of Aboriginal communities in the basin to participate in water management. Anticipated future changes may have even greater impacts on the basin.

Recent studies released by the Goyder Institute indicate that climate change may reduce precipitation and increase temperatures in the southern portion of the Lake Eyre Basin, thus producing an overall drying effect.<sup>10</sup> In contrast, the northern portion of the basin which supplies monsoonal rains may experience increased precipitation and greater extremes.<sup>11</sup> The fragile and highly adapted nature of the basin ecosystem leaves it vulnerable in the face of climate change and could lead to substantial changes and even transformation of that system to a new regime.

The Lake Eyre and Great Artesian Basins are currently managed separately. The Lake Eyre Basin is subject to an intergovernmental agreement among the Commonwealth, the states of Queensland and South Australia, and the Northern Territory which includes decision-making at the Ministerial level and input by both a Science Advisory Panel and Community Advisory Committee.<sup>12</sup> The Intergovernmental Agreement only addresses cross-border impacts and despite policy statements aspiring to a whole-of-basin management approach, does not provide the framework or authority for basin wide management. Instead, intra-state water management is the subject of state law.<sup>13</sup>

The Great Artesian Basin has no equivalent to the Lake Eyre Basin Intergovernmental Agreement or Ministerial Forum. Instead, intergovernmental cooperation related to the Great Artesian Basin is addressed as part of the broader arrangements under the Natural Resources Ministerial Council.<sup>14</sup> There is currently no integration between the governance of the surface and groundwater resources of the Lake Eyre Basin and coordination is limited to joint meetings of the Great Artesian Basin Coordinating Committee (GABCC) with the various Lake Eyre Basin entities. The GABCC is composed of representatives from community organizations and governmental entities. The chair is a political appointee (ie, non-governmental member of the committee) chosen by the Commonwealth Minister for Environment but with agreement by relevant State and Territorial Ministries as

well as the Commonwealth Minister for Agriculture, Fisheries, and Forestry).<sup>15</sup> Other members are chosen by the Queensland, New South Wales, South Australian, Northern Territory and appropriate Commonwealth agencies to represent the appointing entity.<sup>16</sup>

## The Analysis of Flexibility in Water Law and Management

Table 1 sets forth the guidelines for review of the legal authority and management structure developed within the AWG Project. Application to the Lake Eyre Basin and connected portions of the Great Artesian Basin and to applicable water law in South Australia, indicate that improvements could be made to current management to increase governance adaptability in the areas outlined in the following paragraphs. Analysis of models for how to proceed in each area will be provided in the full report to be published by the Goyder Institute.

- Increased overlap in appointment of individuals to state and interstate decision-making bodies, scientific advisory and agency science groups, and state and interstate citizen advisory bodies. This increases communication and coordination. More importantly, it leads to networks of experts and regulators with high levels of trust that can respond quickly to unforeseen changes.
- Increased stability in appointments of and scope of authority assigned to various state and interstate water management entities. Recent changes from catchment to integrated natural resources management entities have affected legitimacy and trust (Mitchell 2014). While these changes may be beneficial in the end, attention to stability and the rebuilding of relationships with basin communities will increase the ability of management entities to respond to change.
- Conjunctive management of the Lake Eyre Basin and connected portions of the Great Artesian Basin. The differences between ground and surface water warrant different scientific input and different approaches to management, thus conjunctive management should not apply the identical system developed for management of surface water to groundwater. Instead, coordination between ground and surface water management entities and imposition of requirements for mitigation of the impact of groundwater use and interception on surface water resources and groundwater dependent ecosystems is warranted. In addition, continued focus on bore rehabilitation and maintenance is critical.
- The high level of uncertainty associated with the understanding of the impact of groundwater use

and interception on mound springs requires an adaptive management approach. However, a purely science-driven implementation of adaptive management will fail if not imbedded in a decision-making process overseen by policy makers with authority to adjust goals.

- Provide the resources for Aboriginal communities to build governance capacity. Capacity is critical to the ability of Aboriginal communities to self-govern, pursue economic development, and co-manage water resources. Basins examined by the AWG Project in North America in which Native American tribes have participated in water and fisheries management decisions on a governmental basis have experienced increased resilience benefiting all basin residents.
- Develop local, state and federal level processes for engagement with Aboriginal communities on a government-to-government basis on water management. As the governance capacity of Aboriginal communities increase, local, state, and federal governments will need criteria to identify who speaks for each community. The criteria should be developed in consultation with Aboriginal people. In addition, local, state, and federal governments will need processes to engage with Aboriginal communities on a government-to-government basis rather than as a basin interest group.
- Provide the resources for enforcement and uniform application of water regulations. Lack of resources results in uneven application of regulations with the result that those who voluntarily comply bear a greater burden. Overtime, this reduces the legitimacy of the regulations. This is apparent in the implementation of South Australia's requirements for bore rehabilitation in the Great Artesian Basin.
- Balance flexibility with stability when implementing flexible management. Flexible tools such as

adaptive management can be destabilizing if societal as well as ecological needs are not considered in setting time periods for adjustment. This can be accomplished through a public process, but requires a policy level decision making body as opposed to purely scientific implementation.

- Establish binding dispute resolution mechanisms now, before the next crisis. Many of the planning mechanisms in Australia and specifically the cooperative nature of the Lake Eyre Basin Intergovernmental Agreement do not provide mechanisms to reach final resolution on disputes when consensus is not possible. Climate change may push consensus approaches beyond their limit. Establishing clear mechanisms for dispute resolution now, in exchange for some level of certainty in terms of what types and how much development is acceptable on a shared water resource, may prevent intractable conflict in the future.

## Conclusion

Recent water reform in Australia has advanced preparation for the next drought. Nevertheless, the uncertainty associated with climate change requires additional attention to avenues for flexibility within the existing water management system. Application of the Adaptive Water Governance Project to the Lake Eyre and Great Artesian Basins and to Australia and South Australia water law in general indicates numerous opportunities to enhance flexibility without altering the current framework and goals of water management.

### *Barbara Cosens*

*Professor*

*University of Idaho College of Law and Waters of the West Program*

*Goyder Institute — Flinders University Visiting Professor in Public Sector Policy and Management*

**Table 1: The role of law in adaptive governance**

Structure:	Redundancy: common management and decision-making functions at multiple scales. Redundancy increases the likelihood that decisions can be made and implemented at the scale of a particular problem.
	Polycentricity: multiple centers of authority. Polycentricity provides the same benefits as redundancy.
	Subsidiarity: decision-making at the level closest to the resource as possible yet within the context of a government at multiple scales that fosters the conditions for implementation of management decisions. Subsidiarity increases the likelihood that local knowledge will be used, decisions will be tailored to specific problems, and innovation may occur at the local level supported by governance at larger scales.
	Nesting: representation of decision-making and advisory bodies at lower levels in higher level entities. Nesting allows the formation of ad hoc networks in response to surprise, and similar to subsidiarity, increases the potential for local innovation within stable governance at a larger scale.
	Integration: integration of water resources management across sectors that influence water allocation, quality and land development; and integration of regulation of physically connected resources such as ground and surface water. Integration reduces the possibility of unintended consequences.
	Persistence: stability in representation and decision-making bodies to foster legitimacy and trust, potentially reducing response time to surprise.
Capacity	Adaptive: resources and legal authority to respond to change. Adaptive capacity allows a system of governance to adjust in the face of uncertainty and change.
	Participatory: those affected have the right and resources to have a role in decision making. For Indigenous communities, this equates to the capacity for self-determination. Participatory capacity reduces the likelihood of marginalization of portions of society and increases the likelihood that all aspects of a system will be considered in decision making.
Process	Legitimacy: acceptance of authority because it is perceived to be exercised appropriately and because it is exercised appropriately. Legitimacy is necessary for public support of resource management.
	Procedural justice: transparency, the right to seek review, and engagement at the appropriate level.
	Procedural justice is necessary to identify unintended consequences, check corruption, and to avoid uneven application of the burden of adaptation. For indigenous communities, procedural justice requires processes allowing engagement at the governmental level.
	Problem solving approach: science and interest based collaborative processes. A problem solving approach allows for the possibility of solutions that are beneficial to all and contrasts with political and ideological approaches which are not subject to compromise.
	Balance stability and flexibility: adaptation timeframes that consider both the need for adjustment and the economic need for stability. Balance of stability and flexibility recognizes that while adjustments must occur in the face of change, social systems and particularly economic systems require stability; both must be taken into account.
	Opportunity for reflection and learning: resources for monitoring and a process for feedback and consideration of new information. The opportunity for reflection and learning assures that response to change will not be rote, and that society will evolve with the approach to management.
	Dispute resolution: process for resolving conflict and making final, binding decisions on tradeoffs regarding scarce resources. Dispute resolution is essential as water scarcity in the face of climate change unfolds. There may come a point when consensus is not possible and unless a system for resolving issues is designed and agreed to beforehand, conflict is likely.

Figure 1

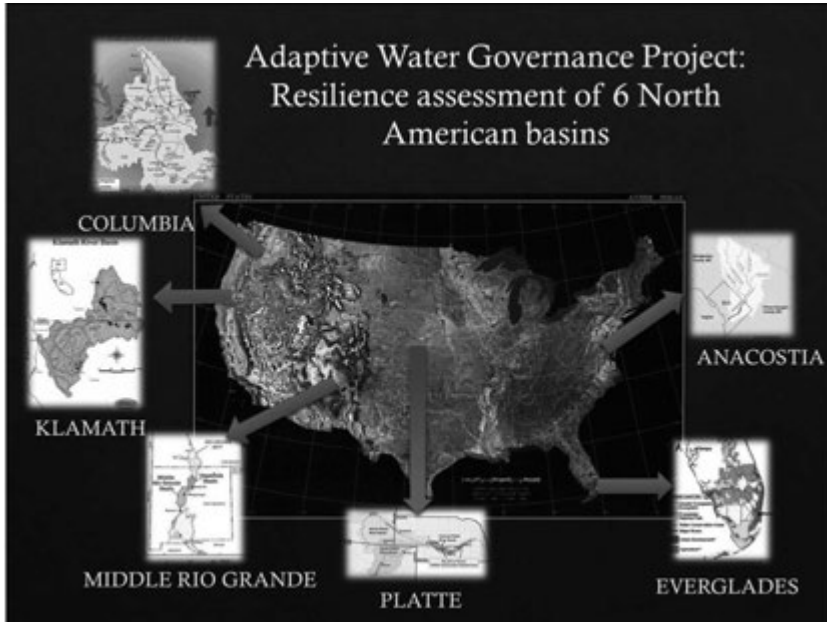
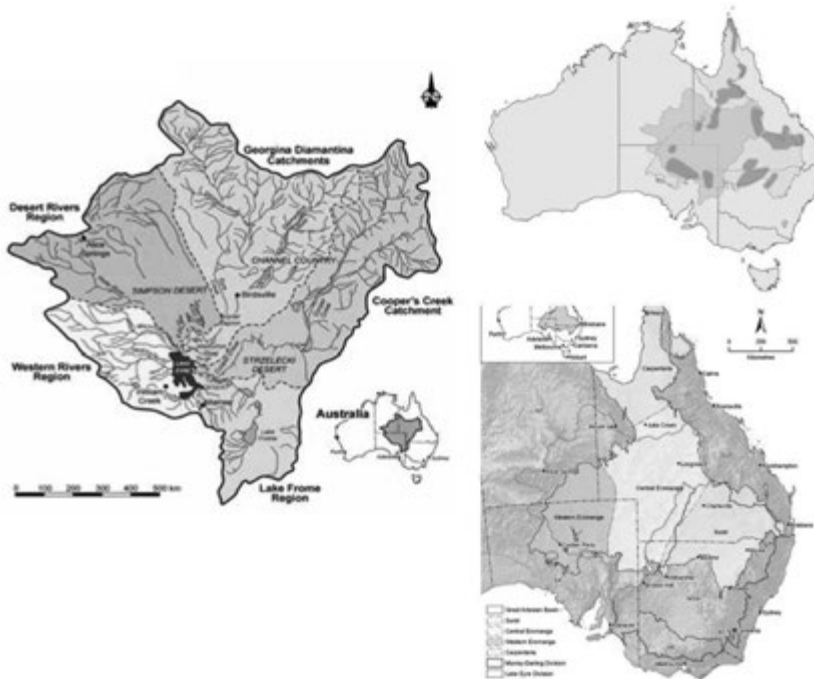


Figure 2



## Footnotes

1. B Cosens Application of the Adaptive Water Governance Project to the management of the Lake Eyre Basin and its connections to the Great Artesian Basin Report to Flinders University and the Goyder Institution (2015), available at <http://goyderinstitute.org/index.php?id=53>.
2. B Cosens and L Gunderson (2014-2015) Adaptive Governance in Regional Water Systems to Manage Resilience in an era of Changing Climate. A project funded through NSF funded National Socio-Environmental Synthesis Center, SESYNC. Available online at <http://www.sesync.org/project/water-people-ecosystems/adaptive-water-governance>. See also, B Cosens, L Gunderson, C Allen and M H Benson "Identifying Legal, Ecological and Governance Obstacles, and Opportunities for Adapting to Climate Change" (2014) *Sustainability* 6(4): 2338-2356 doi:10.3390/su6042338 available at <http://www.mdpi.com/2071-1050/6/4/2338>; B Cosens, L Gunderson and B Chaffin "The Adaptive Water Governance Project: Assessing Law, Resilience and Governance in Regional Socio-Ecological Water Systems facing a Changing Climate" (2015) 51 *Natural Resources and Environmental Law Edition of the Idaho Law Review* 1, available at <http://www.uidaho.edu/law-law-review/articles>.
3. University of Idaho, Law, *Idaho Law Review* March 2015, [www.uidaho.edu](http://www.uidaho.edu).
4. B Walker and D Salt *Resilience Practice: Building Capacity to Absorb Disturbance and Maintain Function* Island Press 2012.
5. Resilience Alliance, *Assessing Resilience in Social-Ecological Systems: A Workbook for Scientists (2007)*, [www.resilience.org](http://www.resilience.org).
6. M Thoms, S Capon, R Price and Doug Watkins (Dec. 2009) *Lake Eyre Basin Rivers Assessment Implementation Plan Project Milestone 2 Report: Proposed LEB Rivers Assessment Methodology*, available at [www.lakeeyrebasin.gov.au](http://www.lakeeyrebasin.gov.au); C Leigh, F Sheldon, R T Kingsford and A H Arthington, "Sequential floods drive 'booms' and wetland persistence in dryland rivers: a synthesis, *Marine and Freshwater Research*, 2010, 61, 896-908; A H Arthington and S R Balcombe "Extreme flow variability and the 'boom and bust' ecology of fish in arid-zone floodplain rivers: a case history with implications for environmental flows, conservation and management" (2011), *Ecohydrology* 4(5): pp 708-720; R T Kingsford, J F Costelloe and F Sheldon "Lake Eyre Basin: Challenges for Managing the World's Most Variable River System", in V R Squires, H M Milner and K A Daniell (eds) *River Basin Management in the Twenty-First Century: Understanding People and Place*, CRC Press.
7. T A McMahon, R Murphy, P Little, J F Costelloe, M C Peel, F H S Chiew, S Hayes, R Nathan and D D Kandel, *Hydrology of the Lake Eyre Basin* November 2005 available at [www.lakeeyrebasin.gov.au](http://www.lakeeyrebasin.gov.au); M Keppel, K E Karlstrom, A J Love, S Priestley, D Wohling and S De Ritter (eds) "Allocating Water and Maintaining Springs in the Great Artesian Basin" (2013) Volume I: *Hydrogeological Framework of the Western Great Artesian Basin*, National Water Commission, Canberra, available at <http://archive.nwc.gov.au/library/topic/groundwater/allocating-water-and-maintaining-springs-in-the-great-artesian-basin>; A Love, D Wohling, S Fulton, Pe Rousseau-Gueutin and S De Ritter, (eds), "Allocating Water and Maintaining Springs in the Great Artesian Basin", (2013) Volume II: *Groundwater Recharge, Hydrodynamics and Hydrochemistry of the Western Great Artesian Basin*, National Water Commission, Canberra, available at <http://archive.nwc.gov.au/library/topic/groundwater/allocating-water-and-maintaining-springs-in-the-great-artesian-basin>; A Love, P Shand, L Crossey, G A Harrington and P Rousseau-Gueutin (eds) "Allocating Water and Maintaining Springs in the Great Artesian Basin" (2013) Volume III: *Groundwater Discharge of the Western Great Artesian Basin*, available at <http://archive.nwc.gov.au/library/topic/groundwater/allocating-water-and-maintaining-springs-in-the-great-artesian-basin>; T Gotch, (ed) "Allocating Water and Maintaining Springs in the Great Artesian Basin" (2013) Volume V: *Groundwater-dependent Ecosystems of the Western Great Artesian Basin*, National Water Commission, Canberra, available at <http://archive.nwc.gov.au/library/topic/groundwater/allocating-water-and-maintaining-springs-in-the-great-artesian-basin>; R T Kingsford, J F Costelloe and F Sheldon "Lake Eyre Basin: Challenges for Managing the World's Most Variable River System" (2014) in V R Squires, H M Milner and K A Daniell (eds) *River Basin Management in the Twenty-First Century: Understanding People and Place*, CRC Press.
8. M Keppel, K E Karlstrom, A J Love, S Priestley, D Wohling and S De Ritter (eds) "Allocating Water and Maintaining Springs in the Great Artesian Basin" (2013) Volume I: *Hydrogeological Framework of the Western Great Artesian Basin*, National Water Commission, Canberra, available at <http://archive.nwc.gov.au/library/topic/groundwater/allocating-water-and-maintaining-springs-in-the-great-artesian-basin>; A Love, P Shand, L Crossey, G A Harrington and P Rousseau-Gueutin (eds) "Allocating Water and Maintaining Springs in the Great Artesian Basin" (2013) Volume III: *Groundwater Discharge of the Western Great Artesian Basin*, available at <http://archive.nwc.gov.au/library/topic/groundwater/allocating-water-and-maintaining-springs-in-the-great-artesian-basin>.
9. M Nursey-Bray, D Fergie, V Arbon, L-I Rigney, R Palmer, J Tibby, N Harvey & L Hackworth L "Community based adaptation to climate change: The Arabana, South Australia" (2013) *National Climate Change Adaptation Research Facility*, Gold Coast, 133 pp.
10. S P Charles, and G Fu *Statistically Downscaled Projections for South Australia 2015*, Goyder Institute for Water Research Technical Report Series No. 15/1, Adelaide, South Australia, available at [www.goyderinstitute.org/uploads/CC%20Task%203%20CSIRO%20Final%20Report\\_web.pdf](http://www.goyderinstitute.org/uploads/CC%20Task%203%20CSIRO%20Final%20Report_web.pdf).
11. R T Kingsford, J F Costelloe and F Sheldon, "Lake Eyre Basin: Challenges for Managing the World's Most Variable River System", (2014) in V R Squires, H M Milner and K A Daniell

- (eds), *River Basin Management in the Twenty-First Century: Understanding People and Place*, CRC Press.
12. Australian Government, Department of Environment, *Lake Eyre Basin Intergovernmental Agreement: Agreement Between the Commonwealth of Australia, the State of Queensland, the State of South Australia and the Northern Territory of Australia — Date 21st Day of October 2000*, available at <http://www.environment.gov.au/resource/lake-eyre-basin-intergovernmental-agreement>; Lake Eyre Basin Secretariat website, n d, <http://www.lakeeyrebasin.gov.au/>.
  13. National Government, National Water Commission, *Intergovernmental Agreement On A National Water Initiative 2004* (NWI) available at: [http://nwc.gov.au/\\_\\_data/assets/pdf\\_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf](http://nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf); *South Australia Natural Resources Management Act 2004* (NRM) available at: <http://www.legislation.sa.gov.au/LZ/C/A/NATURAL%20RESOURCES%20MANAGEMENT%20ACT%202004/CURRENT/2004.34.UN.PDF>.
  14. R Price, M Thoms, S Capon, D Watkins *Lake Eyre Basin Rivers Assessment Implementation Plan Project: Milestone 3 Report: Governance arrangements for the LEBRA*, December 2009 available at [http://www.lakeeyrebasin.gov.au/system/files/pages/71d27602-9826-4d4f-9004-fbc30cde225b/files/lebra-governance-milestone3\\_1.pdf](http://www.lakeeyrebasin.gov.au/system/files/pages/71d27602-9826-4d4f-9004-fbc30cde225b/files/lebra-governance-milestone3_1.pdf).
  15. GABCC Operating Arrangement §4.1; see also, Great Artesian Basin Coordinating Committee, URL: <http://www.gabcc.org.au/>; Great Artesian Basin Consultative Council, 2000, Great Artesian Basin Strategic Management Plan, available at <http://www.gabcc.org.au/11884/Strategic-Management-Plan/>; Great Artesian Basin Consultative Council, 2000, Great Artesian Basin Strategic Management Plan Summary, available at <http://www.gabcc.org.au/11884/Strategic-Management-Plan/>; Great Artesian Basin Coordinating Committee, 2008A, Great Artesian Basin Strategic Management Plan Progress and Achievements to 2008, available at <http://www.gabcc.org.au/12518/GAB-Strategic-Management-Plan-September-2000/>; Great Artesian Basin Coordinating Committee, 2008B, Great Artesian Basin Strategic Management Plan Focus and Prospects 2008-2015, available at <http://www.gabcc.org.au/12518/GAB-Strategic-Management-Plan-September-2000/>.
  16. GABCC Operating Arrangement §3.1.



# More than waterbirds: Application of the Ramsar Convention on Wetlands in Australia

*Jamie Pittock* THE AUSTRALIAN NATIONAL UNIVERSITY

## Introduction

The legal reach of the *Convention on Wetlands of International Importance, Especially as Habitat for Waterbirds*<sup>1</sup> has been underestimated. The application of the Convention in Australia is reviewed here to show that increasing translation of its provisions into Commonwealth law over time has seen it used to better conserve designated Ramsar wetlands. It also underpins the Commonwealth Government's intervention on water allocation in the Murray-Darling Basin and with respect to extractive industries. However, greater application in Commonwealth law has generated aversion to consent for designation of new Ramsar sites, as well as a raft of processes that act as barriers to designation of new sites. A number of the contradictory policies of the Commonwealth are outlined. Use of the Convention to provide a mandate for the Water Act 2008 (Cth) indicates the potential for its greater application in Australia for managing water in an era of climate change and greater scarcity.

## How does it affect you?

- Australia's accession to the Ramsar Convention on Wetlands provides the Commonwealth Government with a mandate to regulate a wide range of water uses nationally.
- The Environment Protection and Biodiversity Conservation Act 1999 (Cth), including the more recent "water trigger", and the Water Act 2008 (Cth) are examples of growing application of the Convention in domestic law based on the external affairs power of the constitution.
- The Commonwealth is likely to draw on the Convention to further regulate water use in an era of increasing demand for water and variability in supply with climate change.

## The Ramsar Convention

The *Convention on Wetlands of International Importance, Especially as Habitat for Waterbirds* was agreed in Ramsar, Iran in 1971 and is the first of the modern, multi-lateral environmental treaties.<sup>2</sup> The last minute addition to the title of "habitat for waterbirds" has

misled many an observer to conclude that the treaty is a quaint institution for birdwatchers,<sup>3</sup> when the treaty focusses on sustainable development policy.<sup>4</sup> The Convention does require contracting parties to designate Wetlands of International Importance, commonly known as Ramsar sites, and one of the nine listing criteria is habitat value for water birds. Contrary to perceptions that these sites must be wetlands of exceptional value, the nine listing criteria could be applied to a vast number of wetlands, for example, those that are representative of a particular wetland ecosystem or those that form good breeding habitat for fish.<sup>5</sup> Undoubtedly a great many of the more than 900 sites in the national directory of important wetlands<sup>6</sup> could be added to the 68 currently designated Ramsar sites in Australia.

Critically, the Convention requires contracting parties to conserve — use "wisely" — all wetlands on their territory "as far as possible".<sup>7</sup> The Ramsar definition of a wetland is particularly broad, encompassing: "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres".<sup>8</sup> Thus, for example, rivers and lakes are defined as wetlands under the treaty.

The key test applied by the Convention is "wise use" of wetlands which has been defined as "maintenance of the ecological character", namely, the "combination of the ecosystem components, processes and benefits/services that characterise the wetland at a given point in time".<sup>9</sup> This is a particularly onerous test since around the world wetlands are a focus of human habitation and livelihoods, are particularly vulnerable to the impacts of people, and there is extensive degradation and loss of wetland ecosystems.<sup>10</sup>

A third major requirement is collaboration among contracting parties for wetlands conservation. The Commonwealth Government's pro-active support for Pacific Island states and the Ramsar Convention Secretariat to better apply the treaty in Oceania<sup>11</sup> is not discussed further here. The Convention now has near universal membership with 168 contracting parties.<sup>12</sup>

The Convention was instigated by four international environmental non-governmental organisations and is

unique in the extent to which it embraces the community sector as participating observers in organs of the treaty.<sup>13</sup> One consequence is that the Conference of Parties has adopted an extensive portfolio of resolutions that guide the contracting parties in the interpretation of the Convention and the conservation of wetlands. This normative policy formulation covers a broad range of activities impacting wetlands, including energy generation,<sup>14</sup> dam development<sup>15</sup> and agriculture.<sup>16</sup>

Some legal commentators have suggested that Ramsar is overly focussed on conservation of sites and lacks adequate enforcement provisions.<sup>17</sup> This view overlooks the extensive attributes of the treaty for moral suasion, including transparent national, triennial reporting requirements, non-government organisation participation in Convention processes, and defacto name and shame debates in the triennial Conference of Contracting Parties.<sup>18</sup> Limited but pro-active support for parties seeking to conserve sites, including technical advice and some access to funding, provides positive incentives for wetlands conservation. As a result Ramsar wetland sites are on average better managed than non-Ramsar wetland protected areas.<sup>19</sup>

It is with this background that the application of the Convention in Australia is now considered.

### Implementation in Australia 1971–1999

Australia was one of the founders of the Convention and designated the first Ramsar sites in 1974. Over the next three decades state and federal governments sporadically agreed to the designation of a number of Ramsar wetlands. While these sites were designated with the details required under Convention processes at the time, the data was limited and did not usually define the ecological character of sites in great depth, a management plan was not required and the mapping of boundaries was often crude.<sup>20</sup> A great strength of the Convention is its capacity to promote conservation of wetlands across land tenures however, in some instances, privately owned wetlands were declared as Ramsar sites without consultation with and concurrence of the landholders.<sup>21</sup>

Importantly, the Ramsar Convention was not directly implemented through domestic law. Up until 1999 the management of Ramsar sites was ad hoc, as indicated by Australia's reports to the Ramsar conference of Contracting Parties that largely comprise a collation of anecdotal reports from state agencies.<sup>22</sup> For instance, developments impacting on Ramsar sites did not attract any additional protection under state government environmental protection laws and the Commonwealth Government had no direct mechanism to intervene, a focus of the critique by Farrier and Tucker.<sup>23</sup> For this reason many aspects of the Convention were given force under

the EPBC Act. Ramsar sites were designated as a "matter of national environmental significance", meaning that new actions that may significantly impact on the environmental values for which the site was listed (including actions proposed outside but impacting on the site values) can be regulated by the Commonwealth Minister for the Environment.

### Implementation for Australian sites, 2000–2015

Incorporation of Ramsar site provisions into the EPBC Act has seen greater Commonwealth efforts to better conserve designated wetland sites.<sup>24</sup> The Federal Government has funded state governments to prepare management plans and accurately map the boundaries of Ramsar sites. Further, detailed ecological character descriptions have been prepared for Ramsar sites that may set baselines by which to measure changes and support regulatory decisions on the significance of impacts of proposed developments.<sup>25</sup>

Initially, environmental organisations, private land holders and a business successfully advocated for the designation of wetlands managed by non-government institutions. In the Gwydir and Macquarie Marshes wetlands in New South Wales, pastoralists supported listing of parts of their properties in order to raise the profile of their wetlands to secure beneficial environmental water flows.<sup>26</sup> The Fivebough and Tuckerbill Wetlands Trust and Hunter Wetlands Centre in New South Wales also campaigned for designations to secure their local wetlands from threatened developments.<sup>27</sup> In South Australia, Banrock Station winery successfully sought designation and restored their portion of the River Murray floodplain to demonstrate their company's environmental sustainability credentials.<sup>28</sup> A Ramsar Site Manager's Network has been established in New South Wales to better engage non-government site managers in governance,<sup>29</sup> but as yet it may have too few members to effectively influence state and Commonwealth government policies.

The Commonwealth has not been proactive in enforcing the Ramsar provisions of the EPBC Act. In the case of clearing of vegetation in the Windella portion of the Gwydir Ramsar site in 2002–2003, Commonwealth prosecution only proceeded after non-government organisations prepared to take legal action. In *Minister for the Environment & Heritage v Greentree (No 3)*<sup>30</sup> in the Federal Court of Australia, Sackville J found that the EPBC Act had been contravened, required rehabilitation of the wetland and awarded pecuniary penalties totalling \$450,000. This is a significant case as one of very few prosecutions of a company director under the Act.<sup>31</sup> In *Minister for the Environment and Heritage v Queensland Conservation Council Inc*<sup>32</sup> in the Federal Court of Australia, the Full Court held that the environmental

impacts of the proposed Nathan Dam may adversely impact the values for which the Great Barrier Reef, hundreds of kilometres downstream, was designated as a world heritage area.<sup>33</sup> As Ramsar sites have similar legal protection as world heritage areas under the EPBC Act, this case highlights the potential for the Commonwealth Minister for the Environment to regulate actions outside the boundary if a designated Ramsar wetland when there may be a significant impact on its “ecological character” (for example, from altering freshwater inflows). Further, third parties may act to conserve designated wetlands under the EPBC Act where the Minister does not.

Greater codification in Commonwealth law has also resulted in aversion to consent for designation of new Ramsar sites by state governments. From 1974 to 1999 there were 52 Ramsar sites designated in Australia, a rate of over two per year, whereas from 2000 to 2014 only 13 sites have been listed at a rate of less than one per year,<sup>34</sup> even though hundreds of wetlands would be eligible for designation.<sup>35</sup> State governments may be concerned that listing additional sites engenders further Commonwealth Government regulation of proposed developments in their jurisdiction. In practice this concern is misplaced as most potential Ramsar wetlands in Australia may already be subject to Commonwealth Government protection through application of other matters of national environmental significance under the EPBC Act, including for example, migratory waterbirds or nationally listed threatened species.<sup>36</sup> Ramsar site designation may actually provide greater certainty for developers and state governments by better defining through management plans and environmental flow agreements what new actions may or may not be constrained.

A consequence of the litigation under the EPBC Act has been adoption of policies by the Department of the Environment that require new Ramsar site nominations to include extensive documentation, namely: a Ramsar Information Sheet; a surveyed boundary description and maps; an ecological character description; a management plan (including for environmental water); and a summary of consultation with stakeholders.<sup>37</sup> While this documentation could be considered prudent, these onerous requirements are barriers to designation of new sites, especially for non-government wetland managers. The Commonwealth’s approach diminishes the opportunities to proactively work with wetland managers to use Ramsar site designation to better conserve significant wetlands.

Further, nomination of Ramsar sites is treated differently compared to other matters of national environmental significance under the EPBC Act. Under the Act, national heritage sites, threatened species and ecological communities may be nominated by members of the

public and assessed by expert committees who make recommendations on listing directly to the Commonwealth Minister for the Environment.<sup>38</sup> By contrast, no formal domestic nomination process is detailed in that Act, other than a requirement for the Minister to consult the relevant state government. However the Commonwealth Government has adopted a policy that requires state government consent for a nomination,<sup>39</sup> despite the obvious barrier that this places in the way of non-government nominators. The Commonwealth Government’s risk adverse policies on new Ramsar site designations contrasts oddly with its recent willingness to legislate based on the Convention to better conserve all wetlands in Australia.

### Implementation for all Australian wetlands, 2008-2015

More recently, the Convention has provided a constitutional mandate for Commonwealth Government intervention to manage water.<sup>40</sup> Allocation of water is now regulated throughout the Murray-Darling Basin under the Water Act.<sup>41</sup> It has also been applied nationally to assess impacts of large coal and gas projects through the addition of a “water trigger” as a matter of national environmental significance under the EPBC Act.<sup>42</sup> In both cases, the Commonwealth Government responded to community concern, at the peak of the drought in the Murray-Darling Basin and over perceived impacts of coal mining and gas extraction on water resources, with legislation that draws their constitutional mandates in large part on implementation of the Ramsar Convention’s principle of wise use of all wetlands.

The onerous obligations of the Convention may give rise to future constitutional challenges to actions in instances where the Commonwealth relies on Ramsar for a legislative mandate but includes measures that are in conflict with treaty obligations.<sup>43</sup> In the case of the Murray-Darling Basin Plan, adopted in 2012 under the Water Act, more water is allocated to conservation of wetland ecosystems in the Basin including 16 designated Ramsar sites.<sup>44</sup> However, for a number of wetlands (including the South Australian Riverland, and Coorong and Lakes Albert and Alexandrina Ramsar sites) the water allocation is locked into volumes insufficient to maintain the historical, designated ecological character of the wetlands,<sup>45</sup> let alone that which shall be needed to manage the impacts of climate change.<sup>46</sup> This raises the question of whether the Water Act is being implemented in a manner substantially inconsistent with a number of treaty requirements, and whether the High Court would consider a plea to render it invalid under the Constitution s 51 (xxix) to be justiciable.<sup>47</sup>

## Future application and conclusions

Use of the Convention to provide a mandate for the Water Act 2008 and the water trigger under the EPBC Act in 2013 indicates the potential for its greater application for managing water in an era of climate change and greater scarcity. As these two legal reforms show, at times of environmental or political crisis over water management, the Commonwealth Government is likely to fall back on the Convention to legislate for higher national standards of water management than those exercised by the state governments. The changes in water availability and water related extreme events induced by climate change, and the emergence of water-intensive industries like carbon farming and shale gas development,<sup>48</sup> may well be catalysts for further application of the Convention in law in Australia.

Further, greater efforts for conservation of wetlands by Indigenous and non-government managers is likely to increase demand for further designation of Ramsar wetlands, especially where these land tenures do not otherwise provide protection against extractive industry developments. The use of the EPBC Act to regulate developments that may impact on the values of wetlands will be further tested in the courts. In these contexts, application of the Ramsar Convention on Wetlands in Australia is certain to continue to expand well beyond the water birds.

### **Jamie Pittock**

Associate Professor

Fenner School of Environment and Society, The Australian National University

---

## Footnotes

1. Ramsar (1971).
2. The Ramsar Convention Secretariat, *History of the Ramsar Convention*, 2014, [www.ramsar.org](http://www.ramsar.org); M Bowman, P Davies and C Redgwell *Lyster's international wildlife law* Cambridge University Press, 2010.
3. D Farrier and L Tucker "Wise use of wetlands under the Ramsar Convention: a challenge for meaningful implementation of international law" (2000) 12(1) *Journal of Environmental Law* 21-42.
4. Ramsar (2012) *Resolution XI.10 Wetlands and energy issues, 11th Meeting of the Conference of the Parties to the Convention on Wetlands* (Ramsar, Iran, 1971); CM Finlayson, N Davidson, D Pritchard, G R Milton and H MacKay "The Ramsar Convention and Ecosystem-Based Approaches to the Wise Use and Sustainable Development of Wetlands" (2011) 14(3-4) *Journal of International Wildlife Law & Policy* 176-198.
5. The Ramsar Convention Secretariat, *The Ramsar sites criteria*, undated, [www.ramsar.org](http://www.ramsar.org).
6. Department of the Environment, *A directory of important wetlands in Australia*, 2009, Australian Government, [www.environment.gov.au](http://www.environment.gov.au).
7. Ramsar (2009) *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, (Ramsar, Iran, 1971), UN Treaty Series No 14583, as amended by the Paris Protocol 3 December 1982 and Regina Amendments 28 May 1987: Art 3.
8. Above, n 7, Art 1.
9. Ramsar (2005) *Resolution IX.1 Annex A: a conceptual framework for the wise use of wetlands and the maintenance of their ecological character*: cl 15.
10. N C Davidson "How much wetland has the world lost? Long-term and recent trends in global wetland area" (2014) 65(10) *Marine and Freshwater Research* 934-941.
11. Department of Environment, *National Report on the implementation of the Ramsar Convention on Wetlands: National Reports to be submitted to the 12th Meeting of the Conference of the Contracting Parties, Uruguay, 2015*, September 2014, COP12 national reports, [www.environment.gov.au](http://www.environment.gov.au).
12. The Ramsar Convention Secretariat, 2014, [www.ramsar.org](http://www.ramsar.org).
13. D Pritchard "Ramsar's unique 'Partners' system keeps pace with the times" (2006) 15 *MEA Bulletin* 1, 4-5.
14. Ramsar Convention (2012) *Resolution XI.21. Wetlands and sustainable development, 11th Meeting of the Conference of the Parties to the Convention on Wetlands* (Ramsar, Iran, 1971), Bucharest, Romania, 6-13 July 2012.
15. Ramsar (2002) *Resolution VIII.2: The Report of the World Commission on Dams (WCD) and its relevance to the Ramsar Convention*.
16. Ramsar (2002) *Resolution VIII.34. Agriculture, wetlands and water resource management*.
17. Farrier and Tucker, above, n 3; O Ferrajolo "State Obligations and Non-Compliance in the Ramsar System" (2011) 14(3-4) *Journal of International Wildlife Law & Policy* 243-260.
18. J Pittock "A pale reflection of political reality: Integration of global climate, wetland, and biodiversity agreements" (2010) 1(3) *Climate Law* 343-373.
19. G Castro, K Chomitz and T Thomas "The Ramsar Convention: Measuring its effectiveness for conserving Wetlands of International Importance" (2002) *Ramsar COP8 DOC*. 37, The World Bank and World Wildlife Fund, Washington DC; Bowman M "The Ramsar Convention on Wetlands: Has it made a difference?" in Stokke O S and Thommessen O B (eds) *Yearbook of International Co-operation on Environment and Development* Earthscan, London 2002/2003 pp 61-68; J Verschuuren "Ramsar soft law is not soft at all" (2008) 35(1) *Milieu en Recht (Environment and Law)* 28-34 (Dutch, reproduced in translation on the Ramsar website).
20. BMT WBM, *Ramsar snapshot study final report*, Department of the Environment and Water Resources, 2007, [www.environment.gov.au](http://www.environment.gov.au).
21. Above, n 20.
22. See, eg, Environment Australia, *National report of Australia for COP7*, Ramsar, 1999, [www.ramsar.org](http://www.ramsar.org).
23. Farrier and Tucker, above, n 3.

24. Above, n 11.
25. Above, n 11.
26. Office of Environment and Heritage, *Gwydir Wetlands: Gingham and Lower Gwydir (Big Leather) Watercourses Ramsar site*, NSW Government, 2012, [www.environment.nsw.gov.au](http://www.environment.nsw.gov.au); Office of Environment and Heritage, *Macquarie Marshes Ramsar site*, NSW Government, 2013, [www.environment.nsw.gov.au](http://www.environment.nsw.gov.au); J Pittock “Mainstreaming experiences in WWF programs. Mainstreaming Wetland Biodiversity Conservation: Experience and Lessons Learned in Practical Applications of Mainstreaming” (2009) *UN Development Programme and the State Forestry Administration of China, Beijing*.
27. Office of Environment and Heritage, *Fivebough and Tuckerbil Swamps Ramsar site*, NSW Government, 2012, [www.environment.nsw.gov.au](http://www.environment.nsw.gov.au); Office of Environment and Heritage, *Hunter Estuary Wetlands Ramsar site*, NSW Government, 2012, [www.environment.nsw.gov.au](http://www.environment.nsw.gov.au).
28. Department of Environment, *Banrock Station Wetland Complex*, Australian Wetlands Database, 2011, [www.environment.gov.au](http://www.environment.gov.au).
29. NSW Ramsar Managers, [www.ramsarmanagers.org.au](http://www.ramsarmanagers.org.au).
30. *Minister for the Environment & Heritage v Greentree (No 3)* [2004] FCA 1317; BC200406748.
31. D E Fisher “Managing wetlands sustainably as ecosystems: the contribution of the law (part 2)” (2010) 21(2) *The Journal of Water Law* 53-65; Environmental Law Australia, *Greentree case*, The University of Queensland, St Lucia.
32. *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190; BC200404703.
33. Environmental Law Australia, *Nathan Dam case*, The University of Queensland, St Lucia.
34. Ramsar (2015) Australia. Ramsar sites information service. Ramsar Convention on Wetlands, Gland.
35. Department of the Environment, above, n 6; B Phillips *Implementing the Ramsar Convention’s “Strategic framework for the future development of the List of Wetlands of International Importance” in Australia* WWF Australia 2003.
36. Environment Protection and Biodiversity Conservation Act 1999 (Cth).
37. SEWPAC (2012) *Australian Ramsar site nomination guidelines. Module 4 of the National Guidelines for Ramsar wetlands — Implementing the Ramsar Convention in Australia*. Department of Sustainability, Environment, Water, Population and Communities, Canberra.
38. Above, n 36.
39. Above, n 37.
40. P Kildea, G Williams “The Constitution and the management of water in Australia’s rivers” (2010) 32 (4) *Sydney Law Review* 595-616.
41. Commonwealth of Australia (2008) Water Act 2007. Act No. 137 as amended. Commonwealth of Australia, Canberra.
42. Department of the Environment (2013) *Water resources — 2013 EPBC Act amendment — Water trigger*. Department of the Environment, Canberra.
43. J Pittock, CM Finlayson, A Gardner, C McKay “Changing character: the Ramsar Convention on Wetlands and climate change in the Murray-Darling Basin” (2010) 27 (6) *Australian Environmental and Planning Law Journal* 401-425.
44. Commonwealth of Australia (2012) *Basin plan*. Commonwealth of Australia, Canberra.
45. Lamontagne S, Aldridge KT, Holland KL, Jolly ID, Nicol J, Oliver RL, Paton DC, Walker KF, Wallace TA, Ye Q “Expert panel assessment of the likely ecological consequences in South Australia of the proposed Murray-Darling Basin Plan” (2012) *Goyder Institute for Water Research Technical Report Series No. 12/2*. Goyder Institute for Water Research, Adelaide; Gardner A (2012) 9. The legal protection of Ramsar Wetlands: Australian reforms. *Environmental Governance and Sustainability*:193.
46. Pittock J “Lessons from adaptation to sustain freshwater environments in the Murray–Darling Basin, Australia” (2013) 4 (6) *Wiley Interdisciplinary Reviews: Climate Change* 429-438. doi:10.1002/wcc.230.
47. Above, n 43.
48. Pittock J, Hussey K, McGlennon S “Australian Climate, Energy and Water Policies: conflicts and synergies” (2013) 44 (1) *Australian Geographer* 3-22. doi:10.1080/00049182.2013.765345.

# The progress of Aboriginal water rights & interests in the Murray Darling Basin in NSW: An essential element of culture

*Dr Virginia Marshall*

## Background

The traditional knowledge of Aboriginal Senior Law men and women<sup>1</sup> holds the key to the comprehension and implementation of Aboriginal laws, such knowledge is immersed with the creation story of water sources, its use and why many water sources are considered sacred, and respectively affirms that the spiritual relationship of being part of “country” remains integral to Aboriginal peoples in Australia;<sup>2</sup> despite the significant political and social events heaved upon the lives of Aboriginal communities. Aboriginal property interests in water does not diminish Aboriginal values, more broadly, the reality is that water remains more than a utilitarian resource to Aboriginal peoples. This sacredness of water remains a formative force in shaping the identity and values of Aboriginal peoples, underpinning Aboriginal relationships within an Aboriginal environment.<sup>3</sup> The nurture of water landscapes by Aboriginal communities holds meaning and purpose; which in turn creates certainty through fulfillment of obligations to “country”. These relationships lie within an Aboriginal concept whereby Aboriginal laws determine that water is inseparable from the land.<sup>4</sup>

To realise Aboriginal water rights and interests will require a bi-partisan policy shift to occur. The increased agency of Aboriginal peoples and their peak bodies is crucial because the incentive to allocate water to Aboriginal communities is minimal as a “stakeholder” in the over-allocated consumptive pool.<sup>5</sup> Significant progress in Aboriginal water policy at an Australian federal and state/territory level is unlikely to be achieved through judicial decisions; nor through the random quotation of international human rights from the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP). Such a policy shift will require bipartisan parliamentary action to amend the status quo for Aboriginal communities in the Murray-Darling Basin and across NSW.

The Aboriginal landscape has, for thousands of generations, before the various waves of migration to Australia, undergone severe and lengthy cycles of drought and water scarcity, recorded as oral knowledge or in

biomarkers. Drought raises serious challenges and is a key trigger for water reform in Australia. The introduction of national water reforms in Australia were primarily focused on stakeholder water interests, with little regard to Aboriginal and Torres Strait Islander rights and interests.<sup>6</sup> An historical review of Australia’s governance over water resources highlights a systemic lack of effective and equitable water management policy, which includes an historic over-allocation of water use and a long period of exploitation under water “licence stacking”. Generally, Aboriginal water rights and interests were seen merely as “co-existing” cultural interests of no economic value.

The previous treatment of Aboriginal water rights and interests was considered by governments as inconsequential to other water users. Governments have sought to protect water use for industry since the establishment of colonial parliaments and Australia’s federation. In terms of understanding how Aboriginal water rights and interests can be recognised in national policies and laws it is important to discuss the concepts of Aboriginal property as they are interpreted by Australian property concepts because the national dialogue has legally recognised water as a type of property right.<sup>7</sup>

Indigenous land rights were progressed by the landmark decision in *Mabo v Queensland (No 2)*,<sup>8</sup> a decision that brought timely reform to the national dialogue on the concept of common law and statutory property rights.<sup>9</sup> The *Mabo* decision changed the way all Australians had been conditioned to understand *terra nullius* and the notion that British colonial settlement had extinguished Aboriginal rights to land, water and resources.<sup>10</sup> In the same way, a paradigm shift is required in Aboriginal water rights and interests to challenge the legal and philosophical construction of *aqua nullius*.<sup>11</sup>

## Conflicts arising from western interpretation and Aboriginal ontology in water rights

The principal characteristic of Aboriginal property rights and interests to water, either in birth or in death, is in the familial connection to “place”; where connection

can be represented by a river, an inter-tidal waterway, a waterhole or in the resources that rest on or beneath water.<sup>12</sup> According to western perspectives and its normative traditions:<sup>13</sup>

[t]he meaning of land (ontic commitments) and explanations of its origins (epistemic commitments) are reduced to a concern for quantification, in contrast to Indigenous relationships to land which are based on highly developed epistemic and ontic commitments.

From an Aboriginal perspective, the importance of characterising water through contextual layers of creation stories remains paramount to understanding traditional law obligations — for example, in relation to particular meanings in Aboriginal water use or maintaining the quality of a “water-hole”, burial sites near river systems, swamps and the impact of seasonal weather cycles.<sup>14</sup>

The incorporation of the contemporary recognition of Aboriginal cultural water rights is created within the Water Sharing Plans (WSPs) in the Water Management Act 2000 (NSW), through a specific purpose water access licence, the Aboriginal Cultural Water Access licence (ACWAL). The WAL is capped at 10 megalitres (the share component) per application as a “one-off” activity and not tradeable. However, the ACWAL fails to go far enough in meeting the water requirements of Aboriginal communities in the Basin, or elsewhere, because it applies a “one-size fits all” approach to water use. The ACWAL also limits the exercise of Aboriginal laws, customs and beliefs to non-economic cultural activities. In addition to the ACWAL, the introduction of the Aboriginal commercial licence is based upon criteria which limits community development opportunities and cannot provide for wealth creation as commercial water trading offers.

The marginalisation of the Aboriginal economy seems inevitable, given the introduction of capitalist market forces and economic utilitarianism. Australian legal frameworks have subsequently undermined Aboriginal customary trade and community values in water. This market approach does not provide a framework of economic and cultural certainty for Aboriginal communities or increase Aboriginal participation in the water market under the existing regimes *if* Aboriginal communities are not participating in the water market.<sup>15</sup>

The objects of the Water Management Act 2000 (NSW) represent the values of Aboriginal peoples in terms of generic concepts such as “spiritual” or “social”. The Western concept of “benefits” which flow to Aboriginal peoples under s 3(c)(iv) implies:

benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water.<sup>16</sup>

If the introduction of an ACWAL and an Aboriginal commercial water licence is the extent to which the

benefits are to flow to Aboriginal communities then the objectives of the legislation appear to be inadequate.

There is a dichotomy in Australian and Aboriginal water values. Australian legislation generally refers to the environment as consisting of “water, land, trees, plants or wetlands” which exist within a western environment constructed on a set of values that represents a broad aesthetic and scientific meaning.<sup>17</sup> The inclusion of Aboriginal peoples’ water values into water policy and legislation requires a cultural acknowledgment of its unique characteristics.<sup>18</sup> Further, the term “customary law” as a conceptual approach to categorise the laws of Indigenous peoples remains controversial with various Indigenous communities because it “draws elements of customary law from non-Indigenous” ontological norms.<sup>19</sup>

In countries where customary law and customary water rights play a significant role, particularly in rural areas where they govern access and rights to water in basic human needs, for the watering of livestock and for subsistence agriculture, customary law and customary water rights are a factor to be reckoned with when preparing “modern” legislation regulating the abstraction and use of water resources through government permits or licences. Failure to recognize the existence and resilience of customary practices, and to take them into account in “modern” water resources legislation, is a recipe for social tension.<sup>20</sup>

Aboriginal ontology provides the context for evaluating whether Australian policy and legislative drafting is effective in portraying the values and meanings of Aboriginal water use, because the emphasis is on Aboriginal peoples defining their own identity.<sup>21</sup>

The Western ideological construction of Aboriginal cultural values strips the inherent nature of its endemic culture, which in turn minimises Aboriginal consultation and engagement in the use of water. In the Water Management Act, the word ‘environment’ is defined as all living things to include human beings. From a customary Aboriginal perspective, the environment and culture are enmeshed.<sup>22</sup>

The National Water Initiative reforms have provided governments with discretionary powers to accommodate Indigenous rights and interests, and any implementation of the reforms rest with each jurisdiction.<sup>23</sup> The Indigenous Actions in the National Water Initiative Agreement recognise Indigenous water interests under the following clauses. In cl 52(i) and (ii) state that the planning process ensures the inclusion of Indigenous representation in water planning wherever possible and will incorporate social, spiritual and customary objectives and strategies wherever they can be developed.<sup>24</sup>

Clause 53 of the National Water Initiative Agreement will take into account in the water planning processes of the possible existence of native title rights to water in the catchment or aquifer area, following the recognition of native title rights, to allocate water to the native title holders.<sup>25</sup> In cl 53 of the Agreement, the use of the

words “where possible” makes government action discretionary. There is no enforceable power to include Indigenous water use, or water resources plans. There is a lack of certainty about Indigenous water rights and interests implied in the phrase “wherever they can be developed” and because words like “cultural” and “spiritual” fail to take into account the complex layers of customary laws.<sup>26</sup>

Clause 54 of the Agreement refers to “water allocated to native title holders for traditional cultural purposes and that it will be accounted for”.<sup>27</sup> The Indigenous objectives under these clauses are clearly inadequate because they are wholly discretionary and do not seek a mandatory commitment from governments to include Indigenous water rights and interests, except for those rights and interests that are native title.<sup>28</sup> In NSW the court’s determination of existing native title rights is negligible.

The Indigenous Action clauses do not provide any meaningful recognition of the water requirements of Aboriginal communities and of Aboriginal values. In this way, “customary objectives” receive a generic treatment and reflect little more than a baseline of Aboriginal values. As an analogy, the complex layering of Aboriginal laws are as central to Aboriginal water rights as the rule of law is central to underpinning the stability of the Australian legal system.

The late Peter Cullen, a member of the Wentworth Group of Concerned Scientists, noted that the water reform policy of the Council of Australian Governments provides “irrigators with a greater involvement than Indigenous interests”.<sup>29</sup> A lack of inclusion of the water rights and interests of Aboriginal peoples reduces the level of opportunity for incorporating Aboriginal concepts and values in water. For example, the nature of Aboriginal rights and interests in trading “things” is limited by western concepts and values because “Aboriginal concepts of waterscapes and landscapes are derived from the cultural matrix of Aboriginal knowledge that is distinct from western values”.<sup>30</sup> The way the characteristics of a western economy are defined in Australia’s water policy and legislation act as barriers to exercising Aboriginal water rights.

The trade of these goods [such as ochre] followed the dreaming tracks [connecting the intermittent waters] ... plentiful supplies of food allowed people to congregate at exchange centres to feast and trade ... trading events were associated with the migrations of bogong moths ... eels in Victoria, fish on the Darling River, and the ripening of bunya nuts in Queensland ... Maccassan seafarers ... made annual journeys to Australia’s northern shores [trading] trepang and turtle shells, out-rigger canoes, sails and tobacco ...<sup>31</sup>

From an Aboriginal perspective, the conundrum in incorporating definitions from native title law and other

western concepts to construct the Aboriginal characteristics is inappropriate, as such definitions for economic or cultural purposes begins from a western perspective of water use.

Aboriginal values, customary rights and interests are not part of Australia’s “mainstream culture”, even though Australia’s history commenced with an Indigenous culture, and the dominant features of water and land are Aboriginal.<sup>32</sup> The difficulty in asserting an Australian “dominant cultural” perspective under Australian law is that it fails to recognise that Aboriginal peoples have adapted to the impact of settlement and its expansion, which is composed of both traditional and revitalized water use. Indigenous water governance and use should be considered in this light when evaluating Aboriginal water requirements.

There is a tension between the acceptance that the common law remedies are available to protect rights and interests in land held under traditional law, and the assertion that there is no room for a parallel system of Indigenous governance.<sup>33</sup>

Fragmenting Aboriginal water knowledge into generic western legal concepts is inadequate to properly represent Aboriginal ontological concepts to water.<sup>34</sup> To apply terms such as “cultural water”, “traditional use”, “communal purposes” and “spiritual activity” in order to interpret Aboriginal water values is equally problematic because it constructs narrow definitions of use.<sup>35</sup> These are also problematic in terms of allocating Aboriginal water use in the Murray-Darling Basin and across NSW.

## **A proposed paradigm shift: Aboriginal water rights in the Murray-Darling Basin**

The Water Act 2007 (Cth) set environmentally sustainable levels of take from the Murray-Darling Basin water resources so as to “balance” the take for various commercial land use activities and the environment.<sup>36</sup> The Basin’s water requirements were analysed on hydrologic indicator sites to determine a sustainable level of take for water management in the proposed Basin Plan.<sup>37</sup> Aboriginal water rights have been limited by legislative definition such as for the purposes of native title rights to water.

In the statutory legislation for the WSP for the Lower Murray Groundwater Source in s 11(f) the objectives of the Plan are to “acknowledge, respect, and protect the Indigenous culture and cultural heritage of the traditional peoples of the Murray region”. In s 22 of the legislation under “native title rights” it notes that no holders of native title rights exist; water is not set aside for Aboriginal peoples as native title does not exist.

The WSP for the Murray Unregulated and Alluvial Water Sources in s 10(b) of its objectives is to “protect, preserve, maintain and enhance the Aboriginal, cultural



and heritage values of these water sources". In s 20 of the Water Sources legislation in "native title rights" it states that "no native title holders exist and as such no native title water requirements will be set aside".

Again, under the WSP for the NSW Murray Darling Basin Fractured Rock Groundwater Sources in s 19 for "native title rights", no native title holders exist and no water requirements will be set aside. In s 19 for "native title rights" the WSP for NSW Murray and Lower Darling Regulated Rivers Water Sources is to account for native title water rights however there are none and water requirements need not be accounted for.

Although there was a significant response of over 400 public submissions by Aboriginal Basin communities on the impact of proposed water reforms, who sought to preserve the Aboriginal environmental landscape, seeking certainty for Aboriginal access to water and its use. The submissions were not included in the analysis of the proposed Basin Plan. Neither in terms of its "weight" in identifying a "key asset", nor in identifying "high-level objectives" for an integrated water framework for Aboriginal water use.<sup>38</sup>

It is arguable that the Murray-Darling Basin planning process did not have the essential information from Aboriginal communities to understand the Basin's historic and contemporary characteristics of managing its water resources. The National Water Initiative at para 25 states that such plans are to "take account of Indigenous interests", however this policy position does not go far enough to fully evaluate and review water allocations to establish Aboriginal water rights and interests in the Basin Plan.

The incorporation of Aboriginal values in water with the framework of national water reforms did not occur until 2004; where Aboriginal organisations urged government to recognise Aboriginal rights and interests in water and include these rights and interests.<sup>39</sup> A precursor to the national reforms was in introduction of the Water Management Act 2000 (NSW). The Objects of the Water Management Act 2000 (NSW)<sup>40</sup> is to provide for "equitable sharing of water resources".<sup>41</sup> Further, to "ensure" the flow-on in "benefits to Aboriginal people in relation to their spiritual, social, customary and economic use of land and water" through the state's provision of "sustainable and integrated management of water resources".<sup>42</sup> The Act has generally failed to deliver on these objectives.

To address the water rights and interests of Aboriginal communities in the Murray-Darling Basin, where native title rights to water are not legally recognised, would be through the reinstatement of the Aboriginal Water Trust. The NSW Cabinet approved the formation and implementation of the NSW Aboriginal Water Trust, a protected state project, to ensure that economic water

benefits would flow to Aboriginal communities and Aboriginal business by their participation in water based enterprise. The Water Trust operated from 2006 to 2009. Subsequent Aboriginal community workshops held across NSW confirmed the Aboriginal Water Trust was seen by Aboriginal communities as "an important body in representing the economic and commercial development to progress Aboriginal community objectives in water".<sup>43</sup> The role of the Aboriginal Water Trust was designed to provide an increased level of Aboriginal participation in the water market through a grant funding system; and to offset the lack of compensation to Aboriginal communities in NSW under the national water reforms. However, the Water Trust was dissolved by the government in 2009, without consultation with Aboriginal communities.

## Conclusion

The Indigenous Actions under the National Water Initiative do not go far enough to meet the water requirements of Aboriginal communities in the Murray-Darling Basin and NSW. If the Indigenous Actions were subject to the scrutiny of human rights standards and principles, such as the incorporation of the relevant articles in UNDRIP into Australian law, assessment under Australia's international human rights obligations would provide legal certainty for Aboriginal communities. In addition to this a biennial report is required to examine whether the complex needs of Aboriginal communities are being met and are consistently implemented across the states and territories. This would increase the legal status and recognition of Aboriginal communities socio-economic and cultural rights to water.<sup>44</sup> The Australian Government affirms the use of the external affairs power in the Australian Constitution is to give effect to Australia's international obligations; where such measures are proportionate.<sup>45</sup>

Aboriginal water rights and interests in NSW and the Murray-Darling Basin are not effectively recognized because the discretionary actions under the NWI is, to "account for" and "consider" Aboriginal water requirements, not to establish legal certainty in "reserved water rights". The language of the NWI Indigenous Actions severely limits meeting the water requirements of Aboriginal communities under the statutory WSPs because the western legal definitions of "native title" fail to recognize a range of other forms of permanent water rights.

In addition, the lack of national and state commitment to guarantee reserved Aboriginal water rights and interests within water policy and water management legislation limits opportunities for Aboriginal communities to exercise customary and economic water rights. The practical benefits which are legislated to flow to

Aboriginal communities have barely been met. Similarly, the recognition of Aboriginal ontological concepts of water and the Aboriginal water values which extend to cultural and legal rights in water resources require substantive inclusion in the National Water Initiatives and mandatory state and territory implementation strategies to ensure national compliance.

In hindsight, the level of effective advocacy maintained by the Aboriginal and Torres Strait Islander Commission (ATSIC), Local Aboriginal Land Councils (LALCs) and Aboriginal community members has left a legacy of “unfinished business” under the NWI, which I propose may be canvassed in a separate class of water use, outside the consumptive pool, in “First Peoples water rights”.

*Dr Virginia Marshall*

---

## Footnotes

1. This refers only to Aboriginal Senior Law men and women who hold obligations under Aboriginal laws. Aboriginal communities use terms such as “Elders” to have the same or similar meaning as noted, or as a term of community respect.
2. V Marshall *A web of Aboriginal water rights: Examining the competing Aboriginal claim for water property rights and interests in Australia* PhD Thesis in law, Macquarie University, 2014, at 11, available online at [www.researchonline.mq.edu.au](http://www.researchonline.mq.edu.au).
3. Above n 2.
4. Above n 2.
5. Above n 2, at 70.
6. Above n 2, at 66.
7. Above n 2, at 18.
8. *Mabo v Queensland (No 2)* (1992) 175 CLR 1; BC9202681.
9. Above n 2, at 19.
10. See K McNeil, *Common Law Aboriginal Title*, Clarendon Press, 1989, at 298–306. Kent McNeil published his research these undertaken at Oxford. A comprehensive examination on how English law would bestow title on Indigenous people where they occupied their lands at the time of settlement, and under the doctrine of tenure could the British have legally claimed Indigenous territories. In his conclusion McNeil argues that the Crown would have had international recognition to claim Indigenous land because of the Crown’s prerogative and deny Indigenous peoples sovereignty. However McNeil submits that at the municipal level the Crown could not ignore that Indigenous peoples occupied their land or the presumptive title which is held by Indigenous peoples as tenants at the point of the Crown acquiring title. The scope of my thesis does not allow a deeper analysis of McNeil’s research.
11. The concept of *aqua nullius* is often referred to in the way land tenure in Australia was considered by the court and governments as *terra nullius* prior to the Mabo (No 2) decision.
12. V Marshall, above n 2, 148.
13. A Reilly “Cartography, Property and the Aesthetics of Place: Mapping Native Title in Australia” (2004) in A Kenyon and Peter Rush (eds), *Aesthetics of Law and Culture: Texts, Images and Screens* at 227– 228. Reilly cites Helen Verran’s “Re-imagining Land Ownership in Australia” (1998) 1(2) *Postcolonial Studies* at 237–254 which examines Indigenous relationships to land as highly developed epistemic and ontic relationships.
14. Above n 2, at 148.
15. Above n 2, at 283.
16. Water Management Act 2000 (NSW).
17. Above n 2, at 194.
18. Above n 2, at 17.
19. B Tobin *Indigenous peoples, customary law and human rights: Why living law matters* Earthscan Routledge, 2014, at 7. See also P Marshall *Stories from the Fitzroy River Drivers: Raparapa* (2nd ed) Magabala, 2011, foreward.
20. S Burchi “The Interface between Customary and Statutory Water Rights: A Statutory Perspective” (Paper presented at the African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa, South Africa, 26–28 January 2005) 32:1 [http://www.fao.org/fileadmin/user\\_upload/legal/docs/lpo45.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/lpo45.pdf). Burchi (2005) cites Nowlan (2004) on western and northern Canadian water rights.
21. Above n 2, at 198.
22. N Collins and V Falk “Water: Aboriginal Peoples in Australia and their Spiritual Relationship with Waterscapes” in E Johnston, M Hinton and D Rigney (eds) *Indigenous Australians and the Law* (2nd ed) Routledge-Cavendish, 2008, at 144.
23. Bardy McFarlane “The National Water Initiative and Acknowledging Indigenous Interests in Planning” (2004) <http://www.nntt.gov.au/news-and-communications/speeches-and-papers/documents/2004/speeches%20national%20water%20initiative%20mcfarlane%20november%202004.pdf>. Paper presented at the National Water Conference, Sydney.
24. National Water Commission “Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory” (2004) National Water Commission [http://nwc.gov.au/\\_\\_data/assets/pdf\\_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf](http://nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf).
25. Above n 24.
26. B McFarlane “The National Water Initiative and Acknowledging Indigenous Interests in Planning” (2004), <http://www.nntt.gov.au/news-and-communications/speeches-and-papers/documents/2004/speeches%20national%20water%20initiative%20mcfarlane%20november%202004.pdf>. Paper presented at the National Water Conference, Sydney.
27. Above n 26.
28. Above n 2, at 324.

29. P Cullen "Water: The Key to Sustainability in a Dry Land" in J Goldie, B Douglas and B Furnass (eds) *In Search of Sustainability* Commonwealth Scientific and Industrial Research Organisation, 2005, at 85.
30. Above n 2, at 168.
31. Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2007* Report No. 2/2008 (Sydney 2008) at 218.
32. Above n 2, at 178.
33. J Basten "Beyond Yorta Yorta" (2003) 2(24) *Australian Institute of Aboriginal and Torres Strait Islander Studies* 4, 5.
34. Above n 2, at 200.
35. Above n 34.
36. Australian Government, Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Technical Background* Vol 2, Pt 2, Public Consultation Guide, Canberra 2010, 487.
37. Above n 36.
38. See Australian Government, Murray-Darling Basin Authority, *Guide to the Proposed Basin Plan: Technical Background* Vol 2, Pt 2 Public Consultation Guide, Canberra 2010.
39. Above n 2, at 77.
40. Water Management Act 2000 (NSW) s 3.
41. Above n 2, at 313.
42. Above n 41.
43. NSW Office of Water, "Our Water Our Country: An information manual for Aboriginal people and communities about the water reform process" (Manual, NSW Department of Primary Industries, 2012) 1–7. See, eg, J Sheehan and G Small, "Aqua nullius" (Paper presented at 13th Pacific-Rim Real Estate Society Conference, Freemantle WA, 21 to 24 January 2007) 2.
44. Above n 2, at 293.
45. Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* Final Report No 126 (2015) 81.

---

# Economic benefits of coal? A glance at Coal and health in the Hunter: Lessons from one valley for the world

*Tomas Hurley CORRS CHAMBERS WESTGARTH*

## Introduction

The Climate and Health Alliance, a not for profit organisation set up with the aim of protecting human health from the impacts of climate change and environmental degradation, recently released the report *Coal and health in the Hunter: Lessons from one valley for the world* (the Report).<sup>1</sup> While not a systematic scientific review, the Report analyses the impacts of the growing Hunter Valley's coal industry on human health and climate change and provides a valuation of the costs associated with such impacts.

A combination of sources were used to compile the Report, including international and national health and medical literature on coal and health, as well as "grey literature", such as submissions to government inquiries, academic, scientific and industry reports, reports from think tanks, community organisations, media and from interviews with local community members and experts.<sup>2</sup>

The Report is authored by Fiona Armstrong, a long standing environmentalist who has qualifications in the health and climate field and is an active campaigner for health and climate action.<sup>3</sup> In addition, experts with qualifications in science, public health, health planning, health services management, medicine, sociology, psychology, environmental studies, public policy, economic development, geography and human rights are acknowledged in the Report for sharing their insights and expertise.<sup>4</sup>

Economic costs associated with the health and social impacts of the coal industry provided in the Report were reviewed and independently verified by Economists at Large, a team of associate economists with a broad range of experience and qualifications across economics, finance and sustainability. Economists at Large specialise in, among other things, environmental and natural resources economics.<sup>5</sup>

The Report appears to have been developed in response to amendments to the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (the Mining SEPP) which mandate that the "significance of the resource" in terms

of economic benefits to the state and the region is the "principal" consideration when determining whether to grant consent to a proposed mining development.<sup>6</sup>

Against this background, this article examines the key issues and main findings of the Report and provides a view on its importance for future mining developments in the Hunter Valley and the rest of New South Wales. The Report is likely to be cited by those opposed to coal mining in the Hunter Valley and elsewhere in NSW in light of the provisions of the Mining SEPP, however its weight or objective value will need to be considered by decision-makers and ultimately the courts if approvals are challenged by opponents.

## Coal and health in the Hunter: Lessons from one valley for the world. A Glance at the Report.

### Snapshot

Key issues highlighted in the Report are:

- Coal production in the Hunter Valley (mine development, mining activities, transportation of coal and its combustion for electricity) has increased dramatically in the last decades.<sup>7</sup>
- As one of the most greenhouse gas intensive activities in the world and one of the main drivers of climate change, the production of coal in the Hunter Valley is responsible for approximately 348 million tonnes of CO<sub>2</sub><sup>8</sup> each year, making it Australia's largest single source of CO<sub>2</sub>.<sup>9</sup>
- Damage to health, industry and infrastructure from climate change is estimated to cost the global economy more than one trillion dollars per annum.<sup>10</sup> Particularly, the social cost of carbon associated with Hunter Valley coal is estimated in the Report to cost between \$16–\$66 billion per annum. This broad range is, according to the Report, the consequence of different evaluations of the social costs of carbon available in published literature. These evaluations escalate from \$37/tonne of carbon dioxide emitted to \$190/tonne.<sup>11</sup>

- The production of coal poses serious risks to the health of local communities which are usually not required to be considered under NSW environmental regulations.<sup>12</sup> The Report estimates the following health costs:
  - Damages from coal combustion at the five coal fired power stations located in the Hunter Valley amount to \$600 million per annum (\$2.6 billion in whole Australia).<sup>13</sup>
  - Damages associated with fine particle pollution (PM2.5) from coal sources in Singleton and Muswellbrook amount to \$65.3 million per annum.<sup>14</sup>
  - Damages associated with air pollution (PM10) from coal sources in Newcastle amount to \$13 million per annum.<sup>15</sup>
- Having regard to these figures and the benefits of the coal industry to NSW, the Report suggests that coal is costing Australia more than its contribution as the:<sup>16</sup>

... economic and employment benefits of proposed projects are frequently overstated by the industry project proponents, while the environmental costs, the greenhouse gas emissions [and] [t]he adverse economic effects on other industries ... is also downplayed, and the health costs ignored.

### **Coal Operations in the Hunter Valley**

For purposes of the Report, coal production in the Hunter Valley is characterised very broadly to include:

- mine development and mining activity;
- transportation of coal; and
- combustion of coal to generate electricity.<sup>17</sup>

There are currently 31 coal mining operation sites in the Hunter Valley producing 145 million tonnes annually and covering approximately 520 square kilometres. In addition, there are at least 21 additional coal mines proposed for the Hunter Valley (either expansions or new mines) and approximately 64% of the Hunter Valley floor is covered by mining exploration licences.<sup>18</sup>

Also, five coal-fired power stations burning approximately 19 million tonnes of coal per annum are located in the area.<sup>19</sup>

Coal that is not burned in the power stations is exported via the Port of Newcastle, the largest coal export terminal in the world. For that purpose, 22,000 diesel powered trains travel each year through the Hunter Valley to the Port of Newcastle.<sup>20</sup>

### **Health impacts of coal**

According to the Report, health concerns associated with the rapid expansion of coal mines in the Hunter Valley include:<sup>21</sup>

- air pollution from coal dust, emissions, explosive blast plumes, transport and combustion;
- water pollution;
- noise and light pollution;
- social disruption and destruction of communities;
- damage to fragile, remnant or threatened ecosystems;
- aesthetic impacts from changes to landscape; and
- health risks associated with climate change.

### *Air pollution*

Particulate matter (particularly PM2.5 and PM10) attributed to coal mining and transportation is said to have exceeded the national standard for PM10<sup>22</sup> several times in the last years, transforming the Hunter Valley into an “air pollution hotspot”, the Report says.<sup>23</sup>

Some other statistics regarding air pollution noted in the Report:

- According to the NSW EPA, the dominant source of particulate matter in the Upper Hunter is coal mining (87% of PM10 and 66% of PM2.5).<sup>24</sup> Coal combustion and transportation also add significantly to this figure.<sup>25</sup>
- Health risks associated with air pollution relate predominantly to cardiovascular and respiratory health, lung cancer and premature death. Specifically, exposure over long periods to high levels of PM2.5 is associated with 4% increase in deaths from all causes; 6% increase in cardiopulmonary deaths; and 8% increase in deaths from lung cancer.<sup>26</sup>
- Short term exposure to PM2.5 can also increase daily mortality by 1% and hospital emergency for cardiovascular and respiratory illness by 3–4%.<sup>27</sup>
- For PM10, long term exposure is associated with lung cancer while short term exposure can trigger adverse health responses leading to hospital admissions.<sup>28</sup>
- Other air pollutants present in coal production, such as sulphur dioxide, oxides of nitrogen, carbon monoxide, hydrochloric acid, are also reported as having adverse health impacts.<sup>29</sup>

The communities most exposed to poor air quality are, according to the Report, those living in the towns of Singleton, Muswellbrook, Camberwell, Warkworth, Maison Dieu, Jerrys Plains and Wybong.<sup>30</sup> Within those communities demographics most at risk are babies and children, elderly, indigenous people, those with chronic ill health, low socio-economic status or people with pre-existing cardiovascular and respiratory disease.<sup>31</sup>

### *Noise pollution*

The Report points to mining activities such as blasting, drilling and digging, coal loading, the operations of excavators, trucks, conveyor belts and other machinery as significant contributors to the elevated levels of noise in some areas of the Hunter, such as Bulga.<sup>32</sup>

The high levels of noise, the Report says, can disrupt lives by interfering with the sleep and sense of wellbeing of people living in nearby communities. This can lead to stress affecting people's health and impair quality of life.<sup>33</sup>

### *Water pollution*

According to the Report, coal mining and combustion pose serious threats to both water security and water quality as coal mines and power generators are big water consumers, responsible for significant water pollution when coal mine waste leaches into groundwater and aquifers.<sup>34</sup>

### *Stress — mental, physical and social*

The expansion of coal mining into the Hunter's farming regions is, the Report says, causing severe psychological distress among community members. The evidence suggests that the strong emotional connections to the land coupled with changes to the landscape associated with mining and contests over land can lead to depression, anxiety and psychological stress.<sup>35</sup>

In addition, the Report points to a recent review on the social harm of mining in the Hunter commissioned by the Australian action group Beyond Zero Emissions which found multiple examples of social injustice and revealed significant community concerns that the Government is failing to address in the community's interest.<sup>36</sup>

### *Work health and safety*

Coal mining is an inherently dangerous occupation. Risks from falling rocks, injuries from machinery, exposure to silica and coal dust, toxic fumes and explosions, occupational heat stress, loud noise are the most relevant, the Report notes.<sup>37</sup>

It also points out that although Australia has strong work health and safety laws, deaths in the mining industry are still one of the nation's leading causes of occupational deaths, with 2013 being the worst Australian year on record in Australia.<sup>38</sup>

### *Global Warming*

Regional risks of global warming include large increases in the frequency of coastal flooding (threatening cities and infrastructure in low-lying coastal areas), droughts and intense rainfall events, heatwaves and intense fires (threatening human health, property and infrastructure).<sup>39</sup>

### *The economics of health and environmental damage from coal*

The Report suggests that the coal industry might be costing Australia more than the economic value of the industry to the nation on the basis that:

- economic and employment benefits of proposed projects are frequently overstated;
- environmental costs, greenhouse gas emissions and the adverse economic on other industries (caused by high mining wages) are downplayed; and
- health costs are ignored.<sup>40</sup>

The following figures are provided in the Report to sustain this thesis:

- Mining royalty payments, which are said to be vital to the delivery of essential services in NSW, accounted for only 2% of the whole NSW State Government revenue (\$1.3 billion in 2012-2013).<sup>41</sup>
- Substantial subsidies, such as the Federal tax exemptions on fuel<sup>42</sup> and the NSW Government support for coal fired electricity,<sup>43</sup> and the provision of coal at reduced prices between state-owned companies<sup>44</sup> are said to diminish the contribution of coal to the national economy.<sup>45</sup>
- In terms of the jobs the coal industry creates, the Report points out that mining in NSW only represents 1.4% of a 3.5 million workforce, while the 13,000 people working in mining in the Hunter Valley make up just 5% of the region's workforce. Indirect jobs as part of the industry's interaction are not mentioned within the Report.<sup>46</sup>
- Health costs associated with coal-fired power in the Hunter Valley are approximately \$600 million per annum (based on an estimation of \$13/MWh).<sup>47</sup>
- Health costs associated with fine particle pollution (PM2.5) from coal sources in Singleton and Muswellbrook amount to \$65.3 million per annum.<sup>48</sup>
- Health costs associated with air pollution (PM10) from coal sources in Newcastle amount to \$13 million per annum. The additional port terminal proposed in Newcastle may double this to \$26 million.<sup>49</sup>

- A range of estimates suggest that the social cost of carbon (including health and property damage, impacts on agriculture, damage to ecosystem services, and other welfare costs associated with climate change) as a consequence of the coal production in the Hunter Valley is something between \$16 and \$66 billion per annum. This figure is expected to climb to \$26–\$111 billion annually by 2022, based on projected production.<sup>50</sup>
- comprehensive health research to evaluate both the risks associated to pollutants from the coal industry and social impacts associated with disruption to communities, landscapes, ecosystems and other industries.

### Mining SEPP and the significance of the resource

According to the Department of Planning and Environment, the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013 (Mining SEPP Amendment) amended the Mining SEPP with the aim “to increase confidence for investors and the community about how decisions are made on mining proposals” by requiring that economic and environmental issues are properly balanced.<sup>59</sup>

The amendments followed the decision of the NSW Land and Environment Court in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd*<sup>60</sup> that refused the application for the expansion of the Warkworth coal mine in the Hunter Valley due to significant and adverse noise, dust and social impacts, and on biodiversity, amendments to the Mining SEPP.<sup>61</sup>

The 2013 amendments introduced to the Mining SEPP mandate that determining authorities have regard to the significance of the resource as the principal consideration when determining an application for a mining development.<sup>62</sup> In doing so, the determining authority must consider:<sup>63</sup>

- the economic benefits, both to the state and the region in which the development is proposed to be carried out; and
- any advice by the Director-General of the Department of Trade and Investment, Regional Infrastructure and Services as to the relative significance of the resource.

For purposes of calculating the economic benefits of the development, the Mining SEPP provides that the following matters are considered relevant:<sup>64</sup>

- employment generation;
- expenditure, including capital investment; and
- the payment of royalties to the state.

The Mining SEPP provides that the weight to be given by the determining authority to any other matter for consideration, such as air, noise and water pollution, is to be proportionate to the importance of that other matter in comparison with the significance of the resource.<sup>65</sup>

In 2014, after the Mining SEPP was amended, 15 applications related to new or existing mining projects were approved by the Planning Assessment Commission.<sup>66</sup> Nevertheless, this scenario may change as the

### *Inadequate regulation with a bias towards approval*

The Report asserts that despite the substantial body of evidence and growing community apprehension, concerns are frequently ignored by the planning authority and decisions made in the interests of mining companies.<sup>51</sup> The following reasons are provided in the Report:

- proposed mining projects usually fail to address cumulative impacts;<sup>52</sup>
- state environmental laws are inadequate to assess health impacts and their social and economic costs;<sup>53</sup>
- federal environmental laws are aimed at protecting biodiversity and ecosystems, not humans;<sup>54</sup>
- state-based regulations have given economic considerations a prevailing interest over social and environmental concerns and have limited the rights of communities to appeal when there has been a public hearing by the Planning Assessment Commission;<sup>55</sup>
- the introduction of the gateway approval to protect strategic agricultural land and groundwater has failed to provide assurance to communities;<sup>56</sup> and
- the approval process involves the practice of contracting out environmental assessments for projects to private consultants who frequently also work for the coal industry.<sup>57</sup>

### *Recommendations of the Report*

In light of the relevant findings and opinions, the Report recommends an extreme response including:<sup>58</sup>

- a ban on new coal projects in the Hunter Valley is implemented together with stronger regulation to adequately evaluate and limit health, climate and environmental damages;
- a transition plan is prepared to assist the Hunter Valley region develop new industries as coal is phased out;
- stricter air quality standards and monitoring;
- a mandatory health impact assessment is implemented as part of all project assessment processes;
- increased consultation with communities affected by coal projects; and

NSW Minister for Planning has announced further amendments to the Mining SEPP in order to give environmental and social considerations a foundational role in decisions about resources use.<sup>67</sup>

As a result, on 7 July 2015, the NSW Government released a proposed amendment to the Mining SEPP, which seeks to remove the prevailing economic consideration of mining developments by repealing cl 12AA of the Mining SEPP (Proposed Mining SEPP Amendment). The Proposed Mining SEPP Amendment is expected to commence by September 2015; until then economic considerations will prevail in the assessment of mining developments.<sup>68</sup>

### Conclusion: the Report and the Mining SEPP

Although the approval process of mining developments has been facilitated by the provisions introduced by the Mining SEPP Amendment, it is likely that future mining developments will have to deal with the Report and its findings as it is likely to be used by those opposing coal mining in the Hunter Valley and elsewhere in NSW.

In this context, to succeed in their assessment processes, future coal mining developments will have to demonstrate that, despite the figures contained in the Report, they are economically beneficial to the region and NSW. For that purpose, evidence will be required to prove that the health and social impacts and the costs associated with such impacts are:

- less than the economic benefits of the development; and/or
- lesser in magnitude than that described in the Report.

In addition, even if the economic benefits of the development outweigh the health and social costs associated with the impacts, future mining developments should keep health and social impacts as low as economically and technically feasible. According to the Mining SEPP, the determining authority may still give weight to other matters in a manner that is proportionate to the economic benefits of the development, if the health and social impacts of the development are disproportionate when weighed against the economic benefits. This will be even more crucial once the Proposed Mining SEPP Amendment commences.

As result, the consideration to be given by the determining authority to the Report and its supporting sources as well as to the further evidence produced by different stakeholders, including mining developers, will be crucial for the future of coal mining in the Hunter and elsewhere in NSW.

**Tomas Hurley**  
*Overseas Lawyer*  
*Corrs Chambers Westgarth*

---

### Footnotes

1. Climate and Health Alliance, F Armstrong *Coal and health in the Hunter: Lessons from one valley for the world* (2015), available at <http://caha.org.au/>, reviewed on 30 March 2015 (the Report).
2. Above, n 1, at 1.
3. Fiona was educated at Macquarie University (Master in Politics and Public Policy), University of Queensland (Postgraduate Diploma in Journalism), University of Southern Queensland (Bachelor of Nursing). See <http://fionaarmstrong.com.au>, accessed on 26 May 2015.
4. Experts include Associate Professor Peter Sainsbury, Associate Professor Nick Higginbotham, Associate Professor Melissa Haswell, Professor Bin Badrudin Jalaludin, Dr Craig Dalton, Professor Howard Bridgman, Professor Colin Butler, Dr Peter Tait, Dr James Whelan and Dr Ben Ewald.
5. Armstrong, above, n 1, at 1. For more information about Economists at Large visit [www.ecolarge.com](http://www.ecolarge.com).
6. State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (the Mining SEPP), cl 12AA.
7. Armstrong, above n 1, at 11, referring to S Mohr, G Mudd, L Mason, T Prior, D Giurco, *Coal: Production Trends, Sustainability Issues and Future Prospects*, Cluster Research Report No 1.7, (2013) Institute for Sustainable Futures, University of Technology, Sydney and Department of Civil Engineering, Monash University, Report for CSIRO Minerals Down Under National Research Flagship, available at: <http://cf/sites1.uts.edu.au/find/isf/publications/ohretal2013coaltrendssustainability.pdf>.
8. According to the Report, only 38 million tonnes of CO<sub>2</sub> comes from coal-fired power stations operating in the Hunter Valley. The balance comes from coal burnt in power stations in Japan, Taiwan, Korea and other destinations where Australian coal is exported.
9. Armstrong, above n 1, at 3, 7, referring to The Australia Institute, R Campbell, *Seeing through the dust*, Policy Brief No 62 (2014), available at: <http://www.tai.org.au/content/seeing-through-dust-coalhunter-valley-economy>.
10. Armstrong, above, n 1, at 7, referring to DARA, 2012, *Climate Vulnerability Monitor, A guide to the cold calculus for a hot planet* (2012), available at <http://daraint.org/climate-vulnerability-monitor/climate-vulnerabilitymonitor-2012/>.
11. Armstrong, above, n 1, at 4, 35, referring to United States Government, Interagency Working Group on Social Cost of Carbon, *Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis* (2013) available at <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulatorimpact-analysis.pdf>; R Tol "Targets for global climate policy: An



- overview,” (2013) 37 *Journal of Economic Dynamics & Control*, 911–928, available at [http://www.parisschoolofeconomics.eu/IMG/pdf/tol\\_paper.pdf](http://www.parisschoolofeconomics.eu/IMG/pdf/tol_paper.pdf); D Anthoff, R Tol and G Yohe, *Risk aversion, time preference, and the social cost of carbon*, (2009) *Environmental Research Letters*, 4, available at [http://iopscience.iop.org/1748-9326/4/2/024002/pdf/1748-9326\\_4\\_2\\_024002.pdf](http://iopscience.iop.org/1748-9326/4/2/024002/pdf/1748-9326_4_2_024002.pdf); H Stewart, & L Elliot “Nicholas Stern: ‘I got it wrong on climate change — it’s far, far worse’” (2013) *The Observer*, 27 January. Available at: <http://www.theguardian.com/environment/2013/jan/27/nicholas-stern-climate-changedavos>.
12. Armstrong, above n 1, at 3.
  13. Armstrong, above n 1, at 3, 32, referring to T Beigler *The Hidden Costs of Electricity: Externalities of power generation in Australia*, Report for Australian Academy of Technological Sciences and Engineering (2009), Parkville, Victoria, available at <http://www.atse.org.au/Documents/Publications/Reports/Energy/ATSE%20Hidden%20Costs%20Electricity%202009.pdf>.
  14. Armstrong, above n 1, at 3, 32–33, referring to P Holmes, *Methodology for valuing the health impacts of changes in particle emissions*, Final Report for NSW Environment Protection Authority (2013).
  15. Armstrong, above n 1, at 3, 32–34, referring to G Morgan, B Jalaludin & V Sheppard, *Air Pollution Economics: Health Costs of Air Pollution in the Greater Sydney Metropolitan Region* (2005), NSW Department of Environment and Conservation.
  16. Armstrong, above n 1, at 31.
  17. Armstrong, above n 1, at 7.
  18. Armstrong, above n 1, at 11, referring to Bureau of Resources and Energy Economics (BREE), *Australian Energy Statistics* (2014), Canberra, and New South Wales Trade & Investment; G Daley G, *Hunter’s changes seen from space*. (1999) *Newcastle Herald*, 2 December, p 18, cited in N Higginbotham, S Freeman, L Connor, G Albrecht, “Environmental Injustice in coal affected communities, Hunter Valley, Australia”, (2010) 16 *Health and Place* 259–266; Hydrology Consulting, *Unfair Shares: How Coal Mines Bought the Hunter River*, 2014, Report for Lock the Gate Alliance, available at <http://www.lockthegate.org.au/unfairshares>.
  19. Armstrong, above n 1, at 11–12, referring to Clean Energy Regulator, *National Greenhouse and Energy Reporting 2012–13*, (2013) available at <http://www.cleanenergyregulator.gov.au/National-Greenhouse-and-Energy-Reporting/published-information/greenhouseand-energy-information/Greenhouse-and-Energyinformation-2012-2013/Pages/default.aspx>.
  20. Armstrong, above n 1, at 11–12, referring to Hunter Valley Coal Chain Coordinator (HVCCC), *Map of operations and key facts* (2012), available at <https://www.hvccc.com.au/aboutus/pages/mapofoperationsv3.aspx>; Newcastle Port Corporation, *Annual Report, 2012–13*, available at <http://www.newportcorp.com.au/site/index.cfm?display=111694>.
  21. Armstrong, above n 1, at 15.
  22. The Report notes that there is no national standard for PM2.5, although the World Health Organisation guidelines have suggested it.
  23. Armstrong, above n 1, at 18, referring to Environmental Justice Australia (EJA), *Clearing the air - Why Australia urgently needs effective national air pollution laws* (2014), available at: [www.envirojustice.org.au](http://www.envirojustice.org.au); NSW Department of Environment and Heritage, *Air quality data sets* (2014), available at <http://www.environment.nsw.gov.au/AQMS/hourlydata.htm>.
  24. Armstrong, above n 1, at 19, referring to NSW Department of Environment and Heritage, *Air quality data, Monthly Maximums 01/01/2013 to 01/01/2014* (2014), available at: <http://www.environment.nsw.gov.au/AQMS/hourlydata.htm>.
  25. Above n 24.
  26. Armstrong, above n 1, at 20, referring to CA Pope, RT Burnett, MJ Thun MJ, E C Eugenia, D Krewski, K Ito and G Thurston, “Lung cancer, cardiopulmonary mortality, and long-term exposure to fine particulate air pollution” (2002) 287 *JAMA*, 132 at 1141.
  27. Armstrong, above n 1, at 20, referring to T Kolbe K Gilchrist, *Particulate matter air pollution in a NSW regional centre: A review of the literature and opportunities for action* Charles Sturt University, Wagga Wagga, 2011.
  28. Armstrong, above n 1, at 20, referring to B Brunkreef, and B Forsberg, “Epidemiological evidence of effects of coarse airborne particles on health” (2005) 26 *European Respiratory Journal* 309–318; RD Brook *et al*, “Particulate matter air pollution and cardiovascular disease: An update to the scientific statement from the American Heart Association” (2010) on behalf of the American Heart Association Council on Epidemiology and Prevention, Council on the Kidney in Cardiovascular Disease, and Council on Nutrition, Physical Activity and Metabolism, *Circulation*, 121:2331–2378; Raaschou-Nielsen O *et al*, “Air pollution and lung cancer incidence in 17 European cohorts: prospective analyses from the European Study of Cohorts for AirPollution Effects (ESCAPE)” (2003) *The Lancet*, London, UK.
  29. Armstrong, above n 1, at 20.
  30. Armstrong, above n 1, at 21, referring to NSW Office of Environment and Heritage, 2013, *Upper Hunter Air Quality Monitoring Network* (2012) Annual Report, Sydney.
  31. Armstrong, above n 1, at 21, referring to NSW Health, Respiratory and cardiovascular disease and cancer in the Hunter New England Area Health Service (2010).
  32. Armstrong, above n 1, at 24.
  33. Armstrong, above n 1, at 24, referring to EnHealth, “The Health Effect of Environmental Noise” 2004, available at [http://www.health.gov.au/internet/main/publishing.nsf/Content/75B7080BFAA2A17FCA257BF0001B6041/\\$File/env\\_noise.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/75B7080BFAA2A17FCA257BF0001B6041/$File/env_noise.pdf).
  34. Armstrong, above n 1, at 24, referring to A Smart, A Aspinall, *Water and the electricity generation industry: Implications of use*, Waterlines Report Series No. 18, (2009), National Water Commission; Physicians for Social Responsibility, *Coal’s assault on human health* (2009), available at <http://www.psr.org/assets/pdfs/psr-coal-fullreport.pdf>

35. Armstrong, above n 1, at 26, referring to J Moffatt, P Baker, "Farmers, mining and mental health: the impact on a farming community when a mine is proposed" (2013) 23 *Rural Society* 1; G Albrecht "Solastalgia: a new concept in human health and identity" (2005) 3 *Philosophy Activism Nature* (online) 41-55; N Higginbotham, S Freeman, L Connor, G Albrecht, "Environmental injustice and air pollution in coal affected communities, Hunter Valley, Australia" (2010) 16 *Health & Place* 259–266; L Connor, S Rosewarne, "The real cost of coal is quickly adding up" (2012), *Newcastle Herald*, 21 May 2012, available at: <http://sydney.edu.au/news/84.html?newsstoryid=9262>; S Munro, *Rich Land Wasteland: How coal is killing Australia* (2012), MacMillan, Sydney.
36. Armstrong, above n 1, at 26, referring to R Colagiuri, J Cochrane, S Girgis, Health and social harms of coal mining in local communities: spotlight on the Hunter region, University of Sydney, Report prepared for Beyond Zero Emissions, Melbourne (2012).
37. Armstrong, above n 1, at 28.
38. Armstrong, above n 1, at 28, referring to Safe Work Australia, *Worker fatalities, Safe Work Australia* (2013), available at: <http://www.safeworkaustralia.gov.au/sites/swa/statistics/work-related-fatalities/pages/workerfatalities>; Niessner J, "Worst Australian year for mining deaths on record" (2013) *Mining Monthly*, 11 December 2013, available at <http://www.miningnewspremium.net/StoryView.asp?StoryID=801874953>.
39. Armstrong, above n 1, at 29, referring to Climate Commission, undated, *The critical decade — Illawarra/South Coast NSW Impacts*, Department of Climate Change and Energy Efficiency, Canberra, available at: [http://pandora.nla.gov.au/pan/136923/20130919-1415/climatecommission.gov.au/wp-content/uploads/4246-CCWollongong-Key-Messages\\_web.pdf](http://pandora.nla.gov.au/pan/136923/20130919-1415/climatecommission.gov.au/wp-content/uploads/4246-CCWollongong-Key-Messages_web.pdf); Climate Commission, *The critical decade — climate change and health*, Department of Climate Change and Energy Efficiency, available at [http://pandora.nla.gov.au/pan/136923/20130919-1415/climatecommission.gov.au/wpcontent/uploads/111129\\_FINAL-FOR-WEB.pdf](http://pandora.nla.gov.au/pan/136923/20130919-1415/climatecommission.gov.au/wpcontent/uploads/111129_FINAL-FOR-WEB.pdf).
40. Armstrong, above n 1, at 31, referring to Campbell R, Grudnoff M, *Economic assessment of environmentally damaging mining and gas developments in New South Wales* (2013) Economists at Large and The Australia Institute, Canberra.
41. Armstrong, above n 1, at 31, referring to NSW Minerals Council "Helping put teachers in classrooms & nurses in hospitals", media release, 4 June 2013, available at: <http://www.worldclassminers.com.au/news/economy/helping-put-teachers-in-classrooms-nurses-in-hospiti/>; Campbell, above n 6.
42. Amounting to \$2 billion each year. The Report cites L Eadie and C Elliot, *Going Solar: Renewing Australia's electricity options*, Centre for Policy Development (April 2013) Sydney, available at: [http://cpd.org.au/wp-content/uploads/2013/04/Going-Solar\\_report1.pdf](http://cpd.org.au/wp-content/uploads/2013/04/Going-Solar_report1.pdf).
43. \$3.6 billion in 2012–13, compared to \$1.4 billion for renewable energy as per Eadie and Ellito, above n 42. In addition, the NSW Government has provided \$873 million in subsidies for the mineral and fossil fuel industries from 2008–2014. The Report cites The Australia Institute, M Peel, R Campbell and R Denniss, *Mining the age of entitlement: State government assistance to the minerals and fossil fuels sector*, Technical Brief No. 31, (2014) Canberra.
44. According to the Report, state-owned Cobbora coal mine supplies coal to state-owned power companies at one third the exporting price.
45. Armstrong, above n 1, at 31.
46. Armstrong, above n 1, at 31, referring to L Connor, S Rosewarne "The real cost of coal is quickly adding up" (2012) *Newcastle Herald*, available at: <http://sydney.edu.au/news/84.html?newsstoryid=9262>; Campbell, above n 6.
47. Armstrong, above n 1, at 32, referring to Beigler, above n 10.
48. Armstrong, above n 1, at 32–33, referring to P Holmes, *Methodology for valuing the health impacts of changes in particle emissions* (2013), Final Report for NSW Environment Protection Authority.
49. Armstrong, above n 1, at 32, 34, referring to G Morgan, B Jalaludin and V Sheppard, *Air Pollution Economics: Health Costs of Air Pollution in the Greater Sydney Metropolitan Region* (2005), NSW Department of Environment and Conservation.
50. Armstrong, above n 1, at 34–35. See above n 8.
51. Armstrong, above n 1, at 37.
52. Above n 51.
53. Above n 51.
54. Above n 51.
55. Armstrong, above n 1, at 39.
56. Above n 55.
57. Above n 55.
58. Armstrong, above n 1, at 4.
59. Department of Planning and Infrastructure, *Benefits of Mining an Important Part of Planning Assessment Process*, media release, 4 November 2013, available at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au).
60. *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347; [2013] NSWLEC 48; BC201301826.
61. Above n 60.
62. Mining SEPP, cl 12AA.
63. Above n 62, cl 12AA(1).
64. Above n 62, cl 12AA(2).
65. Above n 62, cl 12AA(5).
66. See NSW Government, Department of Planning and Environment available online at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au).
67. Australian Broadcasting Corporation, *Controversial planning legislation to be reviewed*, April 2015, accessed on 4 June 2015 available at [www.abc.net.au](http://www.abc.net.au).
68. See Department of Planning and Environment website at <http://www.planning.nsw.gov.au/onexhibition>, accessed on 7 July 2015.

# Genuine and effective community consultation requirements in the NSW resources projects sector

*Rebecca Davie and Claire Smith* CLAYTON UTZ

## Introduction

Genuine and effective community consultation requires a quality process; the focus is on the activities comprising, not the results of, the consultation. The NSW Supreme Court has clarified the requirement for “genuine and effective community consultation” in the NSW Strategic Regional Land Use Policy Delivery Guidelines: Guidelines for community consultation requirements for the extraction of coal and petroleum, including coal seam gas (the Guidelines).

The case was *Metgasco Ltd v Minister for Resources and Energy*.<sup>1</sup> In his decision handed down on 24 April 2015, Button J found that the failure of a consultation process to actually persuade the community to support a project is an irrelevant consideration for a decision-maker to take into account in determining whether consultation has been genuine and effective, in accordance with the Guidelines.

This article reviews the Court’s findings on community consultation and draws some practical guidance for proponents of resources projects and communities on what a quality consultation process may entail.

## Background – the Rosella Well project

Metgasco obtained development approval for the construction of the Rosella E01 conventional gas exploration well (Rosella Well) near Casino and Lismore in the NSW Northern Rivers region.

Metgasco also held Petroleum Exploration Licence No 16 (PEL 16), which contained a number of conditions common in exploration licences, including that the licence holder must engage with the community in relation to the planning for and conduct of prospecting operations authorised by the licence. The specific Activity Approval granted under PEL 16 for the construction of the Rosella Well also incorporated a requirement to carry out consultation generally in accordance with the Guidelines. The Guidelines refer to the need for “genuine and effective consultation” and community consultation as “an integral component” of the exploration program.

The local community had expressed significant opposition to the Rosella Well project, including by establishing a protest camp and sending a large number of letters to the then NSW Minister for Resources and Energy (Minister) describing their reasons for opposing the natural gas project together with broader concerns about extraction of coal seam gas.

The delegate of the Minister (Delegate) purported to suspend Metgasco’s operations approved under PEL 16. The Delegate’s reason for the suspension was essentially an alleged failure to comply with the obligation to consult with the community about Metgasco’s operations in accordance with the Guidelines.

Metgasco brought judicial review proceedings and successfully obtained a declaration from the Court that the Delegate’s decision was not made according to law.

In addition to its challenge on the community consultation issue, Metgasco was also successful on grounds relating to procedural irregularities and statutory construction of the Petroleum (Onshore) Act 1991 (NSW). This article does not focus on those grounds because, in our view, the most practical and interesting learnings from the case come from the Court’s findings in relation to community consultation requirements.

## Consultation activities undertaken

Metgasco describes the community consultation activities it undertook in relation to the Rosella Well project as including:<sup>2</sup>

- reviews with [Metgasco’s] Community Consultation Group and its endorsement of the Rosella consultation program scope and approach;
- the opportunity for direct contact with land holders within 2 km of the well;
- meetings with local councils;
- advertising in local papers;
- an information package about the well;
- interviews on two local radio stations;
- telephone and email responses to questions raised;
- a website providing access to the Rosella community consultation document [(Metgasco reported that the website had about 1,500 hits)]; and

- ad-hoc meetings requested by individuals including many who lived geographically distant from the well site.

The court was not required to determine the merits of the community consultation undertaken by Metgasco. However, it may be useful for future proponents of resources projects to consider the reasons given by the Delegate for purporting to suspend the Rosella Well approval.

The Delegate, in determining that Metgasco had not complied with its community consultation obligations, provided several specific reasons, including that Metgasco had developed a “defeatist attitude” in relation to community consultation. This should be understood in the context that, as the Delegate observed, there was a protest camp on the property adjoining the Rosella Well and the audience at community consultation events was “often hostile”. The Delegate also criticised the level of detail in Metgasco’s Community Consultation Plan and the failure to use the assistance of scientific experts to engage with the community and dispel confusion and misinformation.

### **Court’s findings on consultation requirements**

In finding for Metgasco, the Court determined that it is the activities of the person or body engaging in consultation that the Guidelines cover; not the results or persuasive effect of that consultation.<sup>3</sup> The fact that significant stakeholders (in this case, many members of the local community) remain opposed to a project does not preclude a finding that the proponent has undertaken genuine and effective consultation.

The Court found that the Delegate had taken an irrelevant consideration into account in deciding to suspend PEL 16 because the Delegate had had regard to the failure of the consultation process to persuade the community to support the project.

### **Social licence to operate**

The *Metgasco* decision has demonstrated that the failure of a consultation process to gain community support will not legally prevent a project from proceeding. However, the absence of community support can have practical and financial implications for projects and proponents. There are examples of resources projects being delayed, changed, constrained, regulatory action being taken and the imposition of stringent operating requirements as a result of community opposition and complaints. Each of these implications may present significant financial risks for a project.

There has been increasing focus in recent years on the concept of a “social licence to operate”. This refers to a general level of acceptance or approval continually

granted to a proposed or actual project by local communities and other stakeholders.<sup>4</sup> A social licence may be intangible and difficult to obtain and retain throughout the life of a project, but its attainment has positive practical, financial and legal implications for projects.<sup>5</sup> For example, given the accessibility in many circumstances to any person of both merits appeals and judicial review of decisions made in relation to planning approvals, a social licence can streamline assessment and approval processes and facilitate faster project commencement. Similarly, it may reduce community complaints and regulator intervention during operation of the project.

### **Adaptive approach to consultation**

Notwithstanding the legal position clarified by Button J in *Metgasco*, the importance of the social licence to operate means it is worthwhile for proponents and operators of resources projects to consider what constitutes best practice community consultation by reference to academic and industry guidance.

The spectrum of community consultation on any particular project may include activities that are broad or targeted, formal or informal, episodic or continuing.<sup>6</sup> For example, newsletter updates, media advertisements and public meetings reach a broad section of the community, whereas responses to email queries, face-to-face meetings and site visits are more targeted and can be less formal. The appropriate approach will be adaptive depending on what the project is and who the stakeholders are.

Howards recommends that for community engagement to “work”, it needs to focus on three things:<sup>7</sup>

- a clear and agreed purpose for the engagement;
- transparent parameters as to what the engagement process can seek to influence; and
- an approach that seeks to build trust and positive relationships.

In devising a consultation program designed to achieve support for a project (or at least reduce opposition), proponents should consider that a comprehensive and effective community consultation program will embrace a variety of activities and will do so on a continuing basis. Effective community consultation often requires proponents to collaborate with and empower the community, rather than simply informing the community.<sup>8</sup>

Community consultation cannot only involve one solution; there is no one-size-fits-all activity. A best practice approach needs to be adaptive and appropriate to the relevant part of the community. Head distinguishes the “community sector” from non-government organisations and major business groups because their

power base is quite different to the social interests represented by the community.<sup>9</sup>

External stakeholders requiring consultation in relation to NSW resources projects range from local rural landowners to rural industries to large-scale, sophisticated business groups, special interest groups (eg, environmental groups) and, sometimes, organised protest groups. Bringing understanding, participation and empowerment to each of these groups in an appropriate way is a challenge that proponents need to address.

However, even applying best practice community consultation strategies and activities like the ones discussed here, opposition to resources projects may remain. The *Metgasco* case recognises this.

### Lessons for proponents of resources projects

The *Metgasco* case provides yet another example of the challenges of coexistence between different industries and between industry and community in rural NSW. It demonstrates the importance of early and effective community consultation in any major resources project and provides guidance for proponents and communities on the level of engagement that may be required to constitute quality community consultation.

There are two separate issues for proponents of resources projects to consider in light of the decision in *Metgasco*.

First, the Court determined that, from a legal compliance perspective, the quality of consultative activities and the consultation program is paramount.

The Court was not required to determine the merits of the community consultation undertaken by *Metgasco* and it specifically found that “the [G]uidelines are not prescriptive and admit a degree of flexibility depending upon the circumstances”.<sup>10</sup> Nevertheless, the Minister’s submissions provide guidance on the types of activities the Regulator expects. Those activities may include:

- preparing a detailed community consultation plan;
- clearly identifying all stakeholders requiring consultation;
- assigning qualified, experienced and respected representatives to provide the consultation, particularly where a “hostile” audience is likely, and using scientific experts where necessary;
- providing actions to address specific challenges (eg, the establishment of a particular opposition to the project); and
- persisting with community consultation despite the consultation not necessarily resulting in persuasion of the community to support the project.

Second, proponents should remember that the legal emphasis on process over outcome does not account for the “social licence to operate” that is considered by

many as essential to the successful and timely delivery of resources projects. Consequently, the practical reality is that the results of community consultation remain important. This means that proponents of resources project should continue to engage in best practice community consultation and to be adaptive in their approach not only in planning a resources project but throughout the life of the project to seek to obtain and retain a social licence to operate.

### Conclusion

Community engagement in the resources projects sector is a complex area. The Court’s decision in *Metgasco* makes it clear that persuading the community to support a project is not a legally required outcome of the consultation process. However, practically, coexistence remains a real challenge in NSW resources projects. Meeting this challenge involves co-ordinated legal, technical, social and environmental solutions with regard to all of the stakeholders and issues involved.

**Author note:** After this article was submitted for publication, *Metgasco* brought a claim for compensation against the NSW Government. In November 2015, the NSW Government made a settlement offer of \$25 million in compensation to settle *Metgasco*’s claim and buy-back *Metgasco*’s three gas exploration licences. The *Metgasco* Board has unanimously recommended the settlement offer to shareholders. It will be considered at the AGM scheduled for 16 December 2015. The Chairman’s letter to shareholders recognises that *Metgasco* has explored in good faith for more than 10 years and spent more than \$100 million on exploration activities which have established significant gas resources. In the context of community consultation, the compensation claim and settlement offer demonstrate the strong influence that communities can exert and how critical a “social licence to operate” can be.

**Rebecca Davie**  
 Senior Associate  
 Clayton Utz

**Claire Smith**  
 Partner  
 Clayton Utz

---

### Footnotes

1. *Metgasco Ltd v Minister for Resources and Energy* [2015] NSWSC 453; BC201502970.
2. P J Henderson, *Metgasco* Managing Director and CEO, *Drilling suspension update*, *Metgasco*, May 2014, accessed online 27 April 2015, [www.metgasco.com.au](http://www.metgasco.com.au).

3. Above n 1, at [69].
4. See eg, definition contained in Clean Energy Council, “Community Engagement Guidelines for the Australian Wind Industry”.
5. Above n 2.
6. B W Head “Community Engagement: Participation on Whose Terms?” (2007) *Australian Journal of Political Science*, (42) 3, pp 441–454.
7. M Howards “When community engagement works” (2014) *WME Magazine*, April 2014, pp 30–31.
8. Above n 4, citing International Association for Public Participation (2005).
9. Above n 4.
10. Above n 1, at [69].

## Introducing LexisNexis® Red™

A new page for looseleaf



**LexisNexis® Red™ is a brand new way to access trusted LexisNexis looseleaf content.**

LexisNexis Red provides you with access to looseleaf services digitally, via your iPad or Windows PC. Have the flexibility to carry your looseleaf library with ease, wherever you need to go. Looseleafs are updated automatically via a content delivery system as soon as you go online.

To request a trial visit [www.lexisnexis.com.au/rednewsletter](http://www.lexisnexis.com.au/rednewsletter), contact your Relationship Manager or call **1800 772 772**.



© 2012 Reed International Books Australia Pty Ltd (ABN 70 001 002 357) trading as LexisNexis. LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., and used under licence. "iPhone", "iTunes" and "iPad" are trademarks of Apple Inc. Red is a trademark of Elsevier Properties SA.

---

# Case note: The Environment Centre Northern Territory (NT) Inc v The Minister for Land Resource Management

*Carley Bartlett*

The NT Supreme Court handed down its decision in *The Environment Centre Northern Territory (NT) Inc v The Minister for Land Resource Management*<sup>1</sup> on 29 May 2015. The case was a judicial review of two decisions of the NT Minister for Land Resource Management (the Minister). The question before the court was “whether or not the Minister was required to undertake a merits review” when conducting a statutory review under s 30 of the Water Act 1992 (NT) (Water Act) of decisions of the NT Controller of Water Resources (the Controller) to grant water extraction licences.<sup>2</sup> As remarked by the court, most of the power and responsibility for water resource management in the Northern Territory rests with the Controller, whose decisions are only reviewable under s 30 of the Water Act.<sup>3</sup> Justice Hiley held that the Minister erred in his review of the Controller’s decisions by failing to consider the decisions on the merits, set aside the Minister’s decisions and ordered that the Minister determine the plaintiff’s applications for review afresh.<sup>4</sup> Of particular interest was the court’s reasoning in relation to the importance of water resources in Australia and the primacy of the public interest.<sup>5</sup>

## Background

On 1 April 2014, the Controller issued seven water extraction licences permitting extraction of groundwater from the Mataranka Tindall Limestone Aquifer. The Mataranka Tindall Limestone Aquifer discharges around the Elsey National Park area through springs that in turn feed the Roper River.<sup>6</sup> On 12 May 2014, the Controller issued 11 water extraction licences permitting extraction of groundwater from the Ooloo Dolostone Aquifer. The Katherine and Daly Rivers are the largest groundwater-dependent ecosystems of the Ooloo Dolostone Aquifer.<sup>7</sup>

Following application by The Environment Centre Northern Territory (NT) (plaintiff) under s 30 of the Water Act, the Minister was required to undertake a review of the Controller’s two decisions to issue the

licences. The Minister upheld the decisions of the Controller to grant the licences. The plaintiff sought judicial review of the Minister’s decisions to uphold the decisions of the Controller.

The plaintiff contended that the Minister misunderstood the task required of him by s 30 by failing to ask himself whether the decision under review was a decision that should have been made on the merits and instead asked himself whether the Controller had erred in making the decisions under review.<sup>8</sup> The defendant conceded that the Minister did not undertake a merits review and contended that only if error was established could the Minister go on to re-make a decision under s 30.<sup>9</sup> As such, the only question to be determined by the NT Supreme Court was “whether or not the Minister was required to undertake a merits review”.<sup>10</sup>

## Statutory scheme

When setting out the legal principles regarding reviews, the court emphasised that “it is the proper construction of the terms of any particular statutory grant of a right of appeal which determines its nature”<sup>11</sup> and that “review” has no settled pre-determined meaning but it takes its meaning from the context in which it appears.<sup>12</sup>

There was no express guidance from the Water Act as to how a review under s 30 is to be conducted.<sup>13</sup> Section 30 of the Water Act is as follows:

- (1) Subject to subsection (2), a person aggrieved by an action or decision under this Act (other than s 93(3)) of the Controller, or under s 5(6) of the Minister, may apply to the Minister to review the matter.
- (2) An application under this section shall be made in the prescribed manner and form.
- (3) Subject to this Act, the Minister may:
  - (a) in the case of an application against an action or decision of the Controller:
    - (i) uphold the action or decision;
    - (ii) substitute for the decision the decision that, in the opinion of the Minister, the Controller should have made in the first instance; or



- (iii) refer a matter back to the Controller for reconsideration of the action or decision with or without directions about new matters that the Controller shall take into account in that reconsideration; or
  - (b) in any case, refer the matter to the Review Panel with the request that it advise the Minister within the time indicated on what action the Minister should take in relation to the matter.
- (4) Where a matter has been referred under subsection (3)(b) to the Review Panel, the Review Panel shall consider it and advise the Minister accordingly and the Minister shall take such action under subsection (3)(a)(i) or (ii) as he or she thinks fit.

While s 30(3) identifies what actions the Minister may take when undertaking a review, it does not indicate how the Minister is to go about exercising what on its face is a wide discretion.<sup>14</sup>

The prescribed manner and form referred to in s 30(2) contained provision for an applicant for review to state the “Grounds for Application for Review”. Subclause 4(3) of the Water Regulations 2008 (NT) (the Regulations) states that where “... applicants seek reviews on similar grounds ... in the same general locality, the Review Panel may consider the matters together”.<sup>15</sup>

## Decision

The court rejected the defendant’s contention that the Minister is not obliged to review the merits of the Controller’s decision in the absence of some error, and found that the Minister erred in failing to consider the Controller’s decisions on the merits. The court set aside the Minister’s decisions and ordered that the Minister determine the applications for review afresh.<sup>16</sup> Some of the major findings relevant to the court’s ultimate decision are set out below.

### *Rights of review conferred by s 30*

The court found that there was no suggestion in the Water Act, or elsewhere, that the right of review was constrained by any need to identify and state grounds which show error on the part of the Controller.<sup>17</sup>

The court was of the view that the requirement that an applicant under s 30 of the Water Act be an aggrieved person, and that the applicant use a form that identifies grounds for review, and the reference to grounds in the Regulations all at least implied that “the main focus of the review would be the points raised in those grounds and the accompanying materials”.<sup>18</sup> While a requirement to provide “grounds” might often carry an assumption that a reviewable error must be asserted and established, “absent contrary statutory intention there is no reason to conclude that such an error must be established at any stage of the process”.<sup>19</sup>

### *Primacy of the public interest*

The plaintiff, in its submissions in reply, stressed the importance of the Minister having overall control of water as an important public resource.<sup>20</sup> In addressing this submission, the court remarked that most of the power and responsibility for water resource management in the Northern Territory rests with the Controller, the decisions of whom are final and subject only to review under s 30 of the Water Act.<sup>21</sup> The court also found relevant the view of Spigelman CJ in *State Transit Authority of New South Wales v Fritzi Chemler* that the “scope of an internal merits review ... is an important safeguard for the proper operation of the legislative scheme”.<sup>22</sup>

The court later quoted *ICM Agriculture Pty Ltd v The Commonwealth*:<sup>23</sup>

In Australia, water and rights to use water are of critical importance, not just to those who are immediately interested in particular water rights, but to society as a whole.

The court went on and found that “it would be inimical to the protection of such an important public interest” if the Minister’s powers under s 30 were constrained by the need for error to be established,<sup>24</sup> further stating that:<sup>25</sup>

... there is no reason, express or implied, in s 30 or elsewhere in the [Water] Act, why the Minister would not be able to advance and protect the public interest by taking into account information relevant to the grant of the licence under review, particularly where such information has been generated or acquired after the Controller made his or her decision.

### *Assistance from other decisions*

The court considered the powers and duties imposed upon the Minister under s 30 of the Water Act to be relevantly similar to the powers and duties of review in four other cases, concerning merits review.<sup>26</sup> The court laid out four points, originally discussed and summarised in *Sapina v Coles Myer Ltd*,<sup>27</sup> applicable to the present matter:<sup>28</sup>

- that the [Controller’s] decision is not to be ignored but that the [Minister] needs to decide for himself whether that decision is wrong and what is the “true and correct” or “preferable and correct” decision;
- a broad ranging factual enquiry afresh is not necessarily required;
- the [Minister] has a wide choice available as to how he or she undertakes the task of deciding what is the true and correct decision;
- error (or lack of it) by the [Controller] will or may be relevant to the [Minister’s] task, but does not define the task.

The court also expressed the view that the Minister is obliged to consider each of the matters raised in the application for review, regardless of whether they suggest some factual or legal error.<sup>29</sup> The court stated that

the extent to which the Minister is obliged to consider the Controller's decision and any other materials will vary from case to case.<sup>30</sup>

The court also described several scenarios offering guidance as to steps the Minister might validly take in undertaking a review under s 30 and clarified that "none of these scenarios would necessarily require the Minister to engage in an extensive merits review de novo".<sup>31</sup>

## Comments

The decision clarifies the process required to be taken by the Minister when conducting a review under s 30 of the Water Act. Such reviews are not confined to decisions of the Controller with regards to water extraction licences but, as noted by the court,<sup>32</sup> are also more broadly available to persons aggrieved by *actions* of the Controller, and decisions made by the Minister to declare coastal waters of the Territory to be tidal water for the purposes of the Act.<sup>33</sup>

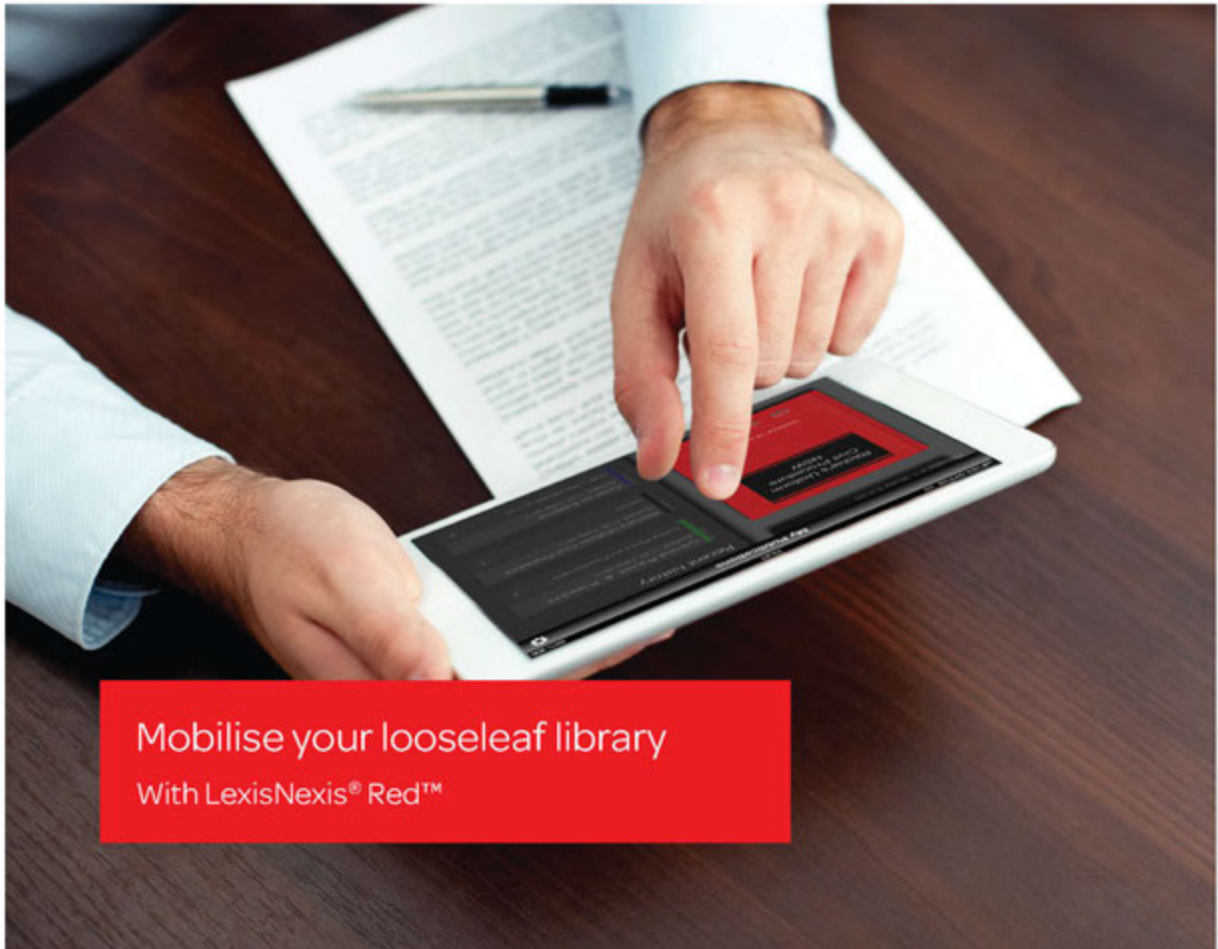
### *Carley Bartlett*

*Researcher to the Hon Justice Brian J Preston, Chief Judge  
Land and Environment Court of New South Wales*

---

## Footnotes

1. *The Environment Centre Northern Territory (NT) v Minister for Land Resource Management* [2015] NTSC 30; BC201504501.
2. Above n 1, at [7], [43].
3. Above n 1 at [127].
4. Above n 1, at [160]–[161].
5. Above n 1, at [126]–[128] and [147]–[148].
6. Above n 1, at [2]–[3].
7. Above n 1, at [2]–[3].
8. Above n 1, at [5].
9. Above n 1, at [6] and [54]–[55].
10. Above n 1, at [7], [43].
11. Above n 1, at [11] citing *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 129; 244 ALR 257; [2008] HCA 13; BC200802507.
12. Above n 1, at [14] citing Mason CJ, Brennan & Toohey JJ in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 235 at 261. See also above, n 1, at [15] citing Basten JA in *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61; [2007] NSWCA 369; BC200710980 at [43].
13. Above n 1, at [16].
14. Above n 1, at [140].
15. Above n 1, at [141].
16. Above n 1, at [160]–[161].
17. Above n 1, at [146].
18. Above n 1, at [142]–[143].
19. Above n 1, at [145]–[146].
20. Above n 1, at [126].
21. Above n 1, at [127].
22. Above n 1, at [128] quoting Spigelman CJ (with whom Basten JA and Bryson AJA agreed) in *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249; BC200708029 at [22].
23. Above n 1, at [147] quoting Hayne, Kiefel and Bell JJ in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140; [2009] HCA 51; BC200911041 at [90].
24. Above n 1, at [148], see also at [127].
25. Above n 1, at [148].
26. Above n 1, at [150] referring to *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; 103 ALD 467; [2008] HCA 31; BC200806838; *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue of the State of New South Wales* (2011) 245 CLR 446; 125 ALD 1; [2011] HCA 41; BC201107574; *Applicants A1 and A2 v Brouwer* (2007) 16 VR 612; [2007] VSCA 139; BC200704928; *Sapina v Coles Myer Ltd* (2009) 7 DDCR 54; [2009] NSWCA 71; BC200902328.
27. *Sapina v Coles Myer Ltd* (2009) 7 DDCR 54; [2009] NSWCA 71; BC200902328 at [57].
28. Above n 1, at [151].
29. Above n 1, at [152].
30. Above n 1, at [152].
31. Above n 1, at [153]–[157] and [158].
32. Above n 1, at [139].
33. In the case of applications against decisions made by the Minister to declare coastal waters of the Territory to be tidal waters under s 5(6) of the Water Act, the Minister may refer the matter to the Review Panel under s 30(3)(b). In applications against actions or decisions of the Controller, the Minister can take any action under s 30(3)(a) or under s 30(3)(b).



**Are you tired of manually updating your looseleaf folders?  
You need LexisNexis Red.**

LexisNexis Red is a performance enhancing referencing tool for the iPad and Windows PC.

Confidently mobilise your research knowing that your services are updated automatically, accessible 24/7 and at your fingertips when you need them the most.

To request a trial visit [www.lexisnexis.com.au/rednewsletter](http://www.lexisnexis.com.au/rednewsletter) contact your Relationship Manager or call Customer Support on **1800 772 772**.



© 2013 Reed International Books Australia Pty Ltd (ABN 70 001 002 357) trading as LexisNexis. LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc, and used under license. "iPhone", "iTunes" and "iPad" are trademarks of Apple Inc.



**Common Law in the Age of Statutes**  
**The Equity of the Statute**  
David Wright

An insightful analysis of the modern intersection  
of legislation and the common law.

**\*RRP: \$125.00**

Publication date: July 2015

\*Prices include GST and are subject to change without notice.

© 2015 Reed International Books Australia Pty Ltd trading as LexisNexis. LexisNexis, LexisNexis Red® and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license.



**Order your copy today!**

eStore: <http://bit.ly/ComLawAS>

phone: 1800 772 772

email: [customersupport@lexisnexis.com.au](mailto:customersupport@lexisnexis.com.au)

**PRACTICE AREA MANAGER: Katherine Pearson, [katherine.pearson@lexisnexis.com.au](mailto:katherine.pearson@lexisnexis.com.au)**  
**SUBSCRIPTION INCLUDES: 10 issues per year EDITOR DIRECT: PO Box 976 Civic Square ACT 2608**  
**TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood [www.lexisnexis.com.au](http://www.lexisnexis.com.au)**  
**ISSN 1035-137X Print Post Approved PP 255003/06151 Cite as (2015) 30(6&7) AE**

This newsletter is intended to keep readers abreast of current developments in the field of environmental issues. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers. This publication is copyright. Except as permitted under the *Copyright Act 1968* (Cth), no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. Neither may information be stored electronically in any form whatsoever without such permission. Inquiries should be addressed to the publishers.

Printed in Australia © 2015 Reed International Books Australia Pty Ltd trading as LexisNexis ABN: 70 001 002 357  
Printed on 100% recycled paper.