



Précis Paper

The crisis of water allocation in the Murray-Darling Basin

Discussion Includes

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The crisis of water allocation in the Murray-Darling Basin

1. In this edition of BenchTV, Richard Beasley SC, barrister, Nine Wentworth Chambers and Senior Counsel assisting the Murray-Darling Basin Royal Commission discusses with Dr Emma Carmody, water law specialist at the Environmental Defenders Office, Sydney, the current crisis of water allocation in the Murray-Darling Basin and law surrounding it.

Why we have a Basin plan and a Water Act

2. Aboriginal people had a very simple Basin plan – don't be greedy, only use what you need and respect the environment.
3. Since the start of the 20th century, when large scale irrigation started, we have not respected the environment, it may not have been the intention to damage it, but that's effectively what's happened.
4. It's a massive area of land, twice the size of France. It covers parts of southern Queensland, most of NSW, most of Victoria and parts of South Australia. There are two big rivers, the Darling and the Murray, which flushes out to the Southern Ocean.
5. The reason we have a Water Act is we've had years and years of over extraction.
6. We should have known in 1982 that we were grossly over-allocating the system because that's when the Murray mouth closed over for the first time since white people came to Australia. It's had to be dredged ever since.
7. Since then we've had the Millenium Drought from 2002-2010.
8. The *Water Act 2007* (Cth) provides that we have to find the amount of water that needs to be restored to the environment, not by a politician, a policy, a lobbyist, or an environmentalist, but by the best available scientific knowledge.
9. That led into the Murray-Darling Basin plan to be run by the Murray-Darling Basin Authority (MDBA).
10. The *Water Act 2007* (Cth) is an environmental act designed to stop the endangerment of our environment and return the Basin to health.

Why the Royal Commission?

11. The question is how much water does the environment need and has that been done properly by the MDBA?
12. But what kicked it off before that were allegations of water theft in the Basin.
13. In particular, there was a Four Corners program, *Pumped*, about alleged theft, particularly in the north of the Darling River.
14. All water licences are granted under State laws in each of the States.

15. The MDBA has powers under the Act to request information if they have concerns about issues related to implementation of the Act or the Basin plan.
16. The Basin plan was passed in November 2012. The NSW water sharing plan was gazetted in October 2012. By definition it became an interim water sharing plan. It technically had to be ticked off by the federal government, though it is a State instrument.
17. If there's not enough water in the river, you're not allowed to pump.

NSW government response to Pumped

18. The Minister at the time appointed Mr Ken Matthews, who had run the National Water Commission before it was disbanded, to investigate the suite of allegations raised in *Pumped*.
19. He made a series of recommendations. He was concerned that WaterNSW was delivering water to customers and at the same time was the regulator.
20. Created world's best practice legislation, passed at the end of 2017.
21. It has since commenced 10 prosecutions, which is fairly extraordinary.
22. 'No meter, no pump' is what Matthews recommended. The government hasn't passed no meter, no pump, but they have passed laws which dramatically improve metering coverage across the State and certain types of pumps will have to have telemetry as well. It's not universal but it's a dramatic improvement. This is assuming it is properly implemented.

Findings of the Royal Commission

23. The core of the legislation is that you have to reinstate an environmental level, an environmentally sustainable level of take – that is, how much water can you take from this system and still have environmental sustainability?
24. The Basin Authority said on average 2,750 gigalitres has to go back to the environment. That figure is certainly not an environmentally sustainable level of take and is therefore unlawful, for the following reasons.
25. The Basin Authority misconstrued the Water Act – the environmentally sustainable level of take is defined in the Water Act – it has entirely environmental criteria and says nothing about economic or social outcomes. How much water the environment needs is determined by science based on environmental criteria. The Basin Authority reduced the figure of what the environment needs, it iterates for social and economic outcomes. That's a fundamental legal error.
26. The evidence before the Royal Commission was that the 2,750 became a political fix – several witnesses referred to the need for a figure consistent with a NSW post code – that is, that it started from 2.
27. The CSIRO was pressured on its report by the Basin Authority.

28. The MDBA didn't take climate change into account in its modelling. The CSIRO described this as 'scientifically indefensible'. The Commissioner found this to be 'negligent and incomprehensible'.
29. The figure that we have recovered for the environment under the Basin plan is based on the historic climate record but it is only up to 2009, so it doesn't include the last 10 years, which is arguably important, since climate appears to be changing, getting hotter and drier.
30. One more aspect the Commissioner found to be unlawful was supply measures.

Supply measures

31. The Basin plan provides for supply measures that are meant to work this way – you can get the same ecological response from less water.
32. This is inverting the precautionary principle – you're playing Russian roulette with the environment.
33. It's also an issue from a governance point of view. There are 36 of these projects – their business cases were not made public. Nor was the MDBA's analysis.

Why the fish kills?

34. The Menindee lakes had been drained recently, it hasn't rained enough, and there were changes to the Barwon-Darling water sharing plan.
35. A perfect storm of circumstances.

What should happen now?

36. The honest implementation of the Water Act. Have an honest conversation about what might be saved economically and who might need to be adjusted out, and an honest discussion about what might be saved environmentally.
37. If done on the best available science and best available independent economics, people can have a debate, will know they are not being lied to, that politics is not being dressed up as science.
38. This is a short summary of Bret Walker SC's recommendation in his Royal Commission report – none of which have been implemented and all of which need to be implemented urgently.
39. We need to be revising the amounts of water that we propose to return to the environment, to see if it is consistent with the Water Act and takes into account climate change.

BIOGRAPHY

Richard Beasley SC

Barrister, Nine Wentworth Chambers, Sydney

Richard Beasley SC came to the Bar in 1997 and was appointed silk in 2011. He has conducted cases and advised on matters involving major administrative law, planning and environmental issues (such as Barangaroo, Allianz stadium and numerous mine approvals), and land acquisition matters. He has also appeared in a wide range of commercial, contract and valuation matters.. He was Senior Counsel assisting the Murray-Darling Basin Royal Commission.

Dr Emma Carmody

Special Counsel, Environmental Defenders Office, Sydney

Emma studied Arts/Law at the University of NSW, where she was awarded the Stephen Seidler Memorial Prize for the Best Achievement in Environmental Law. Her other qualifications include a doctorate in Creative Writing (English/French) awarded by the University of Adelaide. She was admitted as a solicitor in 2003.

Emma joined the law reform team in 2011 after several years working as an in-house lawyer and consultant for various government departments. Her work for EDO NSW includes the provision of legal advice, writing submissions, responding to government inquiries and appearing before parliamentary committees.

She has broad experience advising on all aspects of environment and planning law, as well as particular expertise in water law and policy. As a result, she is frequently called on to advise landholders and community groups across the Murray-Darling Basin, as well as peak conservation and scientific organisations, about State and Commonwealth water laws. She also acts as special advisor for water-related litigation.

Emma regularly publishes book chapters and journal articles in both English and French on various aspects of water law and policy. Her articles are frequently included on reading lists at some of Australia's top law schools, where she also guest lectures on water law.

In parallel to her work at EDO NSW, Emma serves as legal advisor to the Secretariat of the Ramsar Convention on Wetlands in Switzerland. She is also a member of the policy group within the Alliance for Global Water Adaption and a fellow of the Peter Cullen Trust, having completed their Science to Policy Leadership Program in 2013.

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