

**Administering Water Policy in the Eastern States of Australia – Administrative and Other Challenges<sup>1</sup>**

Justice Nicola Pain, NSW Land and Environment Court

*The skies are brass and the plains are bare,  
Death and ruin are everywhere –  
And all that is left of the last year's flood  
Is a sickly stream on the grey-black mud;  
The salt-springs bubble and the quagmires quiver,  
And -- this is the dirge of the Darling River: ...*

'The Song of the Darling River', Henry Lawson (1889)

**Introduction**

The Murray-Darling Basin ('MDB') has environmental, cultural, social and economic significance in Australia. It includes 30,000 wetlands (16 of which are internationally significant) and provides habitats for 120 waterbird species and 46 native fish species.<sup>2</sup> A number of rural towns rely on it for their drinking water. The tourism and agricultural industries in the MDB are worth \$8 and \$24 billion respectively.<sup>3</sup> However, the MDB is affected by a number of environmental problems including reduced water levels and increased salinity, acidity and sedimentation due to over-allocation of water for consumptive uses, land clearing and drought (the frequency and severity of which have increased due to climate change).<sup>4</sup> Most recently, in early

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<sup>1</sup> I gratefully thank Georgia Pick tipstaff and researcher at the NSW Land and Environment Court for her considerable assistance in the research and preparation of this paper.

<sup>2</sup> Murray-Darling Basin Authority, *Discover the Basin* (Australian Government) <<https://www.mdba.gov.au/discover-basin>> [accessed 10 June 2019].

<sup>3</sup> Ibid.

<sup>4</sup> Murray-Darling Basin Authority, *Drought in the Murray-Darling Basin* (Australian Government) <<https://www.mdba.gov.au/managing-water/drought-murray-darling-basin>> [accessed 10 June 2019]; Murray-Darling Basin Authority, 'Climate Change and the Murray-Darling Basin Plan' (Discussion Paper, Australian Government, February 2019) <<https://www.mdba.gov.au/sites/default/files/pubs/Climate-change-discussion-paper-Feb-19.pdf>>; Murray-Darling Basin Authority, *Salinity* (Australian Government) <<https://www.mdba.gov.au/managing-water/salinity>> [accessed 10 June 2019]; Barry T Hart, 'The Australian Murray-Darling Basin Plan: Challenges in its Implementation (Part 1)' (2016) 32 *International Journal of Water Resources Development* 819, 819.

2019 rivers stopped flowing in north-west New South Wales ('NSW')<sup>5</sup> and several major fish deaths occurred in NSW at the Menindee Lakes.<sup>6</sup> The above quote from the 1889 Henry Lawson poem about the Darling River suggests that management of the inland rivers of NSW and beyond no doubt has been a challenge for a long time.

The South Australian Murray-Darling Basin Royal Commission identified in its 2019 report a number of upstream policy and governance issues in the management of water in the MDB. There is an umbrella agreement to manage the MDB between Queensland, NSW, Victoria, South Australia and the Australian Capital Territory ('ACT') ('the Basin states') with the Commonwealth. While overall governance and policy mechanisms are implemented under a Commonwealth Act, management and enforcement of water policy on the ground is largely implemented through Basin state laws. While broadly similar administrative and regulatory regimes exist in all Basin states there are a number of differences in administrative review availability, whether merits review or judicial review, and in enforcement approaches. Judicial review proceedings challenging water sharing plans before the NSW Land and Environment Court highlight difficulties for private interests seeking to challenge strategic water allocation plans. Lack of enforcement of water legislation in NSW was highlighted in the ABC Four Corners program 'Pumped' aired in 2017. Important changes in enforcement policy made since that program have resulted in greater compliance action by the newly established water regulator in NSW.

Management of the MDB is challenging due to its size and the federal system of government in Australia as it spans four states and a territory, an area equivalent to 14 percent of Australia's land mass.<sup>7</sup> A number of legal and policy arrangements to manage the MDB have been implemented over several decades through policy processes such as the 2004 Intergovernmental Agreement on a National Water Initiative. This paper focusses on current arrangements.

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<sup>5</sup> Anne Davies and Lorena Allam, 'When the River Runs Dry: the Australian Towns Facing Heatwave and Drought', *The Guardian* (online), 25 January 2019 <<https://www.theguardian.com/australia-news/2019/jan/25/when-the-river-runs-dry-the-australian-towns-facing-heatwave-and-drought>>.

<sup>6</sup> Anne Davies, 'Hundreds of Thousands of Native Fish Dead in Second Murray-Darling Incident', *The Guardian* (online), 7 January 2019 <<https://www.theguardian.com/australia-news/2019/jan/07/hundreds-of-thousands-of-native-fish-dead-in-second-murray-darling-incident>>.

<sup>7</sup> Australian Bureau of Statistics, *Feature Article: Murray-Darling Basin* (11 November 2015) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1301.0Chapter3042009%E2%80%9310>>.

## **Managing the Murray-Darling Basin at the Commonwealth level**

The legal framework for managing the MDB includes Commonwealth and Basin state laws and non-legislative instruments. In 2007 the Commonwealth government enacted the *Water Act 2007* (Cth) (*'Water Act'*). The *Water Act* has 10 objects including 'to ensure the return to environmentally sustainable levels of extraction for water resources that are over allocated or overused' and 'to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin ...'<sup>8</sup> Importantly, the object to 'maximise the net economic returns to the Australian community from the use and management of the Basin water resources' is stated explicitly to be subject to the two aforementioned objects. The *Water Act* established the Murray-Darling Basin Authority ('MDBA')<sup>9</sup> which was charged with preparing the *Basin Plan 2012* (Cth) (*'Basin Plan'*) in accordance with specifications outlined in the *Water Act*.<sup>10</sup> The MDBA is responsible for monitoring the quality and quantity of Basin water resources and the condition of associated water-dependent ecosystems, developing measures for the equitable and sustainable use of Basin water resources, and conducting research and investigations into the MDB.<sup>11</sup> For example, it must conduct annual reviews into the effectiveness of the *Basin Plan*.<sup>12</sup> The *Water Act* also established the Commonwealth Environmental Water Holder to manage water acquired by the Commonwealth government pursuant to the *Basin Plan*.<sup>13</sup>

The two key instruments which regulate the MDB today are the 2008 Murray-Darling Basin Agreement ('MDB Agreement')<sup>14</sup> and the 2012 *Basin Plan*. The MDB Agreement was entered into between the Basin states and the Commonwealth in 2008 to 'promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Murray-Darling Basin' and to 'give effect to the Basin Plan, the Water Act and State water entitlements'.<sup>15</sup> The MDB Agreement established the Ministerial Council

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<sup>8</sup> *Water Act* s 3(d)(i).

<sup>9</sup> *Ibid* s 171.

<sup>10</sup> *Ibid* s 41.

<sup>11</sup> *Ibid* s 172.

<sup>12</sup> *Ibid* s 52A.

<sup>13</sup> *Ibid* ss 104, 105.

<sup>14</sup> *Ibid* sch 1.

<sup>15</sup> *Ibid* sch 1 cl 1.

which comprises ministers from each of the Basin states and the Commonwealth and determines outcomes on major policies in relation to the management of the MDB.<sup>16</sup> The MDB Agreement also includes provisions relating to the distribution of water in extreme circumstances and ensuring critical human water needs.<sup>17</sup> Crucially, the MDB Agreement has imposed long-term caps on the amount of water that can be diverted from ‘designated river valleys’ within the Basin states.<sup>18</sup> Basin states have a duty to report to the MDBA on compliance with the caps on an annual basis.

The *Basin Plan*, a legislative instrument made pursuant to the *Water Act*, came into force in November 2012 and outlines a new water accounting and compliance framework based on long-term average sustainable diversion limits (‘SDLs’).<sup>19</sup> SDLs represent the maximum long-term annual average quantities of water that can be taken on a sustainable basis from the Basin as a whole and each water resource plan area.<sup>20</sup> Basin states must prepare water resource plans for accreditation by the Commonwealth Minister for Agriculture that identify both surface water and groundwater SDL resource units for each plan area.<sup>21</sup> SDLs must reflect ‘an environmentally sustainable level of take’.<sup>22</sup> The MDBA determined the total surface water SDL for the MDB to be 10,873 gigalitres per year.<sup>23</sup> To achieve this level of take, for environmental purposes 2,750 gigalitres per year would need to be recovered from the 2009 baseline diversion level.<sup>24</sup> This framework was intended to

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<sup>16</sup> MDB Agreement cl 7-9. The MDB Agreement also established the Basin Officials Committee which comprises officials from each of the Basin states and the Commonwealth and advises the Ministerial Council.

<sup>17</sup> MDB Agreement cl 131-4.

<sup>18</sup> MDB Agreement sch E.

<sup>19</sup> Murray-Darling Basin Authority, *Transitioning from the Cap to Sustainable Diversion Limits* (Australian Government) <<https://www.mdba.gov.au/basin-plan-roll-out/sustainable-diversion-limits/transitioning-cap-sustainable-diversion-limits>> [accessed 1 July 2019]; Murray-Darling Basin Authority, *Developing the Basin Plan* (Australian Government) <<https://www.mdba.gov.au/basin-plan-roll-out/basin-plan/developing-basin-plan>> [accessed 1 July 2019]; *Basin Plan* s 6.04.

<sup>20</sup> *Water Act* s 22(1) item 6.

<sup>21</sup> *Ibid* ss 22(1) item 11, 53; see *Basin Plan* ch 10 pt 2, sch 2.

<sup>22</sup> *Water Act* s 23.

<sup>23</sup> Murray-Darling Basin Authority, ‘Discover Surface Water’ (Australian Government) <<https://www.mdba.gov.au/discover-basin/water/discover-surface-water>> [accessed 1 July 2019].

<sup>24</sup> *Ibid*.

come into force on 1 July 2019<sup>25</sup> but has yet to occur as the accreditation of water resource plans has been delayed.<sup>26</sup> The MDBA must establish a register of take for each SDL resource unit to determine for each water accounting period whether there has been compliance with the SDLs.<sup>27</sup> The register will commence on the first water accounting period for each SDL resource unit after 30 June 2019.

In addition to the SDL framework, the *Basin Plan* sets out an environmental watering plan which specifies the overall environmental objectives of the MDB, targets by which to measure progress towards achieving those objectives, and a framework for planned environmental water (water preserved for the purpose of achieving environmental outcomes).<sup>28</sup> A water quality and salinity management plan is also established which outlines the key causes of water quality degradation in the MDB, water quality objectives for the MDB and water quality targets.<sup>29</sup>

The *Basin Plan* places various obligations on Basin states particularly in relation to water resource plan requirements and reporting. First, water resource plans must include rules to ensure that the quantity of water taken from each SDL resource unit for consumptive use in a water accounting period beginning on or after 1 July 2019 is less than the annual permitted take.<sup>30</sup> They must also provide for environmental water in a way that is consistent with the environmental watering plan and contributes to the achievement of the environmental objectives of the MDB.<sup>31</sup> Secondly, the Basin states must report to the MDBA on the level of water taken in each water resource plan area compared to that permitted to be taken, an assessment of compliance with long-term annual diversion limits, the achievement of

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<sup>25</sup> Ibid s 6.04(1). However, since 2012 Basin states have been required to report on water take in each SDL resource unit: Murray-Darling Basin Authority, *Transitioning from the Cap to Sustainable Diversion Limits* (Australian Government) <<https://www.mdba.gov.au/basin-plan-roll-out/sustainable-diversion-limits/transitioning-cap-sustainable-diversion-limits>> [accessed 1 July 2019].

<sup>26</sup> The Commonwealth Minister for Agriculture has granted extensions for various proposed plans to be given to the MDBA by 31 December 2019: Department of Agriculture, *Murray-Darling Basin Plan* (Australian Government) <<http://agriculture.gov.au/water/mdb/basin-plan>> [accessed 1 July 2019].

<sup>27</sup> *Basin Plan* s 6.08.

<sup>28</sup> Ibid s 8.01.

<sup>29</sup> Ibid s 9.01.

<sup>30</sup> Ibid s 10.11.

<sup>31</sup> Ibid s 10.26. See ch 8 pt 2 for the environmental objectives.

environmental outcomes, progress towards water quality targets, and compliance with water resource plans.<sup>32</sup>

### **South Australian Murray-Darling Basin Royal Commission**

The South Australian government established the Murray-Darling Basin Royal Commission in January 2018. The terms of reference included whether the implementation of the *Basin Plan* is likely to achieve the objects of the *Water Act* and whether the enforcement and compliance powers under the *Water Act* are adequate to prevent and address non-compliance with it and the *Basin Plan*. The Commissioner's report was published in January 2019 and found that there were major problems with the MDBA's approach to determining the Basin-wide environmentally sustainable level of take and its management in the MDB system amongst many other systemic problems identified. One positive finding made by the Royal Commission was that the compliance and enforcement framework under the *Water Act*, if properly implemented, is suitable to advance the objects of the Act and the *Basin Plan*.<sup>33</sup>

### **Managing the Murray-Darling Basin at the state/territory level**

All Basin states have a statutory framework that outlines rules that apply to specific areas for the granting of entitlements to take water, approval to use water for specific purposes and construct water-related works, and protecting a proportion of water for the environment. The relevant instrument in NSW is known as a water sharing plan.<sup>34</sup> These operational frameworks are being replaced by the water resource plans made by Basin states pursuant to the *Basin Plan* once accredited by the Commonwealth Minister for Agriculture.<sup>35</sup> While supposed to commence from 1 July

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<sup>32</sup> Ibid s 13.14, sch 12; *Water Act* s 71.

<sup>33</sup> Bret Walker SC Commissioner, 'Murray-Darling Basin Royal Commission Report' (Government of South Australia, 29 January 2019) 665 <<https://www.mdbrc.sa.gov.au/>>.

<sup>34</sup> See *Water Management Act 2000* (NSW) ss 19-21; NSW Department of Industry, *How Water Sharing Plans Work* <<https://www.industry.nsw.gov.au/water/plans-programs/water-sharing-plans/how-water-sharing-plans-work>> [accessed 1 July 2019]. Similar or equivalent frameworks in the other Basin states include: water allocation plans in South Australia; permissible consumptive volumes, sustainable water strategies and management plans in Victoria; water plans and water management protocols in Queensland; and water management areas and environmental flow guidelines in the ACT: Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths Australia, 2<sup>nd</sup> ed, 2018) 309-11.

<sup>35</sup> See NSW Department of Industry, *Basin Plan* <<https://www.industry.nsw.gov.au/water/basins-catchments/murray-darling/basin-plan>> [accessed 1 July 2019].

2019 the timeframe for most water resource plans has been extended to the end of 2019.

### **Review of administrative decisions by Basin state courts and tribunals**

As in most regulated natural resource regimes there are a number of avenues for review of administrative decisions. Review of administrative decisions are most commonly in the form of merits appeals concerning water licensing and approvals in courts or tribunals and where available judicial review proceedings. The two forms of review are markedly different in nature and outcome.

#### **Merits appeals**

In all Basin states, merits appeals lie to courts or tribunals by applicants in relation to decisions made by water authorities/departments such as authorising the taking of water, approvals to use water for specified purposes, and approvals for works related to water use.<sup>36</sup> In South Australia, standing to appeal is confined to the applicant of the particular approval.<sup>37</sup> In Queensland, it extends to any person who properly made a submission about the water licence application.<sup>38</sup> In NSW, there appears to be non-applicant appeal rights for various decisions but this may not apply in relation to the granting of access licences.<sup>39</sup> In Victoria and the ACT, standing extends to any person whose interests are affected by the decision.<sup>40</sup>

In Victoria, the phrase ‘any person whose interests are affected’ has been construed broadly. In *Paul v Goulburn Murray Rural Water Corporation*,<sup>41</sup> The Victorian Civil and Administrative Tribunal (VCAT) considered whether the applicant, who owned land three kilometres away from owners of land who had been granted a groundwater licence, could seek review of the decision to grant the licence. As the matters that had to be considered in granting the licence were broad (‘the existing and projected availability of water in the area’, ‘any adverse effect that the allocation ... is likely to have on existing authorised uses of water’ and ‘the need to protect the

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<sup>36</sup> See *Water Act 1989* (Vic) ss 64, 64AN, 83; *Water Management Act 2000* (NSW) s 368; *Water Act 2000* (Qld) ch 6 pt 3; *Natural Resources Management Act 2004* (SA) s 202; *Water Resources Act 2007* (ACT) s 96, sch 1.

<sup>37</sup> *Natural Resources Act 2004* (SA) s 202(1).

<sup>38</sup> *Water Act 2000* (Qld) ss 114, 851, 877.

<sup>39</sup> *Water Management Act 2000* (NSW) ss 62, 368. Access licences have effect until cancelled, s 69.

<sup>40</sup> See, for eg, *Water Act 1989* (Vic) s 64(1); *Water Resources Act 2007* (ACT) s 96(b).

<sup>41</sup> [2009] VCAT 970.

environment'), 'interests' in the context of this particular decision should be construed broadly. VCAT found that the applicant had standing to appeal the decision since he benefited from a groundwater bore in part of the same hydrogeological system as the nearby land.

A relatively large number of merits appeal cases have been heard in VCAT under the *Water Act 1989* (Vic)<sup>42</sup> and in the Environment, Resources and Development Court ('ERD Court') under the *Natural Resources Management Act 2004* (SA) compared to other Basin states.<sup>43</sup> Fewer cases have been heard in the Queensland Land Court under the *Water Act 2000* (Qld).<sup>44</sup> Only two have been heard in the NSW Land and Environment Court under the *Water Management Act 2000* (NSW)<sup>45</sup> and

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<sup>42</sup> See, for eg: *Senserrick v Melbourne Water* [2001] VCAT 1644; *Bates v Southern Rural Water* [2004] VCAT 2045; *Leonard v Southern Rural Water* [2007] VCAT 1562; *Castle v Southern Rural Water* [2008] VCAT 2440; *Foote v Melbourne Water* [2008] VCAT 2319; *Cox & Ors v Southern Rural Water Authority* [2009] VCAT 1001; *Conroy v Goulburn Murray Water & Ors* [2009] VCAT 2108; *Alanvale Pty Ltd & Anor v Southern Rural Water & Ors* [2010] VCAT 480; *Hosken v Goulburn Murray Water - Tatura* [2010] VCAT 776; *Paul v Goulburn Murray Water Corporation & Ors* [2010] VCAT 1755; *Norman v Goulburn Murray Water Authority - Tatura* [2010] VCAT 845; *Rigoni v Goulburn Murray Water & Anor (Correction)* [2011] VCAT 129; *Gattini & Partners v Knox City Council* [2011] VCAT 201; *Pomona Farms v Grampians Wimmera Mallee Water Authority* [2011] VCAT 1378; *Jerram v Southern Rural Water - Maffra* [2011] VCAT 2003.

<sup>43</sup> See, for eg: *Simes v Minister for Environment & Conservation* [2006] SAERDC 90; *Jack Sims & Son Pty Ltd v Minister for Environment And Conservation (No 2)* [2007] SAERDC 28; *Glengyle Proprietors P/L v Minister for Environment & Conservation* [2009] SAERDC 34; *Mayalukalily P/L v Minister for Sustainability, Environment & Conservation* [2016] SAERDC 9; *Falkenberg & Anor v Minister for Environment & Conservation* [2011] SAERDC 52; *Ka Loller Pty Ltd v The Minister for Environment And Conservation* [2012] SAERDC 62; *Lincoln Minerals Ltd v Minister for Sustainability, Environment & Conservation* [2014] SAERDC 33; *Fechner v Minister for Environment & Conservation (No 2)* [2015] SAERDC 34; *Blefari v Minister for Sustainability, Environment & Conservation* [2016] SAERDC 22; *Metjac Holdings P/L v Minister for Sustainability, Environment & Conservation* [2017] SAERDC 24.

<sup>44</sup> *Gorton v Department of Natural Resources and Mines* [2004] QLC 17; *Gallo & Ors v Chief Executive, Department of Environment and Resource Management* [2012] QLC 15 (which was appealed in *Gallo v Chief Executive, Department of Environment & Resource Management* [2013] QLAC 6); *Vanbrogue Pty Ltd v Department of Environment and Resource Management (No 2)* [2013] QLC 8; *Reed v Department of Natural Resources and Mines & Ors No 2* [2014] QLC 6.

<sup>45</sup> *Shaw & Anor v The Minister Administering the Water Management Act 2000 & Ors* [2013] NSWLEC 102; *Zizza v Minister Administering the Water Management Act 2000* [2014] NSWLEC 1017 (which was appealed on a question of law in *Zizza v Minister Administering the Water Management Act 2000* [2014] NSWLEC 170).

one case in the ACT Administrative Appeals Tribunal under the *Water Resources Act 2007* (ACT).<sup>46</sup>

It is relevant when considering review mechanisms to identify differences across the Basin states' legislative schemes in relation to what needs to be considered by the relevant decision-maker and by extension the court or tribunal considering the merits of a decision upon appeal when, for example, authorising the taking of water.

In Victoria, when deciding whether to grant a licence to take and use water under s 51 of the *Water Act 1989* (Vic), the Minister must consider 10 factors including the existing and projected availability and quality of water in the area; any adverse effect that the allocation or use of water is likely to have on existing authorised uses of water, a waterway or aquifer and the maintenance of the environmental water reserve in accordance with the environmental water reserve objective; the need to protect the environment; the conservation policy of the government; and government policies concerning the preferred allocation or use of water resources.<sup>47</sup>

In *Bates v Southern Rural Water*<sup>48</sup> the applicant challenged the Southern Rural Water Board's refusal of his licence application to take groundwater for irrigation from an aquifer that had been over-allocated. VCAT rejected the appeal in the absence of any declared permissible consumptive volume or approved management plan imposing a legal limit on water allocations. A similarly large licence application had been recently granted to the applicant's neighbour.<sup>49</sup> A key reason for VCAT's decision was that the over-allocation of water in the region and environmental damage to the relevant aquifer would be exacerbated if the licence application was granted.<sup>50</sup> Broad environmental impacts were also considered in *Alanvale Pty Ltd & Anor v Southern Rural Water & Ors*,<sup>51</sup> an appeal of a decision not to grant licences for groundwater extraction. VCAT considered the impacts of climate change on rainfall recharge of aquifers. Applying the precautionary principle, VCAT decided that

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<sup>46</sup> *Rashleigh and Environment Protection Authority* [2004] ACTAAT 31, which was appealed to the Supreme Court and the Court of Appeal (ACT) in *Rashleigh v Environment Protection Authority* [2005] ACTSC 18 and *Environment Protection Authority v Rashleigh* [2005] ACTCA 42 respectively.

<sup>47</sup> *Water Act 1989* (Vic) ss 40(1), 53(1)(b).

<sup>48</sup> [2004] VCAT 2045.

<sup>49</sup> Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths Australia, 2<sup>nd</sup> ed, 2018) 414.

<sup>50</sup> *Bates v Southern Rural Water* [2004] VCAT 2045, [26].

<sup>51</sup> [2010] VCAT 480. See also *Paul v Goulburn Murray Water Corporation & Ors* [2010] VCAT 1755.

the relevant licences should not be granted due to lack of certainty about the existing and future projected availability of groundwater within the relevant groundwater management area. Ultimately, VCAT focussed on the long-term sustainability of the relevant groundwater resources, the likely impact to water quality, and the impact on other existing authorised users in affirming the original decision.

In South Australia, the Minister's decision to grant a water licence must be made in the public interest and if it relates to a water resource within the MDB it must take into account the terms or requirements of the MDB Agreement.<sup>52</sup> A water allocation granted by the Minister must be consistent with the relevant water allocation plan.<sup>53</sup> In *Simes v Minister for Environment & Conservation*,<sup>54</sup> the applicant appealed the Minister's decision to refuse his water licence application. The ERD Court found that the allocation sought by the applicant would be consistent with the relevant water allocation plan, and there was no evidence indicating that the allocation would not be in the public interest.<sup>55</sup> Since the total volume of water (determined on a sustainable basis to be available for allocation) had not been allocated, it would not be in the public interest to refuse an application for a water allocation far less than the remaining volume permitted to be allocated. This decision was reversed by the Supreme Court in *Minister for Environment and Conservation v Simes*.<sup>56</sup> The fact that actual allocations were shown to be below the maximum available did not give the Minister or the ERD Court authority to make an additional allocation that was not authorised by the plan nor was consistent with the plan.<sup>57</sup> Further, the ERD Court erred in finding that the grant of a licence to the applicant would be in the public interest. It was inappropriate for the ERD Court to hold that, because nothing was put to suggest that an allocation would not be in the public interest, the making of an allocation would be in the public interest. The identification of positive reasons as to why the grant of a licence to the particular applicant was in the public interest and not just that of the applicant was required.

In NSW under the *Water Management Act 2000* (NSW) the factors to be considered by the Minister are general, suggesting the discretion is wider than in the Victorian and South Australian schemes. An access licence must not be granted unless the

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<sup>52</sup> *Natural Resources Management Act 2004* (SA) ss 147(5)-(6).

<sup>53</sup> *Ibid* s 151(1).

<sup>54</sup> [2006] SAERDC 90.

<sup>55</sup> *Ibid*, [27].

<sup>56</sup> [2007] SASC 248.

<sup>57</sup> *Ibid*, [47].

Minister is satisfied that 'adequate arrangements are in force to ensure that no more than minimal harm will be done to any water source as a consequence of water being taken from the water source under the licence'.<sup>58</sup> Further, it is the duty of all persons exercising functions under the *Water Management Act 2000* (NSW) to take all reasonable steps to do so in accordance with and so as to promote the water management principles under the Act, and give effect to the State Water Management Outcomes Plan ('SWMOP').<sup>59</sup> The water management principles include that water quality should be protected and enhanced where possible; the cumulative impacts of water management licences and approvals and other activities on water sources and their dependent ecosystems should be considered and minimised; and the social and economic benefits to the community should be maximised.<sup>60</sup>

In *Zizza v Minister Administering the Water Management Act 2000*,<sup>61</sup> an appeal of the NSW Office of Water's refusal to approve a water supply work and water use application, a commissioner of the NSW Land and Environment Court had to decide whether the proposal fulfilled the objects and adhered to the water management principles of the *Water Management Act 2000* (NSW).<sup>62</sup> The commissioner found the volume of water to be extracted was a relevant consideration pursuant to s 96(b) of the *Water Management Act 2000* (NSW). The commissioner found that the volume of water to be taken was excessive given that the purpose for water extraction was an ornamental lake. Ultimately, the commissioner was not satisfied that the proposal was consistent with the water management principles, failed to minimise the cumulative impacts of water management licences and approvals, and that the proposal failed to minimise effects on dependent ecosystems.

In Queensland, the Chief Executive in deciding whether to grant or refuse a water licence application under the *Water Act 2000* (Qld) must consider the relevant water plan, the long-term average sustainable diversion limits included in the *Basin Plan* (if the application relates to the MDB), and all submissions made about the application.<sup>63</sup> In *Gallo & Ors v Chief Executive, Department of Environment and*

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<sup>58</sup> *Water Management Act 2000* (NSW) s 63(2)(b).

<sup>59</sup> *Ibid* s 9(1).

<sup>60</sup> *Ibid* s 5(2).

<sup>61</sup> [2014] NSWLEC 1017.

<sup>62</sup> *Ibid*, [73].

<sup>63</sup> *Water Act 2000* (Qld) s 113.

*Resource Management*,<sup>64</sup> the applicants appealed the respondent's decision to grant them a limited allocation to take underground water for irrigation, stock and domestic supply purposes up to an entitlement of 130 megalitres per annum. The licence application had sought 990 megalitres per annum for that purpose. The Land Court dismissed the appeal, which the applicants appealed to the Land Appeal Court.<sup>65</sup> The principal issues before the Land Court and the Land Appeal Court were whether the appellants had provided sufficient information in their licence application as to their proposed use of any water allocation and the volume of water to be taken.

The Land Appeal Court allowed the appeal and directed the respondent to issue a licence to the appellants to take 267 megalitres per annum.<sup>66</sup> Consideration of all the evidence as to whether it was sufficient to discharge the requirements of the *Water Act 2000* (Qld) and any relevant provision of any applicable water resource plan was required.<sup>67</sup> Merely because the appellants did not complete the application form fully did not mean that they automatically failed.

In the ACT, under the *Water Resources Act 2007* (ACT) the Environment Protection Authority must not issue a licence to take water or a waterway work licence, for example, unless satisfied it is appropriate to do so having regard to the applicant's environmental record and whether issuing the licence may adversely affect the environmental flows for a particular waterway or aquifer that are required under the environmental flow guidelines or adversely affect the environment in any other way or the interests of other water users.<sup>68</sup> In *Rashleigh and Environment Protection Authority*,<sup>69</sup> the Administrative Appeal Tribunal's decision to uphold the Environment Protection Authority's refusal of a licence application to take water from a bore centred on its consideration of whether the grant of the licence would adversely affect the environmental flows of the particular aquifer and have an adverse effect on the environment, and the application of the precautionary principle.<sup>70</sup>

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<sup>64</sup> [2012] QLC 15.

<sup>65</sup> *Gallo & Ors v Chief Executive, Department of Environment and Resource Management* [2013] QLAC 6.

<sup>66</sup> *Ibid*, [99].

<sup>67</sup> *Ibid*, [195].

<sup>68</sup> *Water Resources Act 2007* (ACT) ss 30(3), 44(2).

<sup>69</sup> [2004] ACTAAT 31.

<sup>70</sup> *Ibid*, [70]-[88]. This decision was reversed by the Supreme Court in *Rashleigh v Environment Protection Authority* [2005] ACTSC 18; the Administrative Appeal Tribunal's decision was reinstated by the Court of Appeal (ACT) in *Environment Protection Authority v Rashleigh* [2005] ACTCA 42.

There are likely to be a number of factors influencing why jurisdictions have more or less merits appeals such as the legal nature of the approval, the extent of water allocation made and the extent of third party appeal provisions to name a few. Very few if any appeals have been commenced in NSW. This may be because in NSW water access licences are issued in perpetuity, meaning until they are cancelled. The allocation of water occurs under an annual water allocation process for water access licence holders. A majority of water access licences were transitioned or converted to water access licences when the former scheme under the *Water Act 1912* was changed. In contrast, a number of appeals have been heard in VCAT and refused in light of the numerous environmental protection requirements required to be considered. The Victorian requirements are far more detailed than any of the other Basin state regimes.

### **Judicial review of water sharing plans**

In NSW there have been several challenges to water sharing plans in judicial review proceedings over a number of years. Pursuant to s 336 of the *Water Management Act 2000* (NSW) any person may bring proceedings in the NSW Land and Environment Court for an order to remedy or restrain a breach of Act.<sup>71</sup> Section 47 of the Act specifies the time limit for commencing judicial review proceedings challenging water management plans, which includes water sharing plans.<sup>72</sup> Applicants in judicial review proceedings in NSW have relied on various well-established grounds (illegality, irrationality and procedural fairness) in challenging water sharing plans. There have been no challenges to equivalent instruments in the other Basin states identified to date.

#### *Illegality*

A water sharing plan made by the Minister under s 50 of the *Water Management Act 2000* (NSW) 'must in general terms deal with any matters that a management plan is required to deal with', which are outlined in s 20. Under s 45(1)(a), the Minister may amend a water sharing plan if, among other things, they are satisfied that it is in the public interest to do so. Further, it is the duty of a minister when making or amending water sharing plans 'to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles' of the Act.<sup>73</sup> In relation to water sharing specifically, the principles include the protection of water resources and dependent ecosystems, and the protection of basic landholder rights. Between these

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<sup>71</sup> *Water Management Act 2000* (NSW) s 336.

<sup>72</sup> *Ibid* s 15.

<sup>73</sup> *Ibid* s 9.

two principles, the former must be given priority.<sup>74</sup> The Minister must also have due regard to the socio-economic impacts of the proposals considered for inclusion in a draft plan.<sup>75</sup> Water sharing plans must also be made 'in a manner which gives effect to the State Water Management Outcomes Plan'.<sup>76</sup> These statutory requirements have formed the basis of judicial review proceedings challenging water sharing plans in NSW.

In *Murrumbidgee Horticulture Council v Minister for Land and Water (NSW)*,<sup>77</sup> the Murrumbidgee Horticulture Council, which represented horticulturalists and high security irrigators in the Murrumbidgee region, challenged the validity of the relevant water sharing plan because a provision prohibited the trade of high security licence annual allocations after 1 September in any water year. Consequently this type of trading was confined to the first two months of the water year. The purpose of this limit was to manage historical issues of over-allocation. The Council argued that this provision was beyond the power conferred on the Minister of the *Water Management Act 2000 (NSW)* to make water sharing plans. First, it was inconsistent with s 58 of the Act which sets the water access priorities of different licences. Secondly, it was inconsistent with the target of the SWMOP that all share components of access licences be tradeable. Thirdly, it did not comply with access licence dealing principles made by ministerial order pursuant to the *Water Management Act 2000 (NSW)*, which has the objective to facilitate the maximisation of 'social and economic benefits to the community of access licences'.<sup>78</sup>

I rejected the Council's argument that time limits on dealings in water allocations to high security access licence holders in the plan was an infringement of the priorities in s 58.<sup>79</sup> There was no unfettered right to deal in water allocations specified in the Act. Further, there was no breach of the statutory requirement for the plan to be consistent with the SWMOP.<sup>80</sup> The requirement that the plan 'be consistent with' the SWMOP means that the plan must be in general terms consistent with the whole of

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<sup>74</sup> Ibid s 9(1)(b).

<sup>75</sup> Ibid s 18(1); *Arnold v Minister Administering the Water Management Act 2000* [2014] NSWCA 386, [14] (Tobias AJA), with Meagher and Barrett JJA agreeing at [1] and [2] respectively.

<sup>76</sup> Ibid s 9(2).

<sup>77</sup> (2003) 127 LGERA 450.

<sup>78</sup> Ibid, [32].

<sup>79</sup> Ibid, [41]-[47].

<sup>80</sup> Ibid, [87]-[89].

the SWMOP. Plans must 'in general terms' deal with any matter that a plan is required to deal with. The drafting of the SWMOP did not suggest that the targets were intended to have a 'binding rule-like quality such that a breach would give rise to invalidity'. Since other targets dealing with environmental objectives were met by the plan, it could not be said in this case that the plan was inconsistent with the SWMOP. Lastly, I held that a water sharing plan should comply in general terms with the access licence dealing principles.<sup>81</sup> The social and economic benefits objective was subject to other principles set out in the ministerial order including a provision regarding impact on water sources. In this case the Minister had sought through the relevant provision of the plan to reduce water extraction in the MDB for environmental purposes which satisfied these other principles in the ministerial order.

Regarding the duty imposed on the Minister 'to take all reasonable steps' to promote the water management principles of the *Water Management Act 2000* (NSW), Molesworth AJ stated in *Randren House Pty Ltd v Water Administration Ministerial Corporation (No 4)*:<sup>82</sup>

The only qualitative variable in these provisions is the reference to reasonableness - to take all reasonable steps. Whereas a duty to take 'all' reasonable steps is stronger than just a duty to take reasonable steps, nevertheless, the pivotal test of proper adherence will always come back to what was reasonable in the relevant circumstances.

In that case his Honour rejected a challenge to the relevant water sharing plan on the basis that it was made in breach of the duty to act in accordance with the water management principles. This duty does not require the classification of every water source according to the risk it might face, nor that every decision must equally protect and restore every dependent ecosystem. In this case therefore the degradation of a water body following the approval of the relevant water sharing plan did not invalidate this decision. As Molesworth AJ observed, '[e]very decision, however correctly made, cannot be expected to achieve perfect outcomes. An imperfect outcome is not an indication that the decision-making process was flawed'.<sup>83</sup>

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<sup>81</sup> Ibid, [48]-[82].

<sup>82</sup> [2019] NSWLEC 5, [294].

<sup>83</sup> Ibid, [423].

Similarly, Biscoe J held in *Arnold v Minister Administering the Water Management Act 2000 (No 6)*<sup>84</sup> that the Minister:

is not bound to *achieve* any end to which the water management principles are directed, being principles that need to be balanced to some extent. That is apparent from the language of 'take all reasonable steps' in s 9(1)(a) and the introductory word 'Generally' in s 5(2) [which lists the general water management principles].

In that case his Honour rejected a challenge to the relevant water sharing plan on the ground that in order to comply with s 9, a numerical groundwater model was required because this was the only way to predict the cumulative impacts of groundwater extraction on the groundwater resource (the consideration and minimisation of which is a water management principle under s 5(2)(d)).<sup>85</sup>

On appeal the NSW Court of Appeal affirmed Biscoe J's finding that the above provisions did not create a mandatory requirement that before the making of a water sharing plan which provides for a sustainable yield or recharge, the Minister is bound to consider a sound and reliable numerical hydrogeological model.<sup>86</sup> The objects and water management principles identified in ss 3 and 5 of the Act are stated in far too general terms to give rise to a mandatory obligation of that kind. Another ground of appeal was whether the Minister failed to consider the socio-economic impacts of proposals considered for inclusion in the draft plan by neglecting to undertake a formal socio-economic study or a farm-by-farm analysis of the proposed plan. The Court of Appeal held that the Minister was obliged under ss 18(1) and 5(2)(g) to have due regard to the socio-economic impacts of the proposal considered for inclusion in the plan.<sup>87</sup> The evidence established that the Minister or his delegates had considered an extensive list of matters with respect to the socio-economic impact of the proposals considered for inclusion in the plan.<sup>88</sup> The failure to conduct a socio-economic study on a farm-by-farm basis was not a failure to comply with the obligation to consider the socio-economic impacts of proposals considered for inclusion in the plan. Such a study was one way by which the impacts of the proposals could be measured, but it was not the only way. The Minister was only

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<sup>84</sup> [2013] NSWLEC 73, [180].

<sup>85</sup> *Ibid*, [164].

<sup>86</sup> *Arnold v Minister Administering the Water Management Act 2000* [2014] NSWCA 386 [84]-[87] (Tobias AJA), with Meagher and Barrett JJA agreeing at [1] and [2] respectively.

<sup>87</sup> *Ibid* [14] (Tobias AJA), with Meagher and Barrett JJA agreeing at [1] and [2] respectively.

<sup>88</sup> *Ibid* [161]-[165] (Tobias AJA), with Meagher and Barrett JJA agreeing at [1] and [2] respectively.

required to have 'due regard' to the socio-economic impacts; he was not required to eliminate them.

### *Irrationality*

A decision made in the exercise of a statutory power is unreasonable in a legal sense when it lacks an evident and intelligible justification.<sup>89</sup> That may be so where a decision is one which no reasonable person could have arrived at.<sup>90</sup> If probative evidence can give rise to different processes of reasoning and if reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said to be irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.<sup>91</sup>

In *Murrumbidgee Groundwater Preservation Association v Minister for Natural Resources*,<sup>92</sup> a groundwater sharing plan was challenged, amongst other grounds, as irrational because it made a proportionate reduction of all entitlements, regardless of the history of extraction and the variable sustainable yields from the water resource in different parts of the management area.<sup>93</sup> Upholding the NSW Land and Environment Court's decision, the NSW Court of Appeal held that nothing in the nature, scope and purpose of the *Water Management Act 2000* (NSW) prevented the Minister from implementing a scheme which operated to the detriment of some persons, and to the advantage of others, in a manner not determined by availability of water but by broader considerations of what the Minister regarded as equitable.<sup>94</sup>

In *Arnold v Minister Administering the Water Management Act 2000*<sup>95</sup> (referred to above), the NSW Court of Appeal rejected the applicant's ground that the Minister's decision to make the plan was manifestly unreasonable because the extraction limit in the plan was based on a model which was so flawed and unreliable that it was

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<sup>89</sup> *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332, 367 [76].

<sup>90</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.

<sup>91</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, [131].

<sup>92</sup> (2005) 138 LGERA 11.

<sup>93</sup> Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths Australia, 2<sup>nd</sup> ed, 2018) 411.

<sup>94</sup> *Murrumbidgee Groundwater Preservation Association v Minister for Natural Resources* (2005)138 LGERA 11, [153] (Spigelman CJ), [156] (Beazley JA), [157] (Tobias JA).

<sup>95</sup> [2014] NSWCA 386.

irrational to adopt it.<sup>96</sup> While the model was generally in conformity with best practice as the estimated sustainable yield values were ‘roughly in the correct order’ and could be adopted as interim measures, the applicants’ expert stated that it was unreasonable and irrational to use the model without first calibrating it to address the known issues. The NSW Court of Appeal found that it was open to the NSW Land and Environment Court to accept the expert evidence that considered the model to be of some value, the model had some probative value and was capable of use in determining an appropriate extraction limit.<sup>97</sup>

### *Procedural fairness*

In *Harvey and Tubbo v Minister Administering the Water Management Act 2000*<sup>98</sup> the applicants challenged an amendment to a water sharing plan which abandoned the proportionate reduction of all entitlements in favour of a policy of reductions based on historical extraction.<sup>99</sup> Those licensees who had a history of extraction greater than their new entitlement could still receive supplementary water access licences, which would reduce to zero over the life of the plan. A special circumstances schedule determined whether licensees could receive supplementary water access licences. The applicants argued that the Minister owed them a duty of procedural fairness because the inclusion of the special circumstances schedule identified particular individuals and treated them in a particular way in relation to important entitlements. The applicants were effectively invited to have their individual positions dealt with as potentially constituting special circumstances too.<sup>100</sup> They argued that they had been denied procedural fairness because they were not properly informed about the nature of the consultation exercise and criteria that would be applied in determining the schedule of special circumstances licensees. Accordingly, their submissions did not address the criteria and they were not given the opportunity to respond to the adverse conclusions drawn from these.

Rejecting these arguments, Jagot J held that s 45(1)(a) required consideration of the interests of the public generally rather than the interests of any individual or

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<sup>96</sup> Ibid, [30].

<sup>97</sup> Ibid, [107]-[108].

<sup>98</sup> (2008) 160 LGERA 50.

<sup>99</sup> Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths Australia, 2<sup>nd</sup> ed, 2018) 412.

<sup>100</sup> Ibid, citing *Harvey and Tubbo v Minister Administering the Water Management Act 2000* (2008) 160 LGERA 50, [84].

particular group of individuals.<sup>101</sup> The legislature was more likely to intend that procedural fairness applies to the exercise of a power that singles out individuals and affects their interests in a manner differently from the way in which the interests of the public at large are affected.<sup>102</sup> The power of the Minister under s 45(1)(a) to amend a water sharing plan at any time 'if satisfied it is in the public interest to do so' did not attract the duty of procedural fairness.<sup>103</sup> The exercise of this power 'does not involve an impact on individuals in the requisite direct and immediate sense ... [a]ny amendment to a plan will necessarily impact on all people with any interest in the water source as a class even though the impact itself might be different'. This was so even though the plan was expressed to operate in a particular manner in respect of certain licensees named in the special circumstances schedule.<sup>104</sup> Because a plan set a cap on the overall level of water extraction and then shared that resource between different licensees, a variation in the allocation of water to one licensee necessarily meant that there would have to be a variation in the allocation of water to others.

On appeal,<sup>105</sup> the appellants first argued that they were denied procedural fairness with respect to the adoption of the criterion for inclusion in and exclusion from the special circumstances schedule. Secondly, they argued that they were denied procedural fairness with respect to the decision as to whether or not they satisfied the criterion and, accordingly, ought to have been included in the schedule. The NSW Court of Appeal found it unnecessary to determine the case on the basis of the existence of the duty to afford procedural fairness.<sup>106</sup> The relevant question was what the duty to act fairly required in the circumstances of the case.<sup>107</sup> In the context of the statutory scheme as a whole and the circumstances of the case, fairness did not require the appellants to be given a hearing as to the adoption of the 'criterion' or

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<sup>101</sup> *Harvey and Tubbo v Minister Administering the Water Management Act 2000* (2008) 160 LGERA 50, [74], followed in *NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000*; *Arnold v Minister Administering the Water Management Act 2000* [2011] NSWLEC 51, [43].

<sup>102</sup> *Harvey and Tubbo v Minister Administering the Water Management Act 2000* (2008) 160 LGERA 50, [103].

<sup>103</sup> *Ibid*, [200].

<sup>104</sup> Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths Australia, 2<sup>nd</sup> ed, 2018) 337.

<sup>105</sup> *Tubbo Pty Ltd v Minister Administering the Water Management Act 2008* (2008) 302 ALR 299.

<sup>106</sup> *Ibid*, [58].

<sup>107</sup> *Ibid*, [63]-[65].

as to whether the 'criterion' applied to a particular licence holder.<sup>108</sup> In the application of the test of 'special circumstances', no individual component of the decision-making process could be severed from the entirety of the polycentric decision-making process, involving interconnected and incommensurable interests in the context of the public interest.<sup>109</sup> The appellants had the opportunity to air any grievance. Fairness did not require the appellants to be afforded further opportunities as it would risk an infinite regression of counter disputation.<sup>110</sup>

Gardner et al argue that the specialised ministerial planning powers under the *Water Management Act 2000* (NSW) to make and amend plans have been given a broad effect by judicial interpretation, unconfined by a common law duty of procedural fairness despite the highly discretionary nature of these powers.<sup>111</sup>

Broadly similar provisions exist in the legislative schemes of other Basin states. For example, under the *Natural Resources Management Act 2004* (SA) water allocation plans 'should be consistent with the other parts of the regional NRM [natural resource management] plan',<sup>112</sup> which among other things set strategic directions for all natural resource management activities to be undertaken in relation to the particular region.<sup>113</sup> Further, if the taking and/or use of water from a water resource is likely to have a detrimental effect on the quantity or quality of water that is available from another water resource, the water allocation plan for the first mentioned resource must take into account the needs of persons and ecosystems using water from the other resource as well as the needs of persons and ecosystems using water from its own resource.<sup>114</sup> To the extent that a natural resource management plan or water allocation plan applies to the MDB, it should be consistent with the terms of requirements of the MDB Agreement and any relevant provisions of the *Basin Plan*.<sup>115</sup>

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<sup>108</sup> Ibid, [73], [86].

<sup>109</sup> Ibid, [75]-[79].

<sup>110</sup> Ibid, [84], [88], [90].

<sup>111</sup> Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths Australia, 2<sup>nd</sup> ed, 2018) 339.

<sup>112</sup> *Natural Resources Management Act 2004* (SA) s 76(5).

<sup>113</sup> Ibid s 75.

<sup>114</sup> Ibid s 76(6).

<sup>115</sup> Ibid s 87.

In contrast, under the *Water Act 1989* (Vic) the Minister's discretion to declare permissible consumptive volumes (the total volume of surface and/or groundwater that may be taken in a particular area) is unqualified.<sup>116</sup> However, when sustainable water strategies are prepared for regions of Victoria they must provide for specific forms of strategic planning of the use of water resources including the identification of threats to the reliability of the supply and quality of water.<sup>117</sup> Strategic water strategies must also take into account the results of any long-term water resources assessment undertaken pursuant to the Act and various principles set out in the *Environment Protection Act 1970* (Vic) including the principle of integration of economic, social and environmental considerations, the principle of intergenerational equity and the precautionary principle. In relation to management plans, a consultative committee appointed under the *Water Act 1989* (Vic) must consider any comments made by interested persons and make appropriate changes to the draft management plan.<sup>118</sup>

In Queensland, the Minister must consider various factors when making a draft water plan including regional plans, specified environmental values, the *Basin Plan* (if the draft water plan is within the MDB), the public interest, the results of any public consultation undertaken, and the water-related effects of climate change on water availability.<sup>119</sup> Particular factors must also be considered when making a draft water use plan.<sup>120</sup>

*Schwennesen v Minister for Environment and Resource Management*<sup>121</sup> was an appeal of the primary judge's finding that the Minister's determination of the appellant's rights and conditions attaching to his water allocations in relation to the governor in council's decision to make a resource operation plan was not a decision 'of administrative character'. Therefore the appellant was not entitled to make an application for the reasons for the decision pursuant to the *Judicial Review Act 1991* (Qld). The Court of Appeal (Qld) dismissed the appeal, finding that the Minister's decision was not 'of administrative character' for several reasons. First, the prescribed content of a resource operation plan did not focus on any individual interest. Resource operation plans have a broad scope in that they regulate the long

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<sup>116</sup> *Water Act 1989* (Vic) s 22A.

<sup>117</sup> *Ibid* s 22C.

<sup>118</sup> *Ibid* s 31(1A).

<sup>119</sup> *Water Act 2000* (Qld) s 45.

<sup>120</sup> *Ibid* s 60.

<sup>121</sup> [2010] QCA 340.

term use of the relevant water resource ‘to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water’.<sup>122</sup> Within the large area the plan applied to, it regulated among other things the purposes for which water taken under a water allocation could be used and all future applications for water licences. The Court found these provisions to be legislative in character, providing an extensive series of new rules of general application in a large geographical area for subsequent implementation by the executive. Secondly, the legislative character of the plan was indicated by the fact that the Act allowed for the amendments of resource operations plans.<sup>123</sup> Thirdly, the binding legal effect of the plan indicated that the decision was of legislative character.<sup>124</sup>

In the ACT, when determining the total amount of surface and ground water that is available for taking in water management areas, the Minister must take into account the environmental flow guidelines and the total resources of the territory.<sup>125</sup>

The question of why judicial review challenges to the equivalent of water sharing plans in jurisdictions other than NSW have not been made arises. Speculation leads me to suggest the absence of a broad standing provision such as s 336 in the *Water Management Act 2000* (NSW) and the express provision in s 47 concerning judicial review proceedings. The equivalent of water sharing plans in other jurisdictions may have a different legal character. In Queensland in *Schwennesen* the resource operation plan was considered legislative rather than administrative in character and not amenable to review under the *Judicial Review Act 1991* (Qld).

### **Notification of applications**

In NSW, South Australia, Queensland and the ACT, there is an obligation to advertise to the public applications to take and use water for example and/or notify objectors of the determination of the application.<sup>126</sup> However, in Victoria there is no such obligation. Providing notice of an application is at the discretion of the water

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<sup>122</sup> Ibid, [14].

<sup>123</sup> Ibid, [24].

<sup>124</sup> Ibid, [29].

<sup>125</sup> *Water Resources Act 2007* (ACT) s 17(2).

<sup>126</sup> *Water Management Act 2000* (NSW) ss 61(3), 64; *Water Act 2000* (Qld) ss 112, 114(7); *Natural Resources Management Act 2004* (SA) s 146(4)-(5); *Water Resources Act 2007* (ACT) s 95, sch 1 (the authority must also take reasonable steps to give a reviewable decision notice to any person in addition to the applicant whose interests are affected by the decision, see *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 67A).

authority.<sup>127</sup> Further, there is no obligation imposed on the water authority to give notice of its decision to anyone. This has implications for access to justice for those wishing to object to such applications.

These procedural issues were highlighted in *Conroy v Goulburn Murray Water & Ors*,<sup>128</sup> where the relevant water authority did not give notice to objectors of its decision to grant licences for the construction of a bore and to take and use groundwater until well after the expiry of the 28 day period from the date of the decision within which an application for review must be lodged under s 64 of the *Water Act 1989* (Vic). An application for an extension of time within which to commence the proceeding under s 126 of the *Victorian Civil and Administrative Act 1998* was refused by VCAT for the following reasons. First, a significant length of time (18 months) elapsed since the applicant first put in their objection. There was no evidence that they had been proactive in any way in terms of following up on that objection or seeking to find out what had occurred.<sup>129</sup> Secondly, if the application was granted the proponent would suffer prejudice,<sup>130</sup> such as significant financial loss associated with investment made in the bore and irrigation infrastructure, and consequential losses in operating a farming enterprise. Thirdly, there is a strong public policy interest in providing certainty to licence and permit holders which is evident by cl 65 of Sch 1 of the *Victorian Civil and Administrative Act 1998*. This states that VCAT must not extend the time for commencing a proceeding under a planning enactment if a permit, licence or works approval has been issued to any person on or after the expiration of the time appointed for lodging an application for review of the decision to grant that permit, licence or approval.

VCAT observed that there were procedural issues relating to the *Water Act 1989* (Vic) which necessitated legislative reform. Since providing notice of an application is at the discretion of the relevant water authority, a person's right of review may be compromised by a failure to give notice in time for a person to exercise their right (which occurred in this case). This is particularly an issue because rights of review are not limited to licence applicants or objectors (they are available to a person whose interests are affected), and there is growing interest by people in the grant of new licences and the construction of new bores given the pressures on water resources.

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<sup>127</sup> *Water Act 1989* (Vic) s 49.

<sup>128</sup> [2009] VCAT 2108.

<sup>129</sup> *Ibid*, [31].

<sup>130</sup> *Ibid*, [32].

## **Enforcement**

Basin state legislative schemes are focussed on ensuring compliance by individuals and corporate entities. The 2019 South Australian Royal Commission report concluded that Basin states' water legislation 'generally appears sufficiently robust to provide for a range of enforcement options against individuals for instances of non-compliance'.<sup>131</sup> The report also observed a high degree of inconsistency between Basin states regarding the range of offence provisions and the use of administrative orders. The report suggested legislative reform to increase uniformity across the different enforcement schemes. Basin states' monitoring capacity and compliance culture are crucial to the achievement enforcement outcomes and these are highly variable.<sup>132</sup>

### **Civil enforcement by regulator**

A range of enforcement tools is available to Basin state regulatory authorities. These include administrative orders to prohibit water use and unlawful construction or use of water works, to protect the environment and generally ensure compliance with legislation.<sup>133</sup> It may be an offence to fail to comply with such an order.<sup>134</sup> Basin state authorities can also apply to the relevant court or tribunal to have these administrative orders enforced and for a range of other orders to be made, for example restraining a breach of legislation.<sup>135</sup>

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<sup>131</sup> Bret Walker SC Commissioner, 'Murray-Darling Basin Royal Commission Report' (Government of South Australia, 29 January 2019) 67 <<https://www.mdbrc.sa.gov.au/>>.

<sup>132</sup> Ibid 650. The MDBA compliance review published in November 2017 found significant variations between the Basin states regarding compliance culture, the level of resourcing, the extent of transparency and the clarity of their policy frameworks. For example, between 2012 to 2016, 94 percent of surface water was metered in South Australia compared to between 25 and 51 percent in the northern MDB (northern NSW and southern Queensland): Murray-Darling Basin Authority and Independent Review Panel, 'The Murray Darling Basin Water Compliance Review' (MDBA Publication No 44/17, November 2017) 12, 17.

<sup>133</sup> *Water Act 1989* (Vic) s 78; *Water Management Act 2000* (NSW) ss 324-7, 329, 330, 333; *Natural Resources Management Act 2004* (SA) ss 193, 195, 197; *Water Resources Act 2007* (ACT) ss 71-76.

<sup>134</sup> *Water Management Act 2000* (NSW) s 336C; *Natural Resources Management Act 2004* (SA) s 130(2); *Water Resources Act 2007* (ACT) s 771.

<sup>135</sup> *Water Management Act 2000* (NSW) ss 335, 336; *Water Act 2000* (Qld) s 784; *Natural Resources Management Act 2004* (SA) ss 201, 220.

## Citizen enforcement

In NSW, s 336 of the *Water Management Act 2000* (NSW) is being relied on in *Inland Rivers Network Incorporated v Harris and Others* in the NSW Land and Environment Court. The applicant community organisation has commenced proceedings seeking a declaration that the respondents during various time periods took water from the Barwon-Darling rivers in contravention of s 60A(4) of the *Water Management Act 2000* (NSW), being a volume of water in excess of that authorised to be taken under the relevant water access licence. The applicant is also seeking an order restraining the respondents from taking water otherwise than in accordance with the water access licence, and an order requiring them to return to the river system a large volume of water equivalent to what was taken. These proceedings are presently stayed pending the outcome of contested criminal proceedings in *Water NSW v Harris* referred to below.

In Queensland, a person may bring proceedings in the District Court for among other things an order to remedy or restrain the commission of an offence against the *Water Act 2000* (Qld).<sup>136</sup> A person may bring such a proceeding regardless of whether any right of that person has been infringed by the commission of the offence.

## Criminal enforcement

There are differences between legislative schemes in the Basin states but all broadly provide that it is an offence to take water unless authorised to do so,<sup>137</sup> contravene licence conditions,<sup>138</sup> use water without relevant approvals,<sup>139</sup> and construct water-related works without approval.<sup>140</sup> There are also offences relating to water metering such as meter tampering.<sup>141</sup> Criminal enforcement in NSW and Victoria is discussed below. Prosecutions have occurred in other Basin states but comprehensive

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<sup>136</sup> *Water Act 2000* (Qld) s 784.

<sup>137</sup> *Water Act 1989* (Vic) s 33E; *Water Management Act 2000* (NSW) s 60A; *Water Act 2000* (Qld) s 808; *Natural Resources Management Act 2004* (SA) s 127(1), (6); *Water Resources Act 2007* (ACT) s 77A.

<sup>138</sup> *Water Act 1989* (Vic) s 64AF; *Water Management Act 2000* (NSW) s 60B; *Water Resources Act 2007* (ACT) ss 28, 77A.

<sup>139</sup> *Water Act 1989* (Vic) s 64J; *Water Management Act 2000* (NSW) s 91A.

<sup>140</sup> *Water Act 1989* (Vic) s 75; *Water Management Act 2000* (NSW) ss 91B-D; *Natural Resources Management Act 2004* (SA) s 127(3), (6); *Water Resources Act 2007* (ACT) s 77C;

<sup>141</sup> *Water Management Act 2000* (NSW) ss 91H, 91I, 91IA, 91J, 91K; *Water Act 2000* (Qld) s 811; *Water Resources Act 2007* (ACT) s 77J.

research is difficult when most cases are heard in local or magistrates courts which do not publish judgments and/or the regulator does not provide public information on its enforcement activities as the Victorian Department of Environment, Land, Water and Planning does.

### *New South Wales*

The ABC's Four Corners program 'Pumped: Who's Benefitting from the Billions Spent on the Murray-Darling?' was aired on 24 July 2017 identifying significant community concern about lack of enforcement of water licence conditions by the Department of Industry and WaterNSW. An independent investigation commissioned by the Department of Industry into NSW water management and compliance was conducted by Ken Matthews. His final report was published on 24 November 2017.<sup>142</sup> After the publication of this report the Natural Resources Access Regulator ('NRAR') was established on 14 December 2017 as an independent regulator under the *Natural Resources Access Regulator Act 2017* (NSW) with complete carriage of compliance and enforcement of water management legislation in NSW.<sup>143</sup> Prior to the NRAR, enforcement of the *Water Management Act 2000* (NSW) was split between the Department of Industry and WaterNSW.<sup>144</sup>

According to NSW Land and Environment Court statistics, between January 2016 and July 2017 WaterNSW commenced five class 5 (summary criminal enforcement) proceedings. Between July 2017 and February 2019 (a similar period) WaterNSW and the NRAR commenced 30 class 5 proceedings, a substantial increase. More broadly, 69 class 5 summonses were filed between June 2009 and 2017 whilst 27 summonses were filed between 2018 and June 2019 (constituting 28 percent of all cases filed over the 10 year period).

The creation of the NRAR has resulted in a significant increase in the number of compliance officers working in the state.<sup>145</sup> Compared to 2017, in 2018 the NRAR

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<sup>142</sup> Ken Matthews, 'Independent Investigation into NSW Water Management and Compliance: Advice on Implementation' (Final Report, NSW Department of Industry, 24 November 2017) <[https://www.industry.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0019/131905/Matthews-final-report-NSW-water-management-and-compliance.pdf](https://www.industry.nsw.gov.au/__data/assets/pdf_file/0019/131905/Matthews-final-report-NSW-water-management-and-compliance.pdf)>.

<sup>143</sup> Department of Industry, 'About NRAR' <<https://www.industry.nsw.gov.au/natural-resources-access-regulator/about-nrar>> [accessed 2 March 2019].

<sup>144</sup> Ibid.

<sup>145</sup> Natural Resources Access Regulator, 'Compliance Outcomes: 2018 Compared with 2017' (NSW Department of Industry, March 2019) <[https://www.industry.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0011/227378/NRAR-compliance-outcomes-2018-compared-with-2017.pdf](https://www.industry.nsw.gov.au/__data/assets/pdf_file/0011/227378/NRAR-compliance-outcomes-2018-compared-with-2017.pdf)>.

received 70 percent more cases for investigation and finalised 80 percent more cases. Further, there were:

- five times as many allegations of unlawful water take received
- more than four times as many directions to remove unlawful water management works
- more than three times the number of penalty notices issued
- more than double the total number of enforcement actions determined

Interestingly when comparing 2018 to 2017, the NRAR expressly referred to the MDB in stating that there were approximately 110 percent more cases received for investigation, over 10 percent more cases finalised, and over 150 percent more enforcement actions were determined in the MDB.<sup>146</sup>

Two recent NSW Land and Environment Court cases reflect the greater focus of the regulator(s) in NSW on prosecuting. In *Water NSW v Harris* the defendant pleaded not guilty to two charges of contravening a condition of a water supply works and water use approval, an offence specified in s 91G(2) of the *Water Management Act 2000* (NSW). The alleged conduct occurred in Brewarrina. Judgment is reserved before Robson J. In *Water NSW v Barlow*<sup>147</sup> the defendant was fined a total of \$102,866 for two charges of taking water from the Barwon River when metering equipment was not working (an offence under s 91I(2) of the *Water Management Act 2000* (NSW)), a strict liability offence. The defendant was also fined \$86,625 for one charge of failing to comply with an embargo on taking water (s 336C(1)), a strict liability offence.

### *Victoria*

An increase in enforcement activities can be seen in Victoria. Between 1 July 2014 and 30 June 2017, a total of 11 prosecutions under the *Water Act 1989* (Vic) were initiated by Victorian water corporations (statutory entities responsible for monitoring water take in non-urban areas and enforcing the *Water Act 1989* (Vic)).<sup>148</sup> In

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<sup>146</sup> Ibid.

<sup>147</sup> [2019] NSWLEC 30.

<sup>148</sup> Victoria Environment, Land, Water and Planning, 'Water Compliance Report 2014-15' (16 July 2018) <<https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2014-15>>; Victoria Environment, Land, Water and Planning, 'Water Compliance Report 2015-16' (16 January 2019) <<https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2015-16>>; Victoria Environment, Land, Water and Planning, 'Water Compliance Report 2016-17' (16 January 2019) <<https://www.water.vic.gov.au/water->

contrast, between 1 July 2017 and 30 June 2018, 14 prosecutions were initiated.<sup>149</sup> Since July 2014 there has also been a marked increase in the number of reported alleged compliance breaches of the *Water Act 1989* (Vic)) (most of which were addressed by at least an advisory letter).<sup>150</sup>

According to the Victorian Department of Environment, Land, Water and Planning, the increase in alleged breaches reported between the 2016 and 2017 periods:<sup>151</sup>

...is due to a combination of factors including increased capacity of water corporations to detect breaches and resolve to take enforcement actions targeting overuse against an allocation bank account (unauthorised use), and strong demand for water in regulated surface water markets combined with dry conditions. In most cases, the amount of unauthorised use is small and dealt with through advisory or warning letters.

### **In conclusion**

Substantial changes in the management of the MDB are underway with the aim of better integration between Commonwealth and Basin state water sharing instruments under the *Water Act* (Cth) and Basin state water legislation. The *Basin Plan* requires Basin state water resource plans to be approved by the MDBA in 2019. The commencement date of 1 July 2019 has been extended as many plans have yet to be accredited. How the scheme will be enforced practically is

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for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2016-17>.

<sup>149</sup> Victoria Environment, Land, Water and Planning, 'Water Compliance Report 2017-18' (16 January 2019) <<https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/compliance-report-2017-18>>.

<sup>150</sup> 382 (1 July 2014 to 30 June 2015); 1077 (1 July 2015 to 30 June 2016); 1117 (1 July 2016 to 30 June 2017); 1625 (1 July 2017-30 June 2018): Victoria Environment, Land, Water and Planning, 'Water Compliance Report 2014-15' (16 July 2018) <<https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2014-15>>; Victoria Environment, Land, Water and Planning, 'Water Compliance Report 2015-16' (16 January 2019) <<https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2015-16>>; Victoria Environment, Land, Water and Planning, 'Water Compliance Report 2016-17' (16 January 2019) <<https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/water-compliance-report-2016-17>>; Victoria Environment, Land, Water and Planning, 'Water Compliance Report 2017-18' (16 January 2019) <<https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/compliance-report-2017-18>>.

<sup>151</sup> Victoria Environment, Land, Water and Planning, 'Water Compliance Report 2017-18' (16 January 2019) <<https://www.water.vic.gov.au/water-for-agriculture/taking-and-using-water/compliance-reports/compliance-report-2017-18>>.

unknowable at this stage. The MDBA has released a compliance policy 2018-21 which sets out how it considers things will work at the Commonwealth level. Whether water resource plans will be judicially reviewable under the *Administrative Decisions Judicial Review Act 1977* (Cth) is also difficult to predict.

To date a variety of administrative decisions concerning the use of water in various aspects have been subject to merits review in Basin state courts and tribunals. Not surprisingly, the factors considered in merits appeals by courts and tribunals reflect the respective statutory schemes, particularly those matters which are required to be taken into account in such decisions. All regimes have mandatory environmental considerations to varying degrees. The experience in Victoria particularly identifies the importance of such considerations in the granting or refusal of water access licences in that jurisdiction.

Interestingly, judicial review challenges to overarching strategic water sharing plans have only been attempted in NSW, without success by any applicant to date. A number of these challenges have been summarised in the paper and demonstrate the difficulty for individual water users, who consider their interests have been adversely affected, to challenge water management plans where ministerial decision-making must have regard to numerous factors and balance a number of matters in the overall public interest.

Another area of variation between Basin states is the extent to which open standing provisions enable citizen enforcement of water laws. Resort to criminal enforcement also varies across Basin states, reflecting differences in enforcement culture according to the South Australian Royal Commission and the MDBA. Significant changes in the enforcement entities and compliance policies in NSW since the end of 2017 have resulted in far greater prosecution rates than in previous years.

Management of the MDB is a significant on-going challenge for the Commonwealth and Basin state governments. The overall implementation of the *Basin Plan* in the next few years through these jurisdictions will determine whether the scheme is a good one in balancing the many human demands on a complex natural system while attempting to preserve its environmental integrity.