

An ambitious water plan fails to deliver

The Report of the South Australian Murray-Darling Basin Royal Commission

By Josie Walker

On 29 January 2019, Commissioner Bret Walker SC handed down the Report of the South Australian Murray-Darling Basin Royal Commission (the Report). The Royal Commission was instigated by the government of South Australia, the tail-end state of the Murray-Darling Basin, long frustrated at the over-extraction of water by upstream states. The legacy of over-extraction can be seen particularly starkly in the Coorong, a Ramsar-listed wetland at the mouth of the Murray, which has been suffering from algal blooms and a drastic decline in its internationally-significant birdlife for many years. This is just one of the many riverine ecosystems which should have been protected by the Commonwealth and affected states under the Murray-Darling Basin Plan (MDBP).

The Report describes the scheme of intergovernmental cooperation between the Commonwealth and the Murray-Darling Basin States, beginning in 2007 as ambitious and unprecedented. Under the Commonwealth *Water Act 2007* (the Water Act), a key benchmark for the allocation of water is the Sustainable Diversion Limit (SDL). The SDL was supposed to be set, based on the best available scientific advice, at a level which would not compromise the health of riverine ecosystems. The Murray-Darling Basin Authority (MDBA) was then supposed to allocate the permissible take of water among each of the basin states. Individual states then determined the amount which could be taken from each regulated water source through state-based mechanisms. In New South Wales, these mechanisms are Water Sharing Plans under the *Water Management Act 2000* (NSW).

The MDBA published its *Guide to the Proposed Basin Plan* (the Guide) in 2010. The Guide posited an SDL which would achieve basin-wide environmental objectives with a high degree of certainty. Even in the original Guide, that figure was adjusted downwards to avoid perceived unacceptable impacts on the productivity of the basin. Nevertheless, Commissioner Walker SC describes the Guide as ‘arguably the most comprehensive, scientifically-based open and transparent publication produced by the MDBA to date’ (p 165). Notoriously, there was an intense political backlash against the Guide, which



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led to the SDL being adjusted downwards in 2012 with little scientific justification. The Report finds that ultimately the SDL was determined having regard to ‘the limit of sectional or political tolerance for a recovery amount’, rather than the science. The Report finds that this exercise demonstrated a ‘cynical disregard for the clear statutory framework for decision-making... to the lasting discredit of all those who manipulated the process to this end’ (p 24).

Even after the SDL was set at a level patently inadequate for the protection of ecosystems, it was not immune from further erosion. The MDBP provides a mechanism by which the SDL may be adjusted if the amount of water set aside for the environment can be demonstrated to be more than is necessary for the protection and recovery of basin ecology. The Report finds that, while this process of adjustment has the potential to benefit both the environment and consumptive users in principle, to date these processes have been distorted, because ‘the overt aims of some of the currently proposed adjustments is to enable more water to be used consumptively by irrigators’. This has led to a lack of scientific rigour in the adjustment process which presents a further risk

to the integrity and lawfulness of the SDL (pp 28-29).

The Report is particularly critical of reported threats by the New South Wales Minister for Agriculture, Niall Blair, to ‘blow up’ the MDBP if adjustments are not approved in response to the planned Menindee Lakes Scheme (p 29). The Menindee Lakes Scheme is a proposal by the NSW government to change the management of the Menindee Lakes to decrease the amount of water lost through evaporation. New South Wales is urging the MDBA to increase the level of permissible take to take account of the water efficiencies promised by this scheme. However, these management changes have been resisted by the MDBA to date because of their potential to negatively affect bird and fish habitat.

It is of concern that the negative portrayal of the MDBP in the Royal Commission Report could be used by some in the political arena as a justification for abandoning the process of cooperative basin management altogether. That would be a mistake. The MDBP is the only mechanism that we have for rationally allocating water between consumptive and environmental uses across the four basin states and one territory. Without it, there would be no legal brake on upstream states taking as much water as they could use, leaving both downstream users and the environment high and dry. While the MDBP has not so far lived up to its promise, the alternative of *not* having a MDBP would be much worse.

As Commissioner Walker SC says at p 25 of his Report, the errors which have been made to date in departing from the spirit and letter of the *Water Act 2007* (Cth) ‘can and should be rectified’. The MDBA needs to be reformed to provide for greater transparency and a greater degree of independence from political interference. Not only environmental objectives, but a respect for the rule of law, should prompt rectification of past errors. At the end of the day, it may be easier to build political consensus behind a strengthened MDBP based on independent scientific advice which promises improved health for the riverine system, than one based on political expediency which merely maintains our inland rivers on life support.