Intergovernmental Responses to Water Disputes in Australia

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1. Introduction

Measured on rainfall levels, Australia is naturally the driest populated continent on earth. The more recent impact of climate change has greatly compounded the effects of water scarcity on the Australian economy, society, and environment. The ever-present and increasing scarcity of water throughout the Australian federation gives rise to a considerably high risk of disputation over water resources, their allocation, and the risk of over allocation and a commensurate need to manage these risks. The geographical area in which this risk is highest is the Murray-Darling Basin (MDB), an area one million square kilometres in size or 14 per cent of Australia, that straddles the states of New South Wales (NSW), Victoria, Queensland, South Australia, and the entire Australian Capital Territory (ACT) and is based around the rivers Murray and Darling, the former of which actually forms a long inter-state boundary. As a product of both the multi-jurisdictional nature of the MDB and its problems and due to fact that legislative responsibility for water and environmental management under the Australian constitu-

[*] The content of this paper is exclusively based on the personal views of the author. They do not, in any way represent the views of any other party, including any Government or Minister thereof.

tional structure is shared between both the state and federal levels, the Australian system has approached the issue of water management and disputation with the objective of pre-emptive avoidance through various tools of innovative cooperative federalism, particularly through intergovernmental agreements. It is of great concern then, that in more recent times it appears that the Commonwealth level is trending towards an abandonment of cooperative federalism, in relation to water and numerous other issues, in favour of what has been termed "opportunistic federalism," an approach that threatens past agreements and in its latest guise in the form of the 2007 *National Plan for Water Security* has itself given rise to a major new dispute related to water.

2. Australian Federalism: An Overview and Trends

Australia is one of the oldest functioning federations in the world, arising as it did out of a series of conventions held during the 1890s between then British colonies. Formal federation occurred in 1901 by way of the enactment by the Imperial Parliament of the Commonwealth Constitution. Over the 106 years since Federation, Australia has maintained a highly stable system of democratic government administered eventually by six states, two territories, and the federal-level Commonwealth. The Constitution does not confer on the Commonwealth Parliament the power to legislate on all subjects but rather enumerates its powers in a limited list. The states by comparison are able to legislate on a much broader array of issues, being bound only by the limits placed on them by the national Constitution. Thus, on paper, it would appear that the Australian states are the most powerful level of the federation, yet this is not the case. Since Federation, the Commonwealth has steadily extended its powers and broadened its finances, supported by the regularly supportive interpretations of the High Court of Australia.

Several trends become discernable as long-term features of the Australian federation, namely, (i) a relatively high degree of shared functions, particularly as an outcome of the Commonwealth moving into areas of traditional state responsibility; (ii) a strong

centralising trend, supported by supremacy of Commonwealth law over inconsistent state law, the role of tied financial grants to the states and, as outlined above, by the High Court's interpretations (the most recent example of which is the key case of *NSW* vs. *Commonwealth (2006)* concerning the Federal takeover of the industrial relations system in which the Court made it clear that it would continue to give full breadth to Commonwealth powers regardless of the federal implications); (iii) a relatively high degree of vertical fiscal imbalance, with the states raising only 19 per cent of all taxes but responsible for at least 40 per cent of public spending; and (iv) a propensity towards innovative initiatives in cooperative federalism (Twomey and Withers, 2007).

Whilst all inter-jurisdictional issues within the Australian federation ideally need to analyse through the complex multi-layered lens of all four of these trends, it is the latter characteristic—cooperative federalism—that relates most closely to the issue of water management and disputation.

3. Cooperative Federalism and Water Policy

The enumerated powers of the Commonwealth Parliament do not expressly include the environment or water management. Yet, through the use of other powers, widely interpreted by judicial review, environmental and water issues have been and remain the subject of Commonwealth legislation (and of course state legislation also). An example of this is seen in the use of the external affairs power to allow the Commonwealth to legislate on an environmental issue domestically in order to give effect to an international environment treaty, even when the Commonwealth is not a party to the international agreement. Furthermore, the Commonwealth's role in water issues is reinforced by the existence of a Federal Minister for the Environment.

In part as a reaction to this trend, the Australian federation has an innovative track record in developing successful tools of cooperative, or what others have termed collaborative, federalism. Most notable of these are the Council of Australian Governments

(COAG) which first met in 1992 and consists of the Prime Minister and all Premiers and Chief Ministers. COAG meets at least annually and traditionally maintains a detailed and heavy working agenda. A further example is the more recent formation of the States and Territories-only Council on the Australian Federation in 2006. Both of these forums regularly consider water-related management and disputation issues. In addition to these whole-of-government forums, an immense array of subject-specific forums have been developed in areas requiring targeted collaboration. These range from the informal through to summits and formal inter-governmental agreements (IGAs).

Regardless of the constitutional niceties of legislative power allocation, the issue of water—where it rains and where water can be found—pays no respect to borders nor to the accompanying political bargaining. This is particularly so in the MDB and even more particularly so during periods of adverse climatic conditions. As such, the management of scarce water resources has a long history as a subject for IGA's within the Australian federation and within the MDB. In fact the first MDB IGA was signed between the Commonwealth and all relevant states in 1914. This was renewed in a 1993 IGA and most recently in the MDB IGA of June 2006, again signed by all relevant parties. This latest IGA, formalized by a detailed signed agreement 61 pages in length, has as its purpose, "to promote and coordinate effective planning and management for the equitable and sustainable use of the water, land and other environmental resources of the MDB".

Importantly, the IGA establishes the ongoing mechanisms for water management in the MDB, namely, a Ministerial Council made up of a maximum of three Ministers from each party, which will consider and determine major policy issues and authorize measures to achieve the purpose of the IGA. The Council must meet at least annually, although in practice most such Ministerial Councils meet at least twice a year. Decisions of the Council must be taken unanimously.

The Council is supported by the MDB Commission made up of a President and Commissioners, appointed by the parties. The Commission is tasked with giving effect to the Council's directions.

The substantive areas of the Council and Commission's focus illustrate the underlying dispute avoidance and, if necessary, dispute management methodology of this approach to federal interaction. Work centres on investigating, measuring, and monitoring water in the MDB, all in aid of a transparent system of water distribution and management based on very specific individual state entitlements to water set out in a schedule to the IGA. The states retain ownership of the water itself and control of the allocation system within the state, once the water is distributed according to the IGA.

A key feature of this, and previous IGA's, is that it contains its own, albeit somewhat flawed, formal dispute resolution mechanism. Commissioners bring motions to the Commission on behalf of state parties; if the Commission cannot reach consensus agreement within two months the matter is referred to the Council, where if agreement is still unable to be reached in a further six months, any party can refer the matter to an arbitrator whose eventual decision binds the parties, the Council, and the Commission. This process has been criticized for being too slow and cumbersome.

Finally, in addition to this specific regime established by the MDB IGA for that river basin, cooperative federalism has also been the norm in relation to the national management of water and water disputation, most notably governed by the 2004 COAG-led *IGA on a National Water Initiative*. The National Water Initiative (NWI) is a federal-level reaction to the naturally cross-jurisdictional, and sometimes national, realities of water management and potential disputation. It highlights the variability of water resource security in Australia and requires all parties to undertake a series of 70 actions, most involving working across borders. In addition, the state and territory parties (namely, NSW, Victoria, South Australia, Queensland, ACT, and the Northern Territory) were required to develop NWI Implementation Plans. The NWI IGA also established a Commission that would fulfil an analogous role to the MDB Commission, in this case reporting to COAG rather than a Ministerial Council. However, differently from the purely cooperative nature of the MDB IGA regime, the NWI is linked to reform payments. That is, the Commonwealth has the power to suspend

competition payments, being the financial benefits flowing directly from the Commonwealth to the states when they fulfil their various reform obligations. This occurred recently until the Prime Minister announced on 13 September 2007, that on the advice of the NWI Commission he was allowing A$ 43 million in such payments to be disbursed on the basis of new and improved progress by the states on water reform. As such it can be said that the NWI initiative also contains an element of coercive federalism, although this element is secondary to its cooperative motif.

The overarching point here is to draw attention to the long history of cooperative federalism in the area of water management and water disputation, diversion, and management. Whilst there have been many criticisms levelled at these governance structures, especially that they are too bureaucratic and, in the case of the MDB Council too ineffective as a result of decisions only being taken by consensus, they have broadly delivered a cooperative response to the cross-jurisdictional problems of water and water dispute management.

4. The Drought and a New Approach to Water Policy

The drought facing south-eastern Australia, centred on the MDB, is potentially the worst since Federation and likely since well before. Large areas of NSW in particular are experiencing their lowest rainfall levels on record and across the MDB the level of inflows into the Murray River are equally poor with total monthly inflow consistently up to 95 per cent below long-term averages. MDB dams are largely dry and all major eastern state urban areas, and indeed most minor towns, are on varying levels of water restrictions as governments grapple with collapsing supply and expanding populations.

The worst affected are agricultural producers within the MDB. For example, the almost non-existent wheat crop is having international price ramifications on staple food items in the US and Europe, not to mention within Australia itself. The commercial price of irrigation water has pushed past A$ 1,000 per megalitre

for the first time ever. The scale of the problem is exemplified by the Commonwealth's announcement just this week of a new programme of A$ 700 million to support farming communities. In many cases the payments under this scheme will be transitional payments to move farmers off the land due to the very real likelihood, driven further by climate change, that most farming will be permanently impossible in large parts of the MDB.

It is in this water management environment that the Prime Minister, without prior consultation with any affected states or territories, launched the *National Plan for Water Security* on 25 January 2007. The Plan was stated to be for the purpose of improving water efficiency and addressing the over-allocation of water in rural Australia, where 70 per cent of Australia's water is consumed. As such the Plan has no impact on urban water strategies. It is to be backed by A$ 10 billion in new Commonwealth money. Importantly, the MDB IGA would be abolished and the MDB Commission would be re-constituted as a Commonwealth Government agency, the MDB Authority, rather than the current statutory independent entity, reporting to the Commonwealth Minister rather than the multi-jurisdictional MDB Council.

The Plan was effectively announced as the Commonwealth's answer to the issues faced in the MDB. Specifically, the Plan would "address once and for all" water over-allocation in the MDB, establish new governance arrangements for the MDB and cap surface and groundwater use in the MDB, among other objectives. The central claim was that the cooperative federal governance arrangements outlined above were not in the best interest of the MDB, were "parochial" and "unwieldy and not capable of yielding the best possible Basin-wide outcomes". The Commonwealth claims there is a lack of MDB-wide water data; that Queensland and the ACT ignore the basin-wide water use cap and NSW is regularly in breach; that consensus decision-making at the MDB Council makes it ineffective; and that the inter-state nature of the substantive issues are not reflected in that states are able to negatively affect other states without sanction. As such the Commonwealth has requested NSW, Victoria, Queensland, South Australia, and the ACT sign a new IGA committing them to refer all of their legislative

powers in relation to the MDB to the Commonwealth. Under the Plan, water would remain vested in the Crown in right of the states (i.e. the states would still own the water) but the issuing of entitlements to such water and their administration would pass to the Commonwealth alone.

Section 52 (xxxvii) of the Constitution provides that the Commonwealth has the power to legislate in "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States". Under the Plan, it is the Commonwealth's contention that an efficient outcome can only be achieved with a single level of government performing oversight in MDB water management. Undoubtedly the drought's severity focused the Prime Minister's (the full Cabinet was not consulted prior to the announcement of the Plan) mind on it, as did the forthcoming Federal election due at the end of 2008. But as Twomey and Withers (2007) highlight, "the level of efficiency of the system depends upon how intergovernmental relations between these tiers of government are conducted and how powers and functions are allocated between the tiers". With the release of the Plan, the Commonwealth has acted unilaterally, abandoning the long-held tradition of relatively successful cooperative federalism in this field.

It would be highly unsound to assert that that history of cooperative federalism in water management in the MDB has delivered all the necessary solutions for the problems and disputes faced within the Basin. Also, the new order of magnitude of those issues as a result of the drought mean more and new action is urgently needed. However, the approach adopted by the Commonwealth is a risky and untested strategy at best and liable to lead to the collapse (with no clear replacement) of the current MDB IGA regime at worst.

Before turning to how this new direction has actually given rise to a new level of system dispute over water resources and their management, we should seek to place the Commonwealth's Plan in a broader federal trend being experienced in Australia, namely, "opportunistic federalism".

5. Opportunistic Federalism

Justice Kirby of the Australian High Court, in the minority in the industrial relations takeover case of 2006, called the outcome of that case "optional or opportunistic federalism". Effectively what he and others are referring to is when one level—here (and usually) the federal level—disregards the constitutional legislative power configurations and, as the opportunity or expedient need suits them, behaves outside their normal boundaries. In Australia, the Prime Minister in a recent speech delivered in August 2007 entitled *Australia Rising to a Better Future* fully embraced this approach, saying Australia should "embrace a sense of aspirational nationalism to guide relations between different levels of government" which will on some occasions "require the Commonwealth bypassing the states altogether". He specifically mentioned "getting the balance right" on the challenge of water scarcity as a key issue to be dealt with within this new rubric. Since that speech the Commonwealth has sought to take over individual hospitals, major export ports, and other key infrastructure, all exclusive state responsibilities.

This entire approach has been criticized on many fronts. Peter Hartcher of *The Sydney Morning Herald* called it a plan for a "constitutional coup d'etat" with "Australia rising" being only at the expense of the states sinking (*SMH*, 21 August 2007). *The Australian* newspaper editorial called it a "wily re-election strategy" (21 August 2007). Apart from the clear process weaknesses and the disregard for the well established mechanisms of cooperative federalism such as COAG, the Plan rests on the fact that the Commonwealth has the financial resources as a result of acute fiscal imbalance to fund the necessary reform while the states do not (Twomey and Withers). The principle of subsidiarity is ignored with no examination of which level of government is actually better placed to undertake the task. In fact, when we do examine this issue, it is clear that the Commonwealth has not only played a leading role in any inadequacies within the current MDB regime (as the MDB Council Chair among other key roles), but it has no particular expertise from a public service perspective in fulfilling the role it is seeking to assume (this being evidenced very clearly

in the Commonwealth's offer to hire any and all state public servants working in the area the new Authority would control because of its own lack of expertise).

Some have pointed to the element of coercive federalism in the NWI IGA, that is, the ability of the Commonwealth to withhold payments unless reform is progressed, as evidence that this new more aggressively centralist type of federalism is not entirely new to water policy. The weakness in this argument is that the threat of "coercion" under the NWI IGA arises by operation of cooperative agreement, rather than a unilateral Commonwealth decision to enter and takeover a legislative field.

6. New System Disputation

Whilst the ostensible goal of the National Water Security Plan may have been seamless management of water issues, and in particular disputes over water usage and allocation, the exact opposite appears to have been the outcome. Whilst NSW, South Australia, Queensland, and the ACT agreed in principle to refer their legislative powers, Victoria has remained steadfast in refusing to do so, under both its previous and recently new premier. The Victorian government has gone so far as to publish an alternative plan entitled *National Water Reform, A Comprehensive and Balanced National Water Reform Plan* in which it welcomes any new financial investment in the MDB as sorely needed as a result of the drought but attacks the Commonwealth plan as "under-developed", complex and replete with red tape, lacking clarity and likely to create a "patch-work quilt" of new governance arrangements between the Commonwealth, the new MDB Authority, the states, and those urban areas within the MDB but not part of the Plan (leading to what it calls the "seventh state under centralized control" but looking more like a "Swiss cheese" approach to water management).

Victoria proposes an alternative plan. In it there would be no "broad and poorly defined" referral of powers but a new joint Commonwealth-State Agreement to (i) overhaul the water entitlements system in the MDB to provide enforceable legal title to water entitlements for the environment and new agreed processes to

adjust the balance between consumption and the environment; (ii) the establishment of fully and freely traded water entitlements across the MDB under competitively neutral conditions; and (iii) a new set of governance principles based on an adherence to subsidiarity but with an enhanced role for the Commonwealth overseeing compliance with water allocation and diversion rules and to regulate the water market. The MDB Council would be maintained but consensus voting over policy would be replaced by the Commonwealth having the casting and/or determinative vote in specified areas. The MDB Commission would be kept but reconstituted to provide more independent and expert-based advice. Victoria offered to refer any powers necessary to achieve such an approach.

In essence the Victorians are calling on a quick return to a cooperative approach to the management of water and water disputes in Australia's most important river basin. In response to the Victorian position the Prime Minister has stated that the Commonwealth could achieve the Victorian plan without a referral of powers and that Victoria was acting against the national interest. Nonetheless, the Commonwealth has confirmed that it is moving forward with the Plan without Victoria's formal involvement and relying, for now, on its own constitutional powers. The Commonwealth has subsequently confirmed that large parts of the $ 10 billion Plan will still be available to Victorian farmers, an outcome that seems to undermine the Commonwealth's contention that benefits and efficiencies will only flow to the MDB under its new opportunistic federalist approach. The second outcome of this new system dispute is the very real possibility of two parallel entities, with the MDB Commission remaining in existence, whilst a new MDB Authority is established. Patently such an outcome will not reduce bureaucracy but add to it.

7. Conclusion

Water and water dispute management in the Australian federation is a shared responsibility between the Commonwealth and states and territories. This is reflective of the substantive fact that water

is a cross-jurisdictional issue. The historic outcome of this has been the development of several reasonably successful and innovative cooperative federal structures. Australian federalism's management of water and water disputes is moving into unknown constitutional terrain as a result of a new trend of opportunistic federalism on the part of the Commonwealth. This is a high-risk strategy with little to support it as a viable alternative approach. It is certainly true that the MDB governance structures are in need of reform to meet the pressing realities of drought conditions. But this is best achieved by striking a new more effective balance within the framework of cooperative federalism, not by overturning it completely.