



Law Council
OF AUSTRALIA

Legal Practice Section

28 September 2017

Committee Secretary
Senate Standing Committees on
Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: rrat.sen@aph.gov.au

Dear Sir/Madam

Submission on the Integrity of the Water Market in the Murray-Darling Basin

1. This submission has been prepared by the Australian Environmental and Planning Law Group (**AEPLG**) of the Law Council's Legal Practice Section. The AEPLG welcomes the opportunity to provide comments on The Integrity of the Water Market in the Murray Darling Basin.
2. The AEPLG's primary objectives are:
 - to be a national focus group for environmental and planning law;
 - to represent members of the profession working in the areas of environmental and planning law;
 - to advise the Law Council on issues of environmental and planning law; and
 - to lobby Federal and State Government to implement 'best practice' in environmental and planning law.

Introduction

3. The Terms of Reference for this Inquiry include 'the investigation and public disclosure by authorities, including the New South Wales Government and the Murray-Darling Basin Authority, of reported breaches within the Murray-Darling Basin' and 'any other related matters'.
4. Following the National Water Initiative, water use rights in Queensland, New South Wales, Victoria and South Australia (**the Basin States**) are severed from land rights. The quantity of water attaching to each water use right is set from time to time by a public authority or Minister. This system of water rights is designed as a tool for managing water usage, recognising that water is a scarce resource. The primary means of ensuring that users do not exceed their entitlements is enforcement by public authorities.

5. The allegations of 'water theft' in the Murray-Darling Basin are ultimately allegations that this system of compliance and enforcement is inadequate. To address this inadequacy, it is important not only to look at the current implementation of enforcement and compliance mechanisms by public authorities, but open the enquiry to opportunities for private enforcement.

The System of Water Rights

6. In Victoria, the *Water Act 1989* (Vic) Part 3A establishes a regime of statutory property rights in water. Section 33E makes it an offence to take water from a water source without a water share, with some exceptions relating to domestic and stock use. Section 33F provides for the issuing of 'water shares', which authorise the taking of water under the 'water allocation' for the share, during the 'water season', for which the water allocation is allocated. Ownership of water shares can be transferred under s 33S, subject to ministerial approval. The concept of a water share is dependent upon the water allocation, which is an amount of water determined by the Minister under s 33AC. A holder of a water share cannot use more than that amount of water in the relevant water season. Water allocations can also be assigned under s 33U.
7. Similar systems are in place in the other Basin States.¹ In Queensland and Victoria, water rights are completely independent of licences; other states retain licences to which the water rights are attached.
8. Overlaid on this system of water rights is the set of rules, contained in the Murray-Darling Basin Plan (**MDBP**), restricting amounts of water that can be taken by water users: see, eg, MDBP Chapter 10 Part 3.
9. The notion that water use rights are a form of property is a basic assumption of the MDBP. The content of the MDBP is mandated by the *Water Act 2007* (Cth) s22, which contains numerous references to water rights, including:
 - (a) Table, Item 4(d) – 'trading in water access rights'.
 - (b) Table, Item 8 – 'accounting for any trading, or transfer, of tradeable water rights'.
 - (c) Table, Item 12 – 'trading or transfer of tradeable water rights'.
 - (d) Sub-section 3(g) – 'the circumstances in which tradeable water rights in relation to the water resource plan area may be traded, or transferred, and the conditions applicable to such trades or transfers'.
10. These requirements are reflected, among other things, in the MDBP para 5.07, Chapter 10 Part 8 and Chapter 12. The system of water rights plays a vital role both in the National Water Initiative reforms and the MDBP.
11. Significant importance is placed on the tradability of water rights. This inquiry refers to the 'water market'. Legislative facility of the trade and assignment of rights would ordinarily indicate that such rights are property.² From an economic perspective, commodification and tradability are sufficient for a resource to achieve proprietary status.³ From a legal perspective, however, a more important characteristic of

¹ See *Water Management Act 2000* (NSW) s 71M; *Water Act 2000* (Qld) s 106; *Natural Resources Management Act 2004* (SA) s146.

² *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1247–8 (Lord Wilberforce).

³ See, eg, M J Radin, 'Market-Inalienability' (1986–87) 100 *Harvard Law Review* 1849, 1855ff.

property rights – and one that is fundamental to the economic value of rights, which in turn is necessary for a market to exist in respect of such rights – is exclusivity.

The Exclusivity of Water Rights

12. Exclusivity is the ability of rights holders and the States to prevent non-entitled persons from using water. Exclusivity marks the removal of the subject of a right from the commons, where it would otherwise remain available for use by all. It is the hallmark of property.
13. The underlying impetus for developing a system of water rights – namely, the scarcity of water in Australia – also highlights the importance of exclusivity.

Early explorers of the inland geography of Australia discovered 'that strange phenomenon of Australia' where even apparently substantial rivers evaporated, especially during drought, 'from the intense heat of the plains'.⁴

14. As a result, 'the need for sustainable and efficient management of water resources has attracted a good deal of attention'.⁵
15. From the scarcity of water follows the need to develop a system of entitlements to its use and to prevent persons from exceeding their entitlements. The *Intergovernmental Agreement on a National Water Initiative* recognised 'an increase in demand for water, and an increased understanding of the management needs of surface and groundwater systems'.⁶ This, too, requires effective controls on access to water. One of the greatest obstacles to the establishment of an effective water rights scheme is the difficulty of preventing persons from using water outside or beyond their entitlement.
16. In Victoria, s 33E of the *Water Act* creates an offence of taking water without authorisation, punishable by a fine or imprisonment. There are equivalent provisions in the other Basin States.⁷
17. Despite these offences, water rights may not be exclusive in the way necessary for them to be property. Gray explains the ways in which a resource can fail to be exclusive (or 'excludable', in his terminology), and thereby fail to be property.⁸ In *Victoria Park Racing*, the majority of the Court held that a spectacle is not property because it is not exclusive, and it is not exclusive because it is physically impossible or impracticable to control people's enjoyment of it.⁹ Such resources are *physically* non-exclusive. Alternatively, a resource might be legally non-exclusive, if the holder of a property right fails to (or is unable to) use the legal mechanisms created to protect that right.
18. Furthermore, a resource might be non-exclusive as a matter of political morality. Some resources are so fundamental to human life that it would be unsatisfactory to

⁴ *ICM Agriculture v Commonwealth* (2009) 240 CLR 140, [51].

⁵ *Ibid* [50].

⁶ Council of Australian Governments, *Intergovernmental Agreement on a National Water Initiative*, signed 25 June 2004.

⁷ See *Water Management Act 2000* (NSW) Pt 2 Div 1; *Water Act 2000* (Qld) s808; *Natural Resources Management Act 2004* (SA) s127.

⁸ Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252.

⁹ See, eg, *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 495 (Latham CJ) ('*Victoria Park Racing*').

allow a person or group to exclude access to them. The legislative authorisation of 'domestic and stock' use of water¹⁰ might be a recognition of the moral non-exclusivity of water to the extent that it is necessary for survival and ordinary life.

19. The question of what more needs to be done to achieve clear and secure property rights requires clarity on issues of exclusivity. In considering the integrity of the water market, it is clearly essential the use of water is properly excluded from those not entitled to it.
20. As is apparent from the provisions discussed above, water rights are enforced by state government authorities only. Murray-Darling Basin Authority Chief Executive, Mr Phillip Glyde, was recently quoted as saying that all responsibility for compliance falls to the States.¹¹ That claim is supported by the structure of water legislation. Rights to water use are only rights to use, not rights to exclude. The statutory prohibitions are the only means of enforcing the limits and exclusivity of those rights. Only the government has the power to protect private water rights, notwithstanding that they are meant to be *private* (though statutory) rights. As a consequence, water use rights in their current form may be legally non-exclusive because public authorities do not have the resources, or perhaps the will, to enforce the exclusivity of those rights, and private rights holders do not have the legal power to enforce them. If they are legally non-exclusive, they lack an essential element of private property.
21. Where water rights are unbundled from land rights, they are legally classified as personal property.¹² Further, they are intangible forms of personal property, resembling *choses in action*. It is not possible to physically possess or occupy them, unlike real property or tangible personal property. The only way to recover the benefit of a water right, as with other *choses in action*, is to sue under the relevant legislation, which means that the content of a water right is defined by who the rights holder can sue, and what for. Currently, a rights holder can use general principles of administrative law to sue the relevant Minister or public authority, if the Minister or authority denies the rights holder the benefit of his or her water rights. The remedy would be limited to compelling the Minister or authority to allow the rights holder to access water in accordance with his or her entitlement. It likely would not extend to compelling the Minister or authority to restrain another person from exceeding his or her entitlement. No other rights to sue are available to a rights holder, and the water legislation does not create any private law causes of action for rights holders to restrain unauthorised use of water by others. This reliance on public power makes water rights significantly less secure than other property.
22. 'The distinction between public power and private power is not clear-cut and one may shade into the other'.¹³ However, no system of land rights could function in a jurisdiction like Australia if the sole mechanism for enforcing them were through a public regulatory authority. The ability of a private landowner to bring an action for trespass and nuisance is indispensable to the protection of private land rights and, as

¹⁰ See, eg, *Water Act 1989* (Vic) s 8(1).

¹¹ Linton Besser, Mary Fallon and Lucy Carter, 'Murray-Darling Basin Plan: Irrigation Lobbyists Offered Access to Confidential Government Documents', *ABC News Online*, 24 July 2017 <<http://www.abc.net.au/news/2017-07-24/top-water-bureaucrat-offered-confidential-documents-to-lobbyists/8738568>>.

¹² The *Natural Resources Management Act 2004* (SA) s 146 explicitly provides that water licences are personal property, but in all jurisdictions with unbundled water rights, the nature of those rights is such that they can be classified as personal property under the general law and the relevant general law doctrines would apply.

¹³ *Gerhardy v Brown* (1985) 159 CLR 70, 107 (Murphy J).

water rights become more important, similar options should be available to holders of water rights. While public authorities should retain their current powers of enforcement, private holders of water rights should be able to prevent unauthorised use of water subject to some requirement of proximity based on the geographical divisions drawn in the legislation.¹⁴

Implementation

23. Private causes of action to protect water rights face some difficulties. Currently, water rights are conferred by state legislation, so it would be necessary to establish a system for enforcing these rights across state borders – an issue especially pertinent to the Murray River, which supplies water to three states.
24. The power to bring a private action for ‘water theft’ would be useless unless private persons have means of detecting and collecting evidence of unauthorised water usage. If there are no such means, water will remain a legally non-exclusive resource due to the impracticality of enforcement. Such a means could be created by maintaining public records of water rights holders, their identity, and usage.
25. There may be privacy concerns associated with making such information available. However, the privacy issues are no greater than the detailed personal information contained on land titles registers and the information published by ASIC on companies and company officers. In the case of land and companies, the government recognised that the value of transparency, accountability, certainty and the other interests served by public registers outweigh the importance of privacy. Transparency, accountability and the sustainable management of water are at least as important in the context of water rights. Those interests outweigh the interest in privacy with respect to water rights and usage.

Yours sincerely

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¹⁴ In Victoria, for example, water shares are conferred in respect of a ‘declared water system’, so private rights to sue could be limited to holders of water shares in the same declared water system. The New South Wales legislation uses ‘water management areas’ and ‘water sources’.