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Recent Developments in Australian Environmental Law and Policy

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Murray Darling Basin Plan

As the last Australian 'Country Report' in this e-Journal foreshadowed, a draft *Murray Darling Basin Plan* has been prepared, and the first stages of public consultation has begun. This outlines a long-term plan to address water management problems in Australia's largest agriculturally significant geographical area. The Murray Darling Basin covers over 1 million square kilometres of land, including parts of New South Wales, Queensland, South Australia and Victoria. Water resources in the Murray Darling Basin have been under incredible stress, owing to sustained drought, climate change, and over-allocation of entitlements which, uniquely, are fully tradeable and not tied to land. Prepared under the *Water Act* (2007), a "Guide" to the proposed *Plan* (released in October) is the first stage in a process which aims to restore water flows throughout the Basin by identifying where water is needed, what the limits to extraction are, and setting legally enforceable reductions to water allocations (under which Basin States retain responsibility for setting water use allocations). The Guide to the proposed *Plan* proposes significant cuts to water allocations from Basin rivers, in some areas as much as 45 per cent.

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As anticipated, the release of the *Plan* has generated much conflict amongst stakeholders, which has only been exacerbated by limited opportunities for consultation over the impact of the *Plan* upon Basin communities. One of the major sources of contention is that the *Plan* does not adequately address the social impacts of the proposed cuts to water allocations, placing greater emphasis on environmental concerns and facilitation of the market for entitlements. It was evident that the Murray Darling Basin Authority made their recommendations under the perhaps mistaken belief that the law required them to prioritise the environment as an absolute boundary to water use, then to focus on economic optimisation, and only then to consider some aspects of social interests. However, more recent legal advice tabled in Parliament has revealed that the *Water Act* may require the Authority to consider equal optimisation of economic, social and environmental factors, even in giving effect to international agreements which were previously thought to prevent socio-economic factors from being given a high priority. This new interpretation will require reconsideration of the recommendations of the original plan, taking into account the social and economic impact of these restrictions. The Murray Darling Basin Authority has signalled that they will take this into account in refining the *Plan*, as well as seeking further legal advice. The final version of the *Murray Darling Basin Plan* is to be completed by 2011, with implementation by State Governments to take place between 2012-2019.

The Political Battle over the Wild Rivers

In other water law related developments, Federal Opposition Leader Tony Abbott tabled a private member's bill in mid-November to overturn parts of the state of Queensland's controversial Wild Rivers legislation. The *Wild Rivers Act* (2005) (Qld) was introduced in Queensland to restrict development via statutory declaration along river systems where development activities 'have the potential to degrade the wild river's natural values'. In order to be declared a wild river, the river must have its natural values intact with minimal alteration to the stream's riverine processes. Ten Wild Rivers statutory declarations have been made in Queensland since the introduction of the legislation, including most recently the Wenlock River basin in June 2010. A declaration under the legislation states the types of development which may occur in the catchment, and the conditions under which development may occur.

Indigenous activities (such as hunting, fishing and traditional ceremonies) are not considered as development under the Act.

Tony Abbott's private member's bill seeks to overturn parts of the legislation on the basis that it is claimed by some to be hampering development progress and Indigenous rights. The *Wild Rivers (Environmental Management) Act* (2010) will allow for the use of native title land within a wild rivers area, and will also allow for development. Mr Abbott argues that the *Wild Rivers Act* has prevented Indigenous people from building enterprises on their land that will enable them to enter the economy, and is supported in this view by several Indigenous groups. There are however other Indigenous and environmental groups who remain strongly opposed to the revised Wild Rivers legislation. They suggest that Mr Abbott's bill is badly drafted and will be ineffective in practice, and that it is just an attempt to 'play politics'.[1] The private member's bill has since been referred to the House of Representatives Economics Committee, with a report due by the end of the Autumn sittings in 2011. The terms of reference for the report include consideration of existing legislation, the impact of the proposed bill, if passed, and options for facilitating Indigenous economic development and protecting the environmental values of wild rivers areas.

Highlighting the Essence of Water Law?

These two recent examples from Australia highlight the fact that the human dimensions of conflict over water are often shadowed by the elevation of broader environmental and economic determinism. The next IUCN Academy of Environmental Law Colloquium will provide a good opportunity for legal scholars to deepen our understanding of these issues. In anticipation of this, a workshop on "Water Law through the Lens of Conflict" was held at the University of New England in January 2011. We believe that the lens of legal conflict will enable a reframing of water conflict issues to account for some of the traditional 'human' concerns of the law (such as social justice and procedural fairness), providing further insights into water law and institutions.

[1] See further: http://www.abc.net.au/pm/content/2010/s3066996.htm and http://www.abc.net.au/news/stories/2010/11/11/3063257.htm.

Whilst water issues seem to be dominating the environmental law and policy landscape in Australia at present, there are relevant legal developments in other areas.

Carbon Pricing

Following the shelving of the *Carbon Pollution Reduction Scheme* (*CPRS*) earlier in the year, Australia was left with no direct mechanism setting a price on carbon. This has been a source of some frustration, with industry and environmental groups calling for a price signal on carbon. Research has shown that Australia is lagging when it comes to setting a price on carbon, with our indirect carbon price well below that of other countries. However, the possibility of a direct carbon price now seems to be drawing closer to reality, with the Federal Government asking the Productivity Commission in November 2010 to investigate how other key economies have implemented carbon pricing. The Commission is due to report by May 2011. Explicit carbon prices, such as taxes and permits, and further implicit prices, such as regulation of technologies, subsidies and renewable energy targets, will be considered. The government has announced that it will soon establish a form of carbon pricing for sequestration activities on farmland, but the details are sketchy.

Agriculture vs Coal Seam Gas Exploration

The growing interest in coal seam gas exploration, particularly in the Liverpool Plains and Hunter Valley in New South Wales, and the Surat and Bowen Basins in Southern Queensland, has intensified the conflict between mining and agriculture over natural resource use. Recent concerns amongst Queensland farmers about the impact of the extractive processes, particularly the effect that water pumped from gas wells will have on soil quality and underground aquifers, have prompted calls for an independent Parliamentary inquiry. In the Hunter Valley in New South Wales, local councils have passed resolutions calling for protection of the local farmland and vineyards to be protected from coal seam gas exploration. It will be interesting to see

whether this latest concern results in litigation challenging coal seam gas exploration and development, such as that witnessed in the Liverpool Plains in recent years.[2]

Challenges to Land Clearing Legislation

In September 2010, the High Court overturned a previous decision which had denied farmer Peter Spencer from having his claim relating to property rights and land clearing heard.[3] Mr Spencer famously went on a 52 day hunger strike to draw attention to his plight, after his case was initially dismissed owing to no prospects of success. He was unanimously granted leave to appeal to the High Court, where he will argue that New South Wales land clearing legislation denied him the ability to farm. Spencer claims that restrictions placed upon land clearing after Australia became a signatory to the Kyoto Treaty were akin to seizure of property by the Commonwealth, and rendered his property unviable as he was unable to clear vegetation for farming purposes. This claim will be a difficult one to mount, as essentially Mr Spencer will need to argue that the relevant legislation amounted to an acquisition that resulted in a loss for which he is entitled compensation. This case is a bell-wether for the larger issue of farmers' property rights and legal constraints imposed for the purposes of conservation. We doubt that Mr Spencer can succeed due to constitutional arrangements in Australia, but the issue will bring the issues of environmental constraints into sharper focus. "Red Tape" issues are likely to be featured again.

Corporate Environmental Offenders

New environmental protection legislation has been introduced to the Queensland Parliament, which seeks to 'name and shame' corporate environmental offenders. The bill, introduced by the State Climate Change and Sustainability Minister Kate Jones in late November 2010, empowers the courts to levy harsher penalties for environmental offences, including a range of new court orders such as notification orders where offenders may be 'named and shamed' in the local media. Under the

[2] See for example *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Minister for Mineral Resources* [2009] NSWLEC 165 (24 September 2009).
[3] *Spencer v Commonwealth of Australia* [2010] HCA 28 (1 September 2010).

proposed legislation, compliance teams would be able to enter business premises suspected of an offence without a warrant.

Logging of Tasmania's Native Forests

Decades-long conflict over the logging of native forests in Tasmania seems to be drawing closer to resolution, with stakeholder groups recently presenting a *Statement of Principles* to the Tasmanian Premier, David Bartlett. The *Statement*, an in-principle agreement between environment and forest industry representatives, establishes a plan for industry to phase out native forest logging in favour of plantation forestry. Following the release of the plan, Forestry Tasmania have offered a moratorium on some logging, but several environmental groups do not think that this is sufficient, particularly in light of a $22 million 'rescue package' announced by the Federal Government in November to assist logging contractors who wish to leave the industry.

Conclusion

Australia is going through a period of great contest about the environment, and there is a lot of conflict emerging. Thankfully, this conflict is generally played out through the courts and Parliament, rather than on the streets. The types of challenge that we have highlighted raise important questions about the changing role and significance of environmental law.