# The Northern Basin disallowance

## Parliament votes to protect the Murray Darling Basin Plan

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On 14 February 2018, the Australian Parliament voted to disallow a proposed amendment to the Basin Plan to – amongst other things – take 70 GL (or 70 billion litres) away from the environment in the northern Murray-Darling Basin (**MDB**). The proposed amendment was based on work undertaken by the Murray-Darling Basin Authority (**MDBA**) as part of the Northern Basin Review (**NBR**).

Since our national Parliament exercised its right to reject this amendment, the State of New South Wales has intimated in an official media release that it will walk away from the Basin Plan, claiming that the NBR 'was always part of the Basin Plan package' and that '[t]his move makes the Basin Plan untenable for NSW.'

We have received a number of inquiries from clients about the meaning of these statements, and their possible implications for the ongoing management of scarce water resources in our largest – and most important – river system. The following analysis is designed to separate fact from fiction.

**1. The legal basis for the NBR**

Many people think that the Basin Plan included a legal requirement to undertake the NBR, hence voting against the proposed amendment was somehow going against – or

undermining – the version of the Plan that was passed by the Australian Parliament back in 2012.

However, this is not the case. Rather, clause 6.06 of the Plan provides for the MDBA to conduct research and investigations into limits on extraction (known as 'Sustainable Diversion Limits') for the purpose of informing a review, including, possibly, of these limits. The clause does not pre-suppose a reduction in water recovery – or an increase for that matter.

After such a review is undertaken, any recommendation by the MDBA still has to be adopted by the Minister, tabled in the Australian Parliament and if a disallowance motion is moved, voted on by our elected representatives. This mechanism is commonly used in functional constitutional democracies to ensure parliamentary scrutiny of important decisions.

In this instance, the MDBA's recommendation to reduce water for the environment by 70GL (on the basis of the NBR) was voted down by Parliament. The next section explains why.

**2. Why was the amendment disallowed by the Australian Parliament?**

Before voting, a number of senators explained why they had chosen to support the disallowance motion. Their reasons included:

- significant concerns regarding the scientific work and hydrological modelling undertaken by the MDBA as part of the NBR;
- ongoing concerns about alleged water theft, especially in the Northern Basin;
- ongoing concerns about legal pumping of environmental water purchased with taxpayers' money, particularly in the Northern Basin; and,
- the fact that the NSW Independent Commission against Corruption is currently undertaking an investigation, including into the making in 2012 of one of the most important State laws governing water sharing arrangements in the Northern Basin (namely the Barwon-Darling Water Sharing Plan or **BD WSP**).

**3. Problems with the science and modelling**

In performing their duties and exercising their powers under the Basin Plan, the Minister and the MDBA are legally required to act on the basis of best-available scientific knowledge. It is therefore important to elaborate on the science and modelling underpinning the proposed 70GL reduction.

While the NBR did allow the MDBA to increase its knowledge base in certain areas (which was an excellent outcome), the actual recommendation to remove 70GL from the pool of environmental water was not based on sound evidence.

In particular, it was claimed that the 70GL reduction would have minimal impacts on the environment and downstream users. However, the hydrological modelling underpinning

this claim was based on a number of flawed assumptions. For example, it assumed that:

- users are complying with water laws in the Northern Basin (which has been thrown into doubt by official investigations and reports by Mr Ken Matthews and the MDBA itself);
- the Commonwealth's environmental water could be simultaneously released from storage dams on the tributaries that flow into the Barwon-Darling River to produce one, large flow through the Darling (which is unprecedented);
- most of the Commonwealth's environmental water would actually make it through the Barwon-Darling River (despite the fact that environmental water paid for by taxpayers can be legally extracted by a few large-scale irrigators on that river system);
- the old rules that applied *before* the BD WSP was passed were a good enough representation of the regulatory regime governing water extractions. However, the rule changes that occurred under the BD WSP were significant, allowing (amongst other things) greater volumes of water to be pumped more quickly - and without the previous, daily limits on extractions;
- analysis of big flows on the Barwon-Darling would give an accurate representation of the impact of a 70GL reduction. However, failing to analyse lower flows was a serious omission, particularly given significant increases in access to these lower flows under the BD WSP; and that
- the 70GL reduction would have relatively minimal downstream impacts due to the MDBA's proposed, targeted water recovery program. However, the instrument that was eventually tabled in Parliament included amendments allowing States to *vary* the location from which water is recovered for the environment, completely undermining the purported benefits of the MDBA's targeted scheme. Further, these amendments were not in the version placed on public exhibition.

It is important to note that the MDBA used models provided to them by the States.

**4. Can a State 'walk away' from a legally binding law of Australia?**

The *Water Act 2007* and Basin Plan are constitutionally valid laws passed by the Parliament of Australia. The Australian Government therefore has an obligation to recover the volume of water mandated under the Basin Plan by mid-2019 – which currently stands at 2,750GL.

Relevantly, it also has the legal powers – should it choose to exercise them – to recover the balance of this volume if a Basin State decides to 'walk away' from the Plan.

However, the current, 1500GL limit on 'buybacks' added in 2015 to the *Water Act 2007* could serve to frustrate this outcome if it is not physically possible to recover the remaining volume via on-farm water saving projects. Without delving into the legal and practical complexities of this issue, we note that Parliament could in any case choose to lift the 1,500GL limit in order to guarantee delivery of the 2,750GL by the statutory deadline.

What, then, does it mean for a State to 'walk away' from the Basin Plan? While this is a complex issue, it is likely that it could mean one or more of the following:

- making a declaration that some or all of the Water Act and/or Basin Plan do not apply to the extent of any inconsistency with a State law;
- refusing to appoint a Minister to the 'Ministerial Council' which assists with the Plan's implementation;
- withdrawing from the Intergovernmental Agreement on Water Reform in the Murray-Darling Basin (**IGA**);
- refusing to prepare water resource plans – which will set out how water will be shared between users under the Basin Plan – and which are due for accreditation by the Commonwealth by mid-2019.

However, it is important to note the following:

- The Commonwealth can make a regulation overriding any declaration by a State that some or all of the Water Act and/or Basin Plan do not apply;
- The Ministerial Council currently comprises a Minister from each Basin State and the Australian Government. However, there does not appear to be any legal impediment to it functioning in the absence of an appointed Minister from one or more State;
- Withdrawing from the IGA could result in the Commonwealth terminating funding for State water projects;
- While States are responsible for preparing water resource plans, the *Water Act 2007* allows the Minister to 'step-in' and order the MDBA to make one or more of these plans if any State refuses to do so by the statutory deadline.

This being the case, it is unclear why any State would:

- create widespread uncertainty by making a declaration that could be overridden by the Commonwealth, and which in any case could disadvantage many water users within the State who depend on the sustainable management of water resources;
- choose to absent itself from important negotiations and discussions that occur during Ministerial Council meetings;
- disadvantage itself and its constituents by refusing to participate in the making of water resource plans, which are the most important legal instruments sitting beneath the *Water Act 2007* and Basin Plan; or
- walk away from its share of approximately $6 billion – the amount of Commonwealth funding left to implement the Basin Plan and to assist communities to adjust to a future with less productive water.

Finally – and significantly – the Commonwealth Government has already acquired most of the water needed to satisfy the requirements of the Basin Plan in northern NSW. This means that disallowing the 70GL will not – as some people have framed it – require irrigators to suddenly sell off all of their water. Rather, it means things will remain largely unchanged in NSW.

It is important to bear these legal realities in mind as debate continues. There is a second proposed amendment before parliament concerning the 'adjustment mechanism' that will be the subject of an upcoming post.