ACCC inquiry – into water markets in the M D Basin

25/11/2019 Submission to ACCC

Issue 3 –Regulation and institutional settings

The NSW Regulator for water is DPI Water. The activities of DPI Water are in part if not wholly funded by charges levied on irrigation license holders, i.e. Usage charges.

The funding model applied to the regulator is based on usage charges to irrigators, this causes a conflict of interest as DPI Water tries to reconcile its funding requirements and its responsibilities under the NSW Water Management Act 2000.

The approach taken by DPI Water to secure its funding stream has also, at least in some instances, undermined the market mechanism for water transfer, which is the appropriate mechanism to undertake resource reallocation.

Specifically the approach taken by the regulator in regulating the access rules for Murrumbidgee Supplementary Licenses undermines the market mechanism because it fails to adequately define these entitlement access rights.

This approach by the regulator also ignores requirements under the Water Management Act 2000 (where priority is given to the environment of the river and its dependant ecosystems and critical human needs) and is probably in breach of the Murray Darling Basin Cap 1994 as well.

The creation of the Murrumbidgee Supplementary Licenses in around 2007 were justified on the basis of a "history of use".

This history of use came from General Security License holders using surplus or off allocation flows (later called supplementary flows). These flows came from tributary inflows (tributaries such as Tarcutta Creek) below the main storages. Supplementary flow events were declared when flows were considered surplus to all other system requirements. Supplementary access occurred in stages along the river as these flows progressed down the river and would be extended if more inflows occurred that were considered surplus to requirements. The history of use had both an extent (the extraction limit) and a time component (time needed to divert the flows with the regulated/permissible extraction equipment at that time (pumps and channels). There was also differing treatment on how the extracted flows were accounted for depending on the resource availability in that irrigation season. Below an allocation level of 60% the amount taken would be debited against the irrigator's allocation for that season.

So the "history of use" had both an extent and time component (as well as accounting rules for how the extraction was to be treated, debited against allocation or not).

The Supplementary Licenses issued in around 2007 now only have an extraction component (extraction limit) and no time component to diversions. The diversions can be taken at any rate and at any time once a supplementary event is declared for the relevant reach of the river. This has allowed some supplementary license holders to significantly compress their diversion times to a fraction of what were taken during the history of use period (via substantially larger diversion infrastructure). This is in effect an increase in entitlement. Also, as this is now a separate entitlement there is no longer accounting back to the General Security entitlement that it was previously a part of.

This compression of diversion time has consequences for both the river and its dependant ecosystems and other Supplementary License holders (both other Murrumbidgee Supplementary License holders not compressing their take period and Lowbidgee Supplementary License holders).

Firstly, under the NSW Water Management Act 2000 Licenses of the same category must be treated equally. The allowing of supplementary licenses holders to compress their diversion period may be a boon to those adequately financed to take advantage of the opportunity but does nothing to ensure equal treatment amongst these licenses. But it does ensure greater revenues to the Regulator as some take advantage of the situation. A daily extraction limit reflective of the time component of the history of use needs to be applied. This will also better define these supplementary entitlement in terms of the market place. The current arrangement only creates market uncertainty.

Secondly, no consideration has been given to the effects on the river environment or its dependant ecosystems with this compression of extraction. This despite the requirements under the NSW Water Act 2000 regarding priorities given to the river and its dependant ecosystems. It should be noted that neither the "Environment" nor basic landholder rights are subject to usage charges.

Thirdly, no consideration has been given to the effect on the Lowbidgee Supplementary Licenses. Lowbidgee Supplementary Licenses only gain access to supplementary flows after the intake capacity of Lake Victoria is met (unlike Murrumbidgee Supplementary). The compression of take possible under the Murrumbidgee Supplementary Licenses reduces resource availability for the Lowbidgee Supplementary Licenses, this is exacerbated under climate change.

Most of the Lowbidgee Licenses are being used for environmental purposes. The Commonwealth Lowbidgee License (Nimmie Ciara) is kept in the river (not diverted) as an environmental strategy, this negates its usage charge to the regulator. As the Murrumbidgee Supplementary Licenses were created in 2007 after the introduction of the NSW Water Management Act 2000 it is questionable whether these licenses should have precedence over the Lowbidgee Supplementary Licenses (at least as far as the Lowbidgee Licenses are used environmentally).

It would be appropriate for there to be a review and inquiry into not only the governance and funding arrangements of the NSW regulator but also how this situation arose in the first instance. It goes to the heart of poor management in the MDB.

It should be noted:

"The management and sharing of water in New South Wales is regulated by the NSW WM Act. The guiding principles of that Act are the water management principles set out in s 5 of the Act. Section 5(1) identifies the general water management principles, which include ecological, social, cultural and economic principles which are unlikely to all be separately achievable and will require some degree of trade off. The water management principles specific to water sharing are of a different character and are set out in s 5(3):

(3) In relation to water sharing:
(a) sharing of water from a water source must protect the water source and its dependent ecosystems, and

(b) sharing of water from a water source must protect basic landholder rights, and
(c) sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b)
The meaning of this provision was held by the Land and Environment Court of New South Wales and quoted with approval by the Court of Appeal to mean:
…every drop of water that is necessary to protect the water source is a drop not available for any other purpose. Every drop necessary to protect water dependent ecosystems is not available for basic landholder rights. Every drop
available for basic landholder rights is not available for persons extracting under other rights [emphasis added].

The water management principles create an approach which is not dissimilar to the approach taken in the Federal Water Act, through an SDL limiting consumptive extraction on the basis of an ESLT.

The way in which water sharing principles are to be applied under the Act is set out in s 9(1) of the NSW WM Act as follows:

(1) It is the duty of all persons exercising functions under this Act:
(a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and (b) as between the principles for water sharing set out in section 5 (3), to give priority to those principles in the order in which they are set out in that subsection.

This provision makes it clear firstly that the water management principles are to be applied in the development of water sharing plans under the Act, including when the plan is prepared by the Minister, and secondly that the water sharing principles in s 5(3) are to guide the priority in which water is allocated in water sharing plans."

(Walmsley and Brennan, Australian Environmental Review June 2019)