Water Amendment (Indigenous Authority Member) Bill 2019

Posted 03/04/2019 by James Haughton

James Haughton (Social Policy) and Bill McCormick (Science, Technology, Environment and Resources)

Summary

The Water Amendment (Indigenous Authority Member) Bill 2019 was introduced by the Minister for Agriculture and Water Resources, David Littleproud, in the House of Representatives on 20 February 2019. The Bill amends the Water Act 2007 to add an Indigenous person, referred to as the ‘standing Indigenous Authority member’, to the Murray-Darling Basin Authority (the Authority). This will increase the Authority from six to seven members. The position does not preclude other Indigenous members.

To be eligible for appointment, an individual must:

- Be an Indigenous person with a high level of expertise in Indigenous matters relevant to Murray–Darling Basin (the Basin) water resources. ‘Indigenous matters’ is not defined in the Act but is conceived broadly in the Explanatory Memorandum (p. 6) as including:
  
  experience with the development of cultural flows policy, working with the Commonwealth Environmental Water Holder on using environmental water flows to address cultural needs, working with the Authority on cultural heritage issues in the Murray-Darling Basin, expertise on engaging or consulting with Indigenous people or other social, spiritual and cultural matters relevant to Indigenous people in the Murray-Darling Basin.

- Not be a member of the governing body of a relevant interest group. While this stipulation applies to all members of the Authority, it could conceivably create problems for an Indigenous member (this is discussed further below).

The new member is otherwise subject to the same appointment process and terms and conditions for employment as the six other members of the Authority (as set out in sections 177–190 of the Water Act).

The Bill gives effect to a decision of the Murray-Darling Basin Ministerial Council on 14 December 2018 that a standing Indigenous Authority member position should be established.
Background

The Water Act 2007 and the Murray-Darling Basin Authority

The Water Act enables the Commonwealth and the Basin States to manage the Murray-Darling Basin water resources in the national interest (section 3), with the Basin States having referred some of their constitutional powers to the Commonwealth for that purpose (sections 9, 9A). The Water Act establishes the Authority, which prepares and reviews the Basin Plan and performs various functions.

The Authority’s membership currently consists of the Chief Executive, the Chair and four other members who must have a high level of expertise in one or more fields relevant to the Authority’s functions. The Water Act was amended in 2016 to, among other matters:

- insert ‘Indigenous matters relevant to Basin water resources’ as a relevant field of expertise
- require that water resource plans ‘have regard to social, spiritual and cultural matters relevant to Indigenous people… in the preparation of the water resource plan’
- mandate that the Basin Community Committee must include at least two Indigenous persons with expertise in Indigenous matters relevant to basin water resources and
- make one of the functions of the Authority to engage with Indigenous communities on the use and management of basin water resources.

In 2018 the Authority was directed to report annually on how Indigenous values and uses are considered in environmental water use.

Evolving recognition of Indigenous rights and governance over water

Aboriginal and Torres Strait Islander peoples have traditionally regarded both land and water as inseparable parts of their country. After the Mabo v Queensland [No. 2] (1992) decision, the potential existence of native title over waters was recognised in the Native Title Act 1993. Initially native title was interpreted as only extending to non-commercial use of water and aquatic resources (e.g. fish), but subsequent evolution of case law (particularly the Akiba v Commonwealth (2013) case) has recognised native title rights to commercial use of fisheries and other resources. There has not yet been any recognition of a native title right to the commercial use of water per se, although the creation of a Strategic Indigenous Reserve in some northern water plans may enable commercial use in future. The restrictive scope of Indigenous water rights has meant that, according to a 2009 estimate, Indigenous-specific water entitlements are less than 0.01 per cent of water diversion entitlements in Australia.

The National Water Initiative, signed in 2004, which led to the Water Act, states:

52. The Parties will provide for indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, through planning processes that ensure:

i) inclusion of indigenous representation in water planning wherever possible; and
ii) water plans will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.
53. Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth Native Title Act 1993.

54. Water allocated to native title holders for traditional cultural purposes will be accounted for.

However the 2017 Productivity Commission inquiry into national water reform found that while consultation with Indigenous stakeholders had improved, water plans were not yet taking the cultural and economic water needs of Indigenous communities into account (Recommendations 3.2 and 3.3). The report noted as an example (p. 110) that while the Barkindji people had Native Title recognised over a large stretch of the Darling River in 2015, New South Wales’ 2016 Murray and Lower Darling Regulated Rivers Water Sources plan did not recognise them and made no allowance for Barkindji governance or water allocations. Recently the Barkindji and other Indigenous peoples of the Basin have protested their absence from decision making in the Murray-Darling.

In 2018 the Commonwealth government committed $40 million over four years in funding for the Murray-Darling Basin Indigenous water entitlements program. This program is supported by amendments made in 2018 to the Aboriginal and Torres Strait Islander Act 2005 to enable the Indigenous Land and Sea Corporation to purchase water, as well as land.

**Potential issue—membership requirements**

Proposed paragraph 178(2A)(b) requires that the standing Indigenous Authority member not be a member of a governing body of a relevant interest group. A similar stipulation already applies to all members of the Authority’s board (see existing paragraph 178(2)(b)), and has a clear legislative purpose of preventing conflicts of interest, but may create problems when applied to the standing Indigenous Authority member.

A ‘member of the governing body of a relevant interest group’ is defined by existing subsection 178(4) of the Water Act to cover situations where:

(a) the individual is one of the persons involved in the management of another entity; and

(b) that other entity (whether incorporated or otherwise):

(i) represents one or more classes of holders of water access rights, water delivery rights or irrigation rights; or

(ii) advocates managing the Basin water resources in a particular way.

This very broad definition might exclude many Indigenous persons with relevant expertise from consideration by the Board, as many roles in Indigenous communities and entities are not simply a matter of personal career choice. This may be a particular issue given the pool of Indigenous people with both expertise on Indigenous water matters and the corporate governance experience to contribute effectively to the Authority may be quite small.
For example, an Indigenous person in the Basin may be a member ‘involved in the management’ of their Native Title Prescribed Body Corporate or claimant group, or in Indigenous organisations such as the Northern Basin Aboriginal Nations (NBAN) or the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) by virtue of their cultural knowledge, genealogical descent, customary or Native Title rights to water, or community role as an elder. That group may assert certain rights over water, or advocate particular cultural flows policies. It is precisely their status as an elder or Native Title holder or claimant which gives an Indigenous person both the ‘Indigenous matters’ expertise sought by the Authority and their membership of a relevant entity. The nature of the membership, being ascribed by descent or community status and intertwined with Indigenous assertions of native title or other rights, may be such that they cannot simply be resigned in order to take up an Authority role. Depending on its interpretation, this subsection could create a ‘Catch-22’ situation where the Indigenous people who possess the Basin expertise sought are, by the same token, ineligible to serve.

The authors wish to thank Bradley Moggridge, Professor Sue Jackson and Professor Lee Godden for providing expert advice on the governance of Indigenous entities in the Murray-Darling Basin.