SENTENCING OFFENDERS FOR UNLAWFULLY TAKING WATER IN NEW SOUTH WALES

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Australians are increasingly demanding improved state action to prevent and punish the unlawful taking of water. These calls are made with a sense of urgency due to the fast changing climate. In this article, I use the Water Management Act 2000 (NSW) to explain the sentencing process for offenders who are being sentenced for the unlawful taking of water. I offer suggestions as to how such sentencing outcomes can be improved in order to achieve better outcomes for the environment. I argue that the legislation should be amended to explicitly recognise the threat posed to scarce water resources by climate change and the importance of protecting the human right to water. Such reforms would allow prosecutors to contextualise the gravity of water crime and could lead to better sentencing outcomes.

I INTRODUCTION

In September 2019, the New South Wales (NSW) Natural Resources Commissioner delivered his report into the state of the Barwon-Darling River, the largest inland waterway in NSW.[1] His report commenced with '[t]he Barwon-Darling is an ecosystem in crisis'.[2] Water is essential to life, but has been commodified and exploited in NSW. Water crime, of which the unlawful taking of water is only one kind, is a significant part of environmental crime in NSW and globally,[3]and is perpetrated by corporations to maximise profits.[4]

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[1] Natural Resources Commission, *Review of the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012* (Final Report, Natural Resources Commission, September 2019).

[2] Ibid 1.

[3] Lorenzo Segato, Walter Mattioli, and Nicola Capello, 'Water Crimes Within Environmental Crimes' in Katja Eman, Gorazd Meško, Lorenzo Segato and Massimo Migliorini (eds.), *Water, Governance, and Crime Issues* (Springer Nature, 2020) 31, 40; Rob White and Katja Eman, 'Green Criminology, Water Issues, Human Rights and Private Profit' in Katja Eman, Gorazd Meško, Lorenzo Segato, and Massimo Migliorini (eds.), *Water, Governance, and Crime Issues* (Springer Nature, 2020) 3, 5.

[4] Katja Eman, and Rob White, 'Water and Organised Crime' in Katja Eman, Gorazd Meško, Lorenzo Segato, and Massimo Migliorini (eds.), *Water, Governance, and Crime Issues* (Springer Nature, 2020) 47, 48; 53; Gorazd

Prosecutions for the unlawful taking of water are one way for regulators to preserve the availability of water and aquatic ecosystems. In this article, I consider three NSW Land and Environment Court (LEC) decisions where corporate offenders have been sentenced for unlawfully taking water, and consider whether more can be done by prosecutors or through law reform to ensure its effective punishment. First, I will introduce water crime and the *Water Management Act 2000* (NSW) (WM Act). I then consider three LEC sentencing decisions as case studies. I finally reflect on options which could assist in obtaining better sentencing outcomes, through submissions made by prosecutors and law reform which could enable prosecutors to better contextualise the negative effects of the unlawful taking of water.

I argue that more can be done by prosecutors to ensure that evidence of environmental harm and harm to the regulatory system caused by the unlawful taking of water is before the sentencing court. I further argue that the WM Act could be amended to explicitly recognise the ongoing effects of climate change on water and the importance of protecting the human right to water. Such reforms would allow prosecutors to further contextualise the gravity of water crime which exacerbates the effects of climate change and infringes on human rights to water.

II UNLAWFULLY TAKING WATER AS WATER CRIME

Water is the lifeblood of human civilisation. Its importance to First Nations peoples is well documented.[5] Water not only played a significant role within their societies and economies,[6] but also in their culture and cosmology.[7] From the time of colonisation, First Nations peoples were not only dispossessed of their lands, but also of their access to water as settlers occupied places in close

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Meško, and Katja Eman, 'Policing Water Crimes' in Katja Eman, Gorazd Meško, Lorenzo Segato and Massimo Migliorini (eds.), *Water, Governance, and Crime Issues* (Springer Nature, 2020) 75, 79; Segato, Mattioli, Capello (n 3) 34.

[5] See Virgina Marshall, *Overturning Aqua Nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017); Bradley J. Moggridge and Ross M. Thompson, 'Cultural value of water and western water management: an Australian Indigenous perspective' (2021) 25(1) *Australasian Journal of Water Resources* 4; Siobhan Davies, Jason Wilson and Malcolm Ridges, 'Redefining "cultural values" – the economics of cultural flows' (2021) 25(1) *Australasian Journal of Water Resources* 15.

[6] See generally Davies, Wilson and Ridges (n 5); Marshall (n 5) Ch 2.

[7] Moggridge and Thompson (n 5) 4-6; Davies, Wilson and Ridges (n 5) 17-24; Marshall (n 5) Ch 3.

proximity to reliable fresh water sources.[8] Water was exploited by the colonial settlers as their societies - and the consequent dispossession of First Nations peoples' land - expanded. When thinking about water crime it is impossible to ignore the ongoing struggle of First Nations peoples for increased access to water rights, from which they continue to be excluded since colonisation.[9]

Water is crucial to the Australian economy. In the Murray-Darling Basin alone, the tourism industry is worth $8 billion and the agricultural industry is worth $24 billion.[10] By 2025, as freshwater supplies become scarcer, 85% of Earth's population will endure 'water stressed conditions'.[11] Water's role in ensuring that human rights are realised is essential: the right to life, healthcare and food are all cases in point.[12] So much has been recognised in the *Water Act 2007* (Cth). Section 86A(1) recognises that regard must be had to the 'critical human water needs' for communities reliant on the Murray-Darling Basin for access to water when preparing Basin Plans.[13] Caitlin McConnel opined that implementation of these laws has manifestly failed and requires legislative reconsideration in order to better accommodate communities' water needs.[14] The tension between the economic interests in water and the realisation of human rights inextricably linked with access to water will only become more fraught as climate change continues to put pressure on water availability.

Criminal activity concerning water has a history as long as human civilisation itself. The first attempt at regulating the use of water was in Hammurabi's

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[8] For a detailed analysis of the waves of dispossession of First Nations water rights, see Lana D. Hartwig, Sue Jackson and Natalie Osborne 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession' (2020) 99 *Land Use Policy* 1.

[9] For ways that this struggle continues to materialise see, Moggridge and Thompson (n 5) 8-11; Marshall (n 5) 172-182; Erin O'Donnell, Lee Godden, Katie O'Bryan, 'Final report of the Accessing water to meet Aboriginal economic development needs Project' (University of Melbourne, 2021).

[10] Nicola Pain, 'Administering Water Policy in the Eastern States of Australia – Administrative and Other Challenges' (Paper presented at Australian Institute for Administrative Law National Administrative Law Conference, Canberra, ACT, 18-19 July 2019) 1.

[11] White and Eman (n 3) 5.

[12] Caitlin McConnel, 'Critical Human Water Needs: Failing to Comply with the Objects of the Water Act and Human Rights Obligations' (2019) 36 *Environmental and Planning Law Journal* 212, 213.

[13] See ibid 216-217 for further analysis of the *Water Act 2007* (Cth).

[14] Ibid 228.

Code, from 1790 BCE.[15] Despite this, water crime has only recently piqued criminal lawyers' and criminologists' interest.[16] The importance of water to life and the economy, has led INTERPOL and UNEP to warn that environmental crime, including water crime, is increasingly frequent and requires greater global attention.[17] They have estimated the global value of environmental crime at $USD 91-259 billion.[18] The precise value of water crime is harder to quantify in states with historically poor regulatory and compliance environments like Australia.[19] This has led water crime to be considered 'high profit/low risk' because it is 'difficult to detect, assess, prosecute and study'.[20]

INTERPOL and UNEP have a threefold categorisation of water crime: water fraud, water pollution and water theft.[21] In the Australian context, Barclay and Bartel developed an eightfold typology of water crime: theft, contamination; diversion; unauthorised taking of surface or groundwater; violations of water compliance and enforcement; corruption; terrorism; and, water related consequences of other forms of illegal or unregulated activity.[22] To date there

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[15] Alexander Baird and Reece Walters, 'Water Theft Through the Ages: Insights for Green Criminology' (2020) 28(3) *Critical Criminology* 371, 374.

[16] Ibid 372; Segato, Mattioli and Capello (n 3) 32; White and Eman (n 3) 4.

[17] INTERPOL and United Nations Environment, *Environment, Peace and Security: A Convergence of Threats* (Strategic Report, December 2016) 4; see also, A Loch, C.D.Pérez-Blanco, E Carmody, V Felbab-Brown, D Adamson and C Seidl 'Grand theft water and the calculus of compliance' (2020) 3(12) *Nature Sustainability* 1012, 1012.

[18] Ibid.

[19] Meško and Eman (n 4) 76; on the lack of concrete data about the unlawful taking of water see G. Schmidt, L. De Stefano, M. Bea, E. Carmody, G. van Dyk, A. Fernández-Lop, F. Fuentelsaz, C. Hatcher, E. Hernández, E. O'Donnell and J. J. Rouillard *How to tackle illegal water abstraction? Taking stock of experience and lessons learned* (Fundación Botín, Spain, 2020)https://www.fundacionbotin.org/89dguuytdfr276ed_uploads/Observatorio%20Tendencias/How%20to...ok_enlaces.pdf 7; on Australia's poor history with water regulation and compliance, see Alexander Baird, Reece Walters and Robert White, 'Water Theft Maleficence in Australia' (2021) 10(1) *International Journal for Crime, Justice and Social Democracy* 83, 90; 'Pumped' *Four Corners* (Australian Broadcasting Corporation, 2017) <https://www.abc.net.au/4corners/pumped/8727826>.

[20] Meško and Eman (n 4) 76; Segato, Mattioli and Capello (n 3) 32.

[21]INTERPOL and UNEP (n 17) 40-41; Meško and Eman (n 4) 77.

[22] Elaine Barclay and Robyn Bartel, 'Defining environmental crime: The perspective of farmers' (2015) 39 *Journal of Rural Studies* 188 cited in Meško and Eman (n 4) 78-79.

has only been a small subset of water crime which has been detected, prosecuted and punished in NSW.[23]

I use the phrase 'unlawful taking of water' to described what may be otherwise described as water theft. I do this in recognition that the scope of conduct which could attract liability for unlawfully taking water extends beyond that which is conducted by a direct perpetrator with intention to take something without legal entitlement to do so. Thus, conduct which can be encompassed by offences of unlawfully taking water is much broader in scope than theft in the traditional criminal law sense. In referring to the unlawful taking of water, I do not intend to deny the significance of the offending conduct, or the seriousness of the harm that it causes. I focus specifically on prosecutions concerning the unlawful taking of water because there has been a recent increase in prosecutions for these types of offences which have attained a high public profile. While much has been written about the efficacy or otherwise of the WM Act and Murray-Darling Basin Plan, there has been less analysis of the case law arising from prosecutions and consideration of the lessons that can be learned from them.

III NSW WATER MANAGEMENT REGIME

NSW's primary legislative instrument which regulates the use and management of water is the *Water Management Act 2000* (NSW).[24] The WM

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[23] Pain (n 10) 26-27; Janice Gray '"Thieves, Shady Deals and Murder": Water Theft, Buy-Backs and Fish Kills in the Murray Darling Basin of Australia' in Laura Westra, Klaus Bosselmann, and Matteo Fermeglia (eds.), *Ecological Integrity in Science and Law* (Springer Nature, 2020) 37, 39.

[24] For more detailed analysis of the WM Act generally see, Rosemary Lyster, Zada Lipman, Ed Couzens, Susan O'Neill and Jeff Smith *Environmental and Planning Law in New South Wales* (5th ed., Federation Press, 2021) Ch 8; Kate Owens, *Environmental Water Markets and Regulation: A Comparative Legal Approach* (Routledge, 2017); Deborah Curran and Sharon Mascher, 'Adaptive management in water law: Evaluating Australian (New South Wales) and Canadian (British Columbia) law reform initiates' (2016) 12(2) *McGill International Journal of Sustainable Development Law and Policy* 178; Jenny Burchmore, 'The development of new water legislation for NSW: a policy perspective' (2000) 17(4) *Environmental and Planning Law Journal* 309; Janice Gray, 'Watered down? Legal constructs, tradable entitlements and the regulation of water' in Devleena Ghosh, Healther Goodall and Stephanie Hemelryk Donald, *Water Sovereignty and Borders in Asia and Oceania* (Routledge, 2008) 147; Natalina Nheu, 'The continuing challenge of water management reform in NSW' (2002) 19(3) *Environmental and Planning Law Journal* 217; Cameron Holley and Darren Sinclair, 'Compliance and enforcement of water licences in

Act intersects with other criminal and public law statutes to regulate people's conduct in connection with water.[25] The WM Act's objects are:

> *to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular—*
>
> *(a) to apply the principles of ecologically sustainable development, and*
>
> *(b) to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, and*
>
> *(c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including—*
>
> *(i) benefits to the environment, and*
>
> *(ii) benefits to urban communities, agriculture, fisheries, industry and recreation, and*
>
> *(iii) benefits to culture and heritage, and*
>
> *(iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,*
>
> *(d) to recognise the role of the community, as a partner with government, in resolving issues relating to the management of water sources,*
>
> *(e) to provide for the orderly, efficient and equitable sharing of water from water sources,*
>
> *(f) to integrate the management of water sources with the management of other aspects of the environment, including the land, its soil, its native vegetation and its native fauna,*
>
> *(g) to encourage the sharing of responsibility for the sustainable and efficient use of water between the Government and water users,*

NSW: limitations in law, policy and institutions' (2012) 15(2) *Australasian Journal of Natural Resources Law and Policy* 149.

[25] See, for example, *Fisheries Management Act 1994* (NSW), *Native Vegetation Act 2003* (NSW), *Protection of the Environment Operations Act 1997* (NSW), *Environmental Planning and Assessment Act 1979* (NSW), *Crimes Act 1900* (NSW), *Crimes Act 1912* (Cth), *Criminal Code* (Cth).

> *(h) to encourage best practice in the management and use of water.*[26]

The objects are to be read with the water management principles contained in s. 5. The WM Act should be administered having regard to the objects, principles, and the State Water Management Outcomes Plan,[27] created by the relevant government minister to set strategic priorities for water use and management.[28]

The WM Act establishes a system where irrigators can apply for, and be granted, water access licences which set out the terms upon which they can take water,[29] and water supply work approvals which determine the means by which water can be taken and stored.[30] There are only limited circumstances where water can be taken without a licence and approval, which include for stock and domestic use,[31] in exercise of a harvestable right[32] or native title right.[33] The WM Act mandates that the relevant minister must prepare a management plan establishing the common rules of use and management of water for each riverine system.[34]

The WM Act also creates offences for non-compliance with the scheme which may be enforced by regulators using civil or criminal law.[35] The offences can be prosecuted in the Local Court or LEC. Criminal proceedings are conducted according to the *Criminal Procedure Act 1986* (NSW), and sentencing proceedings are conducted according to the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSP Act). The NSW regime has been criticised for its failure to achieve environmental outcomes and poor regulation and compliance.[36]

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[26] *Water Management Act 2000* (NSW) s 3.

[27] Ibid s 9.

[28] Ibid s 9(2)(a).

[29] Ibid ch 3, pt 2.

[30] Ibid ch 3, pt 3.

[31] Ibid s 52.

[32] Ibid s 53.

[33] Ibid s 54.

[34] Ibid pt 3 ss 15, 18.

[35] Ibid ch 7.

[36] See, for example, Natural Resources Commission (n 1); Brett Walker, 'Murray-Darling Basin Royal Commission Report' (Final Report, Murray-Darling Basin Royal Commission, 29 January 2019); Gray (n 23) 39, 43-44; ABC, 'Pumped' *Four Corners* (Australian Broadcasting Corporation 2017) <https://www.abc.net.au/4corners/pumped/8727826>.;'Cash Splash' *Four*

IV SENTENCING CORPORATE OFFENDERS UNDER WATER LAW

I consider three LEC decisions where corporate offenders were sentenced for unlawful water take offences under the WM Act. The three decisions provide a useful snapshot of sentencing considerations and highlight common issues. The vast majority of such offending is dealt with in the Local Court, and accordingly this analysis may not be representative of lessons that could be learnt from analysis of cases in that jurisdiction.[37] I focus on water take offences, because these have been the most common type of offences to be dealt with in the LEC.[38] I obtained these decisions using the NSW Caselaw website. The only other published decision as at October 2020 that fell within the category of decisions that I consider in this article that has been excluded is *Harrison v Harris* [2013] NSWLEC 105 and the subsequent appeal *Harris v Harrison* [2014] NSWCCA 84. These decisions concern complex factual arguments about the way that water taken at certain times can be apportioned to different licences held by the same irrigator. Due to space constraints, I could not do justice to an analysis of these related decisions. I also do not consider any prosecutions for offending under other statutory schemes such as the *Fisheries Management Act 1994* (NSW)[39] or *Protection of the*

Corners (Australian Broadcasting Corporation 2019) <https://www.abc.net.au/4corners/cash-splash/11289412>.; Ken Matthews, 'Independent NSW Investigation into Water Management and Compliance' (Interim Report, Department of Primary Industry, 8 September 2017); Department of Primary Industries, 'Fish Deaths Interim Investigation Report' (Interim Report, Department of Primary Industry, January 2019).

[37] Pain (n 10) 26. As at October 2020, *Hongzhi Sun v Grant Barnes, Department of Industry* [2018] NSWLEC 196 was an appeal from a Local Court decision to the Land and Environment Court and gives an example of the types of matters brought in the Local Court.

[38] For examples of the other types of water crime that have been before the LEC, see, *Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v Budvalt Pty Ltd; Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v Harris* [2020] NSWLEC 113; *Harrison v Perdikaris* [2015] NSWLEC 99; *Wollongong City Council v Eldridge* [2017] NSWLEC 35.

[39] For examples of such prosecutions see, *Director General, Department of Industry and Investment v Rob Butler (Nee Zachariah El-Chami Batch)* [2011] NSWSC 1620; *Currie v Kim* [2005] NSWSC 188; *Lochiel South Pty Ltd v NSW Department of Trade and Investment, Regional Infrastructure and Services: Lavalle v NSW Department of Trade and Investment, Regional Infrastructure and Services* [2019] NSWDC 22.

Environment Operations Act 1997 (NSW),[40] which may also concern water crime in other contexts but will rarely concern the unlawful taking of water.

A *Murray Irrigation Limited v ICW Pty Limited and Anor* [2006] NSWLEC 23

Following a trial, the defendant ICW Pty Limited was found guilty of two offences contrary to the then s. 246(1)(b) (interfering with a water meter) and two offences contrary to the then s. 247(1) (taking water without authority) of the WM Act.[41] The second defendant, Meares Nominees, was found guilty of identical offences.[42] The then maximum available penalty for each offence was a fine of $275,000.[43] Justice Bignold dismissed the charges without proceeding to conviction pursuant to s. 10(1)(a) of the CSP Act, and ordered the defendants to pay the prosecutor's costs.[44] Unfortunately, Bignold J did not explain the facts underlying the offences.

An important factor that weighed in the defendants' favour, was that they were vicariously liable for offences directly perpetrated by their employee.[45] Justice Bignold placed weight on the defendants being subject to significant media attention during and after their trial.[46] His Honour accepted that the defendants' directors were people of 'high standing' who contributed to their community.[47] His Honour recognised that the defendants already had their annual water entitlement reduced by the value of the unlawfully taken water.[48]

The prosecutor drew the Court's attention to 'the existence of severe drought conditions' at the time of offending and that because of directions issued by the regulator, the defendants were only entitled to take 8% of their water allocation.[49] The water that was unlawfully taken was half of the defendants'

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[40] For examples of such prosecutions, which usually concern pollution related offences, see, *Dyno Nobel Asia Pacific Pty Ltd v Environment Protection Authority* [2017] NSWCCA 302; *Environment Protection Authority v Viva Energy Pty Ltd* [2019] NSWLEC 13; *Environment Protection Authority v John Michelin & Son Pty Ltd* [2019] NSWLEC 88.

[41] *Murray Irrigation Limited v ICW Pty Limited and Anor* [2006] NSWLEC 23, [2].

[42] Ibid.

[43] Ibid [3].

[44] Ibid [51].

[45] Ibid [20].

[46] Ibid [8].

[47] Ibid [11]-[12]; [27].

[48] Ibid [10].

[49] Ibid [17].

annual drought adjusted water allocation.[50] The prosecutor emphasised the importance of general deterrence to prevent similar offending which 'undermine[s] the equitable and orderly distribution of scarce and precious water resources'.[51]

Part of the test under s. 10(1)(a) concerned whether the offence to be dismissed was trivial. Bignold J found that triviality could instead be substituted with the special circumstances that the defendants were vicariously liable for their employee's actions.[52] His Honour went as far as finding that the defendants 'are reasonably regarded as victims of the misconduct of the casual employee inasmuch as they have incurred vicarious criminal liability for his misconduct'.[53]

The prosecutor successfully made submissions about the scarcity of water at the time, and the importance of ensuring compliance with the regulatory regime. However, these submissions carried little weight with Bignold J who proceeded to dismiss the charges without conviction. It is difficult to discern whether the prosecutor advanced evidence to support these submissions. However, as no evidence was referred to in support of these submissions by the Court, it is likely that the prosecutor simply made submissions and expected the Court to accept them without evidence. In order to succeed in advancing such submissions, the prosecutor should have adduced evidence about the impact of water scarcity on water entitlements of others, and also evidence explaining the importance of compliance with the WM Act and the nature and extent of the harm caused by non-compliance to the regulatory system.

Moreover the prosecutor did not advance any submissions in relation to environmental harm. This is surprising given that the volume of water that the defendants took was half of their total allocation for the water year in which their offending occurred. Any unlawful water take in drought is inherently harmful to both the regulatory system and environment, as water levels need to be carefully monitored and measured to ensure that environmental and irrigator needs can be met.

Finally, the WM Act expressly places obligations on licence and approval holders and occupiers of land where irrigation occurs. Justice Bignold's decision to dismiss the charges was heavily based on the defendants'

[50] Ibid.

[51] Ibid.

[52] Ibid [31].

[53] Ibid [44].

vicarious liability for their employee's actions. To make such a finding is contrary to the way that Parliament has drafted the WM Act, namely, to ensure that the powerful entities and individuals who hold licences/approval or occupy irrigated properties are held responsible for conduct under those licences/approval and on those properties. From a public policy perspective, Bignold J adopted flawed logic in relying on the vicarious liability of the defendants in support of dispensing with proceedings under s. 10(1)(a). If such logic was widely adopted, few corporate entities, directors and managers would be held responsible for unlawfully taking water by their businesses. The subject farms are often large commercial operations with many staff that are responsible for on farm operations. The companies had been found guilty of offences which occurred in drought conditions, and due weight should have been given by the Court to the need to send a strong message to similar corporate entities that they are responsible for regulatory compliance under their licences/approvals and on their properties.

B *Harrison v Baring (No 2)* [2012] NSWLEC 145

Following a trial, the defendant, a wheat and canola irrigator, was convicted of four offences contrary to the then s. 341(1)(a) (taking water contrary to a term of a licence) and six offences contrary to the then s. 343(1)(a1)(i) (taking water using a pump contrary to the terms of the pump's approval) of the WM Act during the 2008 calendar year from the Lachlan River.[54] The defendant was charged as sole director of the company which irrigated the property.[55] Justice Pain found that Mr Baring had complete control over the company and was directly liable for its actions.[56] At the relevant time, the maximum penalty for each offence was a fine of $132,000. Justice Pain convicted the defendant and ordered him to pay a total fine of $290,000 and the prosecutor's costs of $80,000.[57] The defendant was sentenced in absentia.[58]

Like the *Murray Irrigation* case, due to a water shortage, the defendant was subject to a restriction on his water allocation at the time of offending.[59] At times, his water allocation was reduced to as low as 10% of his usual

[54] *Harrison v Baring (No 2)* [2012] NSWLEC 145, [1]; I say calendar year because it is to be distinguished from the water year, which runs to the same time line as a financial year.

[55] Ibid [55].

[56] Ibid [59].

[57] Ibid [95].

[58] Ibid [2].

[59] Ibid [14].

allocation.[60] The prosecutor adduced hydrological evidence that between 280 and 632 megalitres of water was unlawfully taken.[61] Her Honour used the lesser of the two figures in determining her sentence (without providing a reason).[62] At the time, 1 megalitre of water in the Lachlan River was valued at approximately $1,000.[63] Using the unlawfully obtained water, the defendant's canola crop yield increased by 2.3 tonnes per hectare[64] and was valued at $77,809.02.[65] The wheat crop yield increased by 0.88 tonnes per hectare[66] and was valued at $59,695.13.[67] Justice Pain was satisfied that the offences were committed for financial gain.[68]

Justice Pain highlighted the importance of the WM Act's ecological and other objects.[69] Her Honour stated 'the systems of ordering water and measuring water taken are important as…[they] lessen negative impacts on the environment and ensure the lawful and equitable sharing of water'.[70] Her Honour accepted that a 'severe water shortage' in the Lachlan River had commenced in June 2004[71] and endured until February 2010.[72] Justice Pain found that every unlawful water take from the Lachlan River during drought was taking water that was essential to protecting the river and its ecosystem.[73] Justice Pain identified that during 2008, when there was water in the Lachlan River near Mr Baring's property, there was no water further downstream.[74] Justice Pain found that '[a]ny unlawful taking of water, however, will have a negative impact on other persons' rights under the WM Act or on the environment or both', despite the prosecutor not making such a submission.[75] Her Honour considered that the environment harm 'is likely to have been

[60] Ibid [14(1)]; [39]-[40].

[61] Ibid [18].

[62] Ibid [32].

[63] Ibid [67].

[64] *Harrison v Baring* [2012] NSWLEC 117, [29].

[65] *Harrison v Baring (No 2)* [2012] NSWLEC 145, [65].

[66] *Harrison v Baring* [2012] NSWLEC 117, [29].

[67] *Harrison v Baring (No 2)* [2012] NSWLEC 145, [65].

[68] Ibid [65].

[69] Ibid [30].

[70] Ibid [44].

[71] Ibid [33].

[72] Ibid [34].

[73] Ibid [45(f)].

[74] Ibid [45(g)].

[75] Ibid [48].

significantly greater' because of the drought conditions.[76] Her Honour also found that the offender breached the public's trust in irrigators to comply with the regulatory scheme.[77]

Justice Pain found that there were few subjective factors tending in the defendant's favour. Her Honour found that the defendant had no relevant criminal record[78] and that he was unlikely to reoffend as his farming company had been deregistered.[79] In synthesising all of these factors, Pain J gave weight to the need for general deterrence without specific deterrence,[80] and emphasised its importance in sentencing offenders for environmental crime.[81]

This case must be analysed with care, as the sentencing hearing occurred with the defendant in absentia. The prosecutor's submissions put before the Court were, therefore, unchallenged. Nonetheless, the prosecutor made strong submissions supported by evidence as to why the defendant's conduct occurred for financial gain, which meant that Pain J could sentence the defendant with a clear understanding of the benefits that the defendant obtained from his conduct. The case is also interesting because whilst the prosecutor adduced evidence about the water shortage in the Lachlan River, the prosecutor did not make submissions about environmental harm. Despite this, Pain J found that harm must have occurred based on the other submissions and evidence before the Court, when considered with the object of the WM Act. It begs the question: how would the sentence have varied if the prosecutor submitted that the offences caused environmental harm and called scientific evidence in support?

Justice Pain also made strong findings about the importance of ensuring that irrigators respected the regulatory systems, and its statutory objects. But again, in contrast to the *Murray Irrigation* case, the submissions made by the prosecutor urging her Honour to find that such harm had occurred were supported by evidence from public servants who explained the process and rationale for reducing water allocations.

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[76] Ibid [50].

[77] Ibid [53].

[78] Ibid [70].

[79] Ibid [71].

[80] Ibid [82].

[81] Ibid [82] – [83].

C *Water NSW v Barlow* [2019] NSWLEC 30

The defendant managed a property which engaged in irrigated and dry land cropping on the Barwon River.[82] He was convicted of offences arising from his instruction to an employee to operate a pump between 16 – 18 May 2015 and 29 May – 2 June 2015.[83] During the first irrigation period, the regulator had declared an embargo in the Barwon River which prohibited water taking.[84] This conduct constituted the s. 336C(1) offence (contravening a direction issued to an irrigator). During both irrigation periods, the meter attached to the pump was not operating properly.[85] This conduct constituted the two s. 91I(2) offences (taking water while metering equipment was not operating properly). Chief Judge of the LEC, Justice Preston was satisfied that, while not being the direct perpetrator, the defendant was in 'complete control over the causes' of the offending, which only benefited Mr Barlow's company.[86] Following the entry of pleas of guilty to each charge, Mr Barlow was convicted and fined a total sum of $189,491 and ordered to pay the prosecutor's costs. The maximum possible fine for each offence was $247,500 and up to $66,000 for each day of continuous offending.

In sentencing, Preston CJ was guided by the objects of the WM Act.[87] His Honour also referred to the principles of ecological sustainability which are imported from the *Protection of the Environment Administration Act 1991* (NSW) through the WM Act's objects.[88] When considering the seriousness of the s. 91I(2) offences, Preston CJ identified that the regulatory regime sees metering as crucial because of its role in 'providing for the orderly, efficient and equitable sharing of water' between stakeholders.[89] He made similar findings regarding the s. 336C(1) offence regarding the importance of ensuring compliance with directions issued by the regulator,[90] particularly when the direction was 'in the public interest to cope with a water shortage in the city of Broken Hill'.[91]

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[82] *Water NSW v Barlow* [2019] NSWLEC 30, [1].

[83] Ibid [6].

[84] Ibid [7].

[85] Ibid [11].

[86] Ibid [51].

[87] Ibid [18]-[21].

[88] Ibid [19].

[89] Ibid [27].

[90] Ibid [28]; [32].

[91] Ibid [30].

Chief Judge Preston was satisfied that the defendant unlawfully took 381.62 megalitres of water during the first irrigation period, and 512.52 megalitres of water in the second.[92] The prosecutor submitted that the volume of water taken would impact on the rights of irrigators downstream,[93] but conceded that it could not prove environmental harm.[94] The prosecutor did, however, submit that environmental harm was likely to occur because the irrigation occurred during a water shortage.[95] To the contrary, Mr Barlow submitted that the prosecutor had no evidence to prove their submissions on harm,[96] and in respect of the s. 91I(2) offences identified that had his meter been working, there was no impediment to him taking the water that he took, as it was within his allocation.[97] His Honour found in favour of the defendant's submissions, accepting that '[w]hilst taking water contrary to the temporary water restrictions order had the potential to impact on people's rights and on the environment, the evidence does not establish the likelihood or actuality of any such impacts.'[98]

In considering the deliberateness of the offending, Preston CJ found that Mr Barlow was recklessly indifferent as to whether an embargo was in place.[99] Mr Barlow's recklessness was not assisted by the Minister indicating that there was no pumping embargo at an irrigators meeting that he attended.[100] However, his Honour found that Mr Barlow should have confirmed what the Minister said before assuming that the embargo had been lifted.[101] In relation to the s. 91I(2) charges, his Honour could not accept that Mr Barlow's staff acted on his instruction, nor could he accept that they acted of their own accord.[102] Preston CJ also rejected the defendant's submission that the meter not functioning properly was accidental.[103] His Honour identified the

[92] Ibid [39].
[93] Ibid [39].
[94] Ibid [40].
[95] Ibid [40].
[96] Ibid [41].
[97] Ibid [42].
[98] Ibid [43].
[99] Ibid [72].
[100] Ibid.
[101] Ibid.
[102] Ibid [76].
[103] Ibid [77].

importance of general deterrence for this type of offence in order to maintain the integrity of the regulatory regime.[104]

Chief Judge Preston found that while Mr Barlow profited from his offending,[105] he did not commit the offences for financial gain.[106] The defendant admitted to taking water to store for future use during the cropping season.[107] His Honour found that the offences occurred as part of the defendant's ordinary business operations.[108] This finding was, in part, a consequence of Mr Barlow having the amount of water that he took debited from his water allocation.[109] Preston CJ also accepted that the defendant did not have any relevant prior convictions and was of good character. He did, however, note that such mitigating factors have limited significance when considering environmental offences, because 'they are typically committed by persons of prior good character.'[110] His Honour also found that Mr Barlow showed genuine remorse.[111]

This case illustrates the importance of prosecutors drawing attention to the way that the regulatory scheme furthers the WM Act's objects, which are fundamentally based on ecological sustainability. Doing so assists the Court in concluding that an offence is more serious than it otherwise would seem and also supports the conclusion that harm to the regulatory system should be avoided. In this case, his Honour made strong findings in both these regards.

However, the prosecutor failed to support submissions made in relation to environmental harm that occurred and was likely to occur, with evidence. This was to the prosecutor's detriment, as Preston CJ could not find that the offending caused or was likely to cause environmental harm. It is clearly not enough to assert that any unlawful water take during a water shortage will necessarily cause environmental harm. Preston CJ, unlike Pain J in the *Baring* case, required additional assistance in drawing that conclusion. Such evidence should not be hard to gather because the reason for an embargo is to prevent harm to the environment and regulatory regime.

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[104] Ibid [106].
[105] Ibid [80].
[106] Ibid [82].
[107] Ibid [80].
[108] Ibid [82].
[109] Ibid [82].
[110] Ibid [86].
[111] Ibid [101].

Finally, it is difficult for the prosecutor to make submissions about whether an offence was conducted for financial gain without knowing the state of mind of a defendant, or having admissions or financial/actuarial evidence like that in the *Baring* case or concerning the market value of the water in the relevant system at the time of the take compared with the value at other times. In circumstances where the defendant offered to return the water, and ultimately had it deducted from his account and therefore paid for it, submissions about financial harm, without any further evidence, become even more difficult for the prosecutor. Preston CJ eloquently drew the distinction between making profit as a consequence of offending and an offence being committed *for* financial gain. Undoubtedly, this distinction will be subject to further judicial consideration.

V IMPROVING SENTENCING OUTCOMES FOR WATER TAKE OFFENCES

These three cases show that the most effective sentencing outcomes are achieved when prosecutors make submissions about the deliberateness of an offender's conduct, the extent to which the offending was committed for financial gain, and the extent to which environmental harm occurred or was likely to occur. The prosecutor must also adduce evidence to substantiate these submissions, which clearly assists the Court in understanding the gravamen of the offending. Gathering evidence to support these types of submissions is not easy. As the *Baring* case shows, the evidence required is technical and often given by senior public servants working in water management or by appropriately qualified experts. This evidence can sometimes be costly and time consuming to gather and can be a financial and resources drain on regulators.

It is also clear that submissions about harm to other irrigators and harm to the regulatory system are most effective when prosecutors draw clear links between the objects of the WM Act and the mischief that the offence provision seeks to restrain, and can provide the Court with evidence to elicit a deeper level of understanding about why regulatory processes and procedures exist and how they advance the WM Act's objects. Again, this is demonstrated in the *Baring* case, where the prosecutor called evidence to explain the process by which allocations can be adjusted during a water shortage.

However, one of the clearest areas for improvement by regulators is to link their sentencing submissions to the way that the unlawful taking of water exacerbates the already deleterious effects of climate change on aquatic ecosystems. Recalling the stark warning from the Natural Resources Commissioner set out in my introduction, such a link is apposite. The

unlawful taking of water exacerbates and multiplies the harmful effects of climate change which are already affecting river systems, their associated ecosystems and communities that rely upon them. Acknowledging that the Commissioner's report is referable to the Barwon-Darling River alone, the report calls for a revised Water Sharing Plan which 'should better consider climate change given projected temperature increases and decreases in water availability'.[112] The final report of the South Australian Royal Commission into the Murray-Darling Basin stated 'the threats to the Basin do not permit inaction until sometime after a 2026 review before we start attempts to find solutions to climate change degradation'.[113] While these regulatory matters fall outside the scope of actions that a Court can remedy in delivering judgment in a criminal prosecution, it does not mean that a Court should fail to act on the warnings about the climate crisis confronting aquatic ecosystems. While it is increasingly common for the LEC to consider climate change when determining civil matters,[114] it does not appear to be raised by prosecutors when offenders come to be sentenced. In light of the purposes of the WM Act, it is entirely proper to raise submissions that an inevitable intention of the Act is to be responsive to other harms posed to aquatic ecosystems, like climate change, and the increasing pressure that human actions like the unlawful taking of water place on already stressed and threatened river systems.

Section 364A of the WM Act sets out factors that the LEC must consider when sentencing, additional to those in the CSP Act. Consideration by the sentencing Court of the contribution that the unlawful taking of water makes towards climate change's effects on river systems could clearly fall within a number of the subsections of s. 364A(1), namely, the impact on other persons' rights; [115] the extent of the harm caused or likely to be caused to the environment;[116] the foreseeability of harm;[117] and, whether the offence was committed during a severe water shortage or an extreme event.[118] Even if consideration of climate change did not fall into any of these categories, s. 364A(2) allows the Court to consider any other relevant matter. If evidence of environmental harm, or reductions to water allocations and embargoes are already required in proceedings, it seems to be a small stretch to ask the

[112] Natural Resources Commission (n 1) 158.

[113] Walker (n 36) 270.

[114] *Bushfire Survivors for Climate Action Inc v Environment Protection Authority* [2020] NSWLEC 152; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.

[115] *Water Management Act 2000* (NSW) s 364A(1)(a).

[116] Ibid s 364A(1)(c).

[117] Ibid s 364A(1)(e).

[118] Ibid s 364A(1)(g).

witnesses who are already otherwise giving evidence to consider how the offending multiplies the threats posed to the river system that are otherwise caused by climate change.

Moreover, even where the prosecutor is unable to prove any harm or likely harm to the environment, but only harm to the regulatory system, the connection between the unlawful take of water and climate change should still be raised. The WM Act's objects include the protection, enhancement and restoration of water sources[119] and to recognise and foster the significant social and economic benefits arising from sustainable and efficient water use.[120] It is, therefore, clearly appropriate for the prosecutor to raise the importance of maintaining the integrity of the regulatory regime especially because of the threat posed by climate change to the availability of water and longevity of healthy aquatic ecosystems. As the effects of climate change become more apparent, an essential task of the regulatory system will be to monitor the changes and adapt usage patterns to maintain the sustainability and viability of river systems.

Sentencing outcomes could further be improved if legislators amended the WM Act in two ways which could assist prosecutors in making submissions on sentence and Courts in appointing a condign punishment. One would be to insert consideration of the relationship of the offending to climate change in s. 364A and recognise climate mitigation and adaptation in the objects of the WM Act. This would avoid the risk of judges rejecting any submissions and evidence adduced on sentence by prosecutors which link offending to the ongoing adverse effects of climate change on aquatic ecosystems.

More importantly, the WM Act should explicitly recognise the human right to water. This will decentre the commodification of water and begin to reconceive of it as a public good[121] in the WM Act. This recommendation follows the views of green criminologists, who argue that governments should develop 'legal and governance frameworks that prioritise the human right to water and ecological sustainability over private interests.'[122] Such a view is

[119] Ibid s 3(b).

[120] Ibid s 3(c).

[121] Baird and Walters (n 15) 384; Eman and White (n 3) 56; Meško and Eman, above n 4, 87-88; White and Eman (n 3) 12-13; Rob White, *Environmental Harm: An Eco-Justice Perspective* (Policy Press, 2013) 174-175; Rob White, 'Criminological Perspectives on Climate Change, Violence and Ecocide' (2017) 3(4) *Current Climate Change Reports* 243, 248-249.

[122] Hope Johnson, Nigel South and Reece Walters, 'The commodification and exploitation of fresh water: Property, human rights and green criminology' (2016) 44 *International Journal of Law, Crime and Justice* 146, 160, cited in White and Eman (n 3) 12. See also, Baird and Walters (n 15) 383; Segato,

only likely to attract greater support as the rights of rivers, in and of themselves, are becoming recognised by law and are attracting increased scholarly attention.[123]

On 21 October 2020, the United Nations (UN) Special Rapporteur on the human rights to safe drinking water and sanitation stated '[p]rofit maximi[s]ation, natural monopoly, and power imbalances' threatened the realisation of the human right to water.[124] The human right to water was first recognised in UN General Assembly Resolution 64/292 on 3 August 2010.[125] This has subsequently been built upon and recognised by other UN bodies.[126] The most recent Human Rights Council Resolution:

> [underlined] the importance of an effective remedy for violations of economic, social and cultural rights, including the human rights to safe drinking water and sanitation …[including procedures] to avoid infringements of such rights with a view to ensuring justice for all for violations'[127]

Mattioli and Capello (n 3) 36-37; Clifford Shearing, 'Criminology and the Anthropocene' (2015) 15(3) *Criminology and Criminal Justice* 255, 258-259.

[123] Erin O'Donnell, 'Rivers as living beings: rights in law, but no rights to water?' (2021) 29(4) *Griffith Law Review* 643; Cristy Clark, Nia Emmanouil, John Page and Alessandro Pelizzon, 'Can you hear the Rivers sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2018) 45(4) *Ecology Law Quarterly* 787.

[124] United Nations Office of the High Commissioner for Human Rights, 'Privatization of water and sanitation services entails human rights risks, says UN expert' (Media Release, 21 October 2020).

[125] *The human right to water and sanitation,* GA Res 64/292, 64th sess, Agenda Item 48, UN Doc A/RES/64/292 (3 August 2010).

[126] See, for example, *The human rights to safe drinking water and sanitation,* HRC Res 42/5, 42nd sess, Agenda Item 3, UN Doc A/HRC/RES/42/5 (3 October 2019); *The human rights to safe drinking water and sanitation,* GA Res 74/141, 74th sess, Agenda Item 70, UN Doc A/RES/74/141 (29 January 2020); *The human rights to safe drinking water and sanitation*, HRC Res 39/8, 39th sess, Agenda Item 3, UN Doc A/HRC/RES/39/8 (5 October 2018); *The human rights to safe drinking water and sanitation*, GA Res 72/178, 72nd sess, Agenda Item 72(b), UN Doc A/RES/72/178 (29 January 2018); *The human rights to safe drinking water and sanitation,* HRC Res 33/10, 33rd sess, Agenda Item 3, UN Doc A/HRC/RES/33/10 (5 October 2016); *Drinking-Water, Sanitation and Health*, WHO Res 64/24. 64th sess, Agenda Item 13.15, UN Doc WHA/64/24 (24 May 2011); *The human rights to safe drinking water and sanitation,* HRC Res 45/8, 45th sess, Agenda Item 3, UN Doc A/HRC/RES/45/8 (9 October 2020).

[127] *The human rights to safe drinking water and sanitation,* HRC Res 45/8, 45th sess, Agenda Item 3, UN Doc A/HRC/RES/45/8 (9 October 2020) Preamble

The importance of the human right to water and sanitation is also recognised by Goal 6 of the Sustainable Development Goals to '[e]nsure availability and sustainable management of water and sanitation for all'.[128]

In addition to the general human rights considerations pertaining to water, the United Nations Declaration on the Rights of Indigenous Peoples recognises the special connection between First Nations peoples and water,[129] and the important role that they should play in water governance.[130] The struggle by First Nations peoples for water sovereignty is ongoing and must be central to any human rights analysis of the human right to water.

Amending the WM Act to include an object to protect the human right to water, and a consideration on sentence as to how the offence has impacted on the human right to water would be a significant reform for a number of reasons. Firstly, it ensures that NSW complies with Australia's human rights obligations and would allow prosecutors to refer to human rights material and jurisprudence in their sentencing submissions. It also elevates the gravity of breaches of NSW water law in recognising that such conduct impinges on human rights, particularly when coupled with the worsening effects of climate change. This should allow prosecutors to make stronger submissions about the harm that is caused by the unlawful taking of water, even in the absence of environmental harm, because the regulatory system exists, in part, to further the object of recognising the human right to water.

When an offender is sentenced for the unlawful taking of water, the submission would then be open to the prosecutor to argue that the offending conduct also infringed on human rights, thus aggravating the offending. If the human right was recognised in the WM Act, the Court would be obligated to consider the submission and make findings about the extent to which the offender infringed on human rights by committing an offence. The implications would extend beyond aggravating the offence's seriousness and

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para 5. See also, Cristy Clark, 'Global Goal Setting and the Human Right to Water' in David V. McQueen *et al* (eds.) *Oxford Research Encyclopedia of Global Public Health* (Oxford University Press, 2020).

[128] *Transforming our world: the 2030 Agenda for Sustainable development,* GA Res 70/1, 70th sess, Agenda Items 115 and 116, UN Doc A/RES/70/1 (21 October 2015).

[129] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007) art 25; also see Tony McAvoy 'The human right to water and Aboriginal water rights in New South Wales' (2008) 17(1) *Human Rights Defender* 6 for a general introduction to the relationship between international human rights law and First Nations water rights.

[130] Ibid arts 25, 32(2).

impact on the penalty imposed. It also introduces an additional moral dimension to the offending which will attract publicity and lead to significant denunciation of offenders. Significantly, it would also create greater space for submissions to be made about the way that the unlawful taking of water impinges on the rights of First Nations peoples to their water rights.

VI CONCLUSION

Water is a necessity for life and a valuable resource for the NSW economy. Following years of exploitation, water crime, particularly through the unlawful taking of water by corporate offenders, is beginning to be seriously investigated, prosecuted and punished. As the three case studies show, the extent to which such crimes are effectively prosecuted and appropriately punished is varied.

In circumstances where NSW's waterways are in crisis, which exacerbates the already escalating and detrimental threat posed by climate change, prosecutors must do better in making submissions on sentences which are supported by evidence to ensure that the Court delivers appropriate sentences to denounce and deter water criminals. Prosecutors could invoke the ongoing impact of climate change on waterways to bolster their submissions about the harmful impact of water crime for both the environment and regulatory regime. Prosecutors would also be greatly assisted by law reform which specifically recognises that the WM Act should protect the state's waterways from the harmful effects of climate change and recognises the human right to water. These reforms would bolster the ability for prosecutors to make submissions which assist Courts in synthesising the gravamen of unlawful take of water offences.

Unfortunately, the water management system is premised on water being a commodity for trade. The commerciality of the regime is placed above the importance of protecting the environment and human rights, and by the time a case proceeds to sentence, there is little that Courts can do to overcome this. Unless the NSW water management regime places environmental and human rights interests at its centre, prosecutors can only continue to try and persuade Courts of the seriously harmful nature of water crimes to prevent other offenders from treating it as a low risk, high profit activity.