

CHAPTER 2

Background to the inquiry

Murray-Darling Basin

2.1 The Murray-Darling Basin (Basin) consists of 23 major river valleys, defined by the catchment areas of the Murray and Darling Rivers and their tributaries. It extends over one million square kilometres, covering the Australian Capital Territory (ACT), three-quarters of New South Wales (NSW), more than half of Victoria, and significant parts of Queensland and South Australia (SA).¹

2.2 More than 2.1 million people live in the Basin and a further 1.3 million people outside the Basin are dependent on its water.² Thirty-nine per cent of Australia's total agricultural production occurs in the Basin, known as 'Australia's food bowl', producing \$15 billion of produce each year (including grains, horticulture, fruit and nuts, grapes and other vegetables, crops, cotton, legumes and canola, pasture, cattle and other livestock). The Basin also contains about 65 per cent of Australia's irrigated land area, and around 40 per cent of Australia's farms.³

2.3 As well as contributing to Australia's economy, the Basin has environmental significance. It contains sensitive and ecologically important wetlands, which provide habitat for migratory birds, and other plants, animals and ecosystems that are nationally and/or internationally significant.⁴ According to the Murray-Darling Basin Authority (MDBA), the Sustainable Rivers Audit ecosystem health assessments for 2004-2007 found that 20 of the 23 major river valleys of the Basin were in poor to very poor ecological condition. However, in 2010 the Basin experienced its wettest spring on record after ten years of extreme drought.⁵

Historical regulation of the Murray-Darling Basin

2.4 Water management has long been an issue of national significance. Prior to federation, the colonies of NSW, Victoria and SA recognised the importance of managing water in the Murray River for use in farming and irrigation, and as a major

1 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 13, available from http://download.mdba.gov.au/Guide_to_the_Basin_Plan_Volume_1_web.pdf, accessed 27 May 2011.

2 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 15.

3 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 13.

4 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, pp 17-19.

5 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 18; Department of Sustainability, Environment, Water, Populations and Communities, 'Commonwealth Environmental Water Holder', <http://www.environment.gov.au/water/policy-programs/cewh/index.html>, accessed 27 May 2011.

transport route.⁶ The issue was also of concern during the Constitutional Convention Debates.⁷ Water management has largely been carried out cooperatively by the Australian Government, and the states and territories. The following section of this chapter sets out the history of regulation of the Basin before the creation of the Water Act.

River Murray Waters Agreement (1914)

2.5 The first agreement to regulate the use of Basin waters was the River Murray Waters Agreement (Waters Agreement). The Waters Agreement was signed by the Commonwealth, NSW, Victoria and SA in 1914, and took effect in 1915. In 1917, the River Murray Commission was established.⁸ The River Murray Commission's role was to regulate the main stream of the Murray River to ensure each of the three party states received their agreed water allocation.⁹

Expansion of the River Murray Commission's powers (1920s-1980s)

2.6 The River Murray Commission's powers were extended over the next forty years. However, its main role was to ensure that the states received their agreed water allocations.¹⁰ In the late 1960s, the River Murray Commission conducted investigations into salinity in the Murray Valley.¹¹ The results of these investigations led to an amendment of the Waters Agreement in 1982, to enable the River Murray Commission to also take account of water quality issues in its management of water.¹²

2.7 In 1984, the Waters Agreement was further amended to enhance the River Murray Commission's role to address environmental concerns, after evidence became available that land used in the catchment played an important role in relation to the successful management of the Basin's river systems.¹³

6 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

7 Kelly, N, 'A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use', *UNSW Law Journal*, (2007), vol. 30, no.3, p. 639.

8 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

9 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

10 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

11 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

12 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

13 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

2.8 Despite the expansion of the River Murray Commission's powers, by 1985 it had become clear to the Commonwealth and the states that the Waters Agreement and the River Murray Commission were unable to effectively manage the Basin's resources.¹⁴ State-based agencies were also seen as being unable to deal with developing inter-state issues, such as rising water salinity and irrigation-induced land salinity.¹⁵

Murray-Darling Agreement – 1987

2.9 With the acknowledgment that issues in the Basin were not confined to the states, a series of intensive negotiations were held between 1985 and 1987 between the Commonwealth, NSW, Victoria and SA on developing a more comprehensive approach to the management of resources and environmental issues in the Basin, specifically land degradation and salinity.¹⁶ These meetings resulted in the development of the Murray-Darling Basin Agreement (first Agreement) in 1987. The first Agreement led to the development of a process for the effective management of water and other resources across the Basin.¹⁷

Reforms – early 1990s

2.10 The signing of a new Murray-Darling Basin Agreement (second Agreement) in 1992 superseded the earlier Water Agreement and replaced the River Murray Commission.¹⁸ The Commonwealth, NSW, Victoria and SA legislatively ratified the second Agreement in 1993.¹⁹ Queensland and the ACT ratified the second agreement in 1996 and 1998, respectively.²⁰ The second Agreement also resulted in the creation of the Murray-Darling Ministerial Council, the Murray-Darling Basin Commission (Basin Commission), and the Community Advisory Committee.²¹

14 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

15 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

16 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

17 Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/history_mdbc.html, accessed 17 February 2011.

18 Murray-Darling Basin Commission, *Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/data/page/44/Murray-Darling_Basin_Agreement.pdf, accessed 17 February 2011.

19 *Murray-Darling Basin Act 1993* (Cth); *Murray-Darling Basin Act 1992* (NSW); *Murray-Darling Basin Act 1993* (Vic); *Murray-Darling Basin Act 1993* (SA).

20 *Murray-Darling Basin Act 1996* (Qld); the ACT formalised its participation through an MOU in 1998, and ratified in the *Murray-Darling Basin Agreement Act 2007* (ACT).

21 Murray-Darling Basin Commission, *The Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/the_mdbc_agreement.html, accessed 17 February 2011.

2.11 The Basin Commission was the executive arm of the Murray-Darling Ministerial Council, and was responsible to both the Murray-Darling Ministerial Council and the governments on the Murray-Darling Ministerial Council.²² The Basin Commission's main functions were to:

- advise the Murray-Darling Ministerial Council in relation to 'the planning, development and management of the Basin's natural resources'; and
- assist the Murray-Darling Ministerial Council in developing measures for the 'equitable, efficient and sustainable use of the Basin's natural resources'.²³

Intergovernmental Agreements – 1994-2004

2.12 In 1994, the Council of Australian Governments (COAG) adopted a strategy for the efficient and sustainable reform of the Australian water industry.²⁴ This strategy was further enhanced in 1996.²⁵ In 2004, COAG agreed to an Intergovernmental Agreement on a National Water Initiative (NWI).²⁶ Through the NWI, the Commonwealth, states and territories agreed on the importance of servicing the water needs of rural and urban communities while ensuring the health of river and groundwater systems. Under the NWI, governments made a number of commitments among other things to:

- return over-allocated water systems to sustainable levels of use;
- improve water planning, including through providing water to meet environmental outcomes;
- expand permanent trade in water;
- introduce better and more compatible registers of water rights and standards for water accounting; and
- improve the management of urban water.²⁷

22 Murray-Darling Basin Commission, *The Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/the_mdbc_agreement.html, accessed 17 February 2011.

23 Clause 17 of the former Murray-Darling Basin Agreement, Murray-Darling Basin Commission, *The Murray-Darling Basin Agreement*, http://www2.mdbc.gov.au/about/the_mdbc_agreement.html, accessed 17 February 2011.

24 COAG Communiqué, 25 February 1994, http://www.coag.gov.au/coag_meeting_outcomes/1994-02-25/index.cfm#water, accessed 17 February 2011.

25 Australian Government Solicitor (AGS), *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 2.

26 COAG Communiqué, 25 June 2004, pp 1-3, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

27 Australian Government Solicitor (AGS), *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 3.

2.13 In addition, the Commonwealth, NSW, Victoria, SA and the ACT signed an Intergovernmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray-Darling Basin.²⁸ The Intergovernmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray-Darling Basin had the following objectives:

- to establish a framework for implementation of the Parties' commitment to invest \$500 million to address water overallocation in the [Basin];
- to implement arrangements for cost effective, permanent, recovery of water to achieve the...environmental objectives of the Living Murray First Step decision...;
- to provide water on an on-going basis to meet agreed environmental objectives in the [Basin]; and
- to improve management of environmental water in the [Basin].²⁹

National Plan for Water Security – 2007

2.14 In January 2007, the Australian Government announced the National Plan for Water Security (Plan).³⁰ The Plan comprised ten points to improve water efficiency and address water over-allocation. It also proposed a number of initiatives, some of which were legislative, and others which would be addressed through programs, such as water buybacks and investment in irrigation infrastructure.³¹

Water Act 2007

2.15 After announcing the Plan, the government introduced the Water Bill 2007 in August 2007. It took effect in March 2008. The Water Act implemented a number of the reforms set out in the Plan, most particularly the provision for a Basin Plan that would set a 'sustainable diversion limit on surface and groundwater extraction in the Basin'.³² The provisions of the Water Act are discussed later in this chapter.

-
- 28 COAG Communiqué, 25 June 2004, pp 2-3, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011. Tasmania and Western Australia later signed in June 2005 and April 2006, respectively.
- 29 COAG Communiqué, 25 June 2004, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/docs/iga_water_overallocation_murray_darling.pdf, accessed 30 May 2011.
- 30 Australian Government, *A National Plan for Water Security*, 25 January 2007, p. 1, http://www.nalwt.gov.au/files/national_plan_for_water_security.pdf, accessed 17 February 2011.
- 31 Australian Government, *A National Plan for Water Security*, 25 January 2007, http://www.nalwt.gov.au/files/national_plan_for_water_security.pdf, accessed 17 February 2011.
- 32 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 3.

Murray-Darling Basin Memorandum of Understanding – 2008

2.16 Following the Water Act's commencement, the Commonwealth, NSW, Victoria, SA, Queensland and the ACT entered into a Memorandum of Understanding in relation to the Basin at a COAG meeting in March 2008.³³ It was agreed that further cooperative agreements would be implemented for the management of the water in the Basin, which built on arrangements established under the Water Act, particularly in relation to matters on which the Australian Government did not have the constitutional power to legislate.³⁴

Intergovernmental Agreement on Murray-Darling Basin Reform – 2008

2.17 In July 2008, COAG agreed to an Intergovernmental Agreement on Murray-Darling Basin Reform (2008 Intergovernmental Agreement).³⁵ The 2008 Intergovernmental Agreement set out further details of the cooperative arrangements, under which the Commonwealth, NSW, Victoria, SA, Queensland and the ACT agreed to renegotiate a revised Murray-Darling Basin Agreement. It was also agreed that the states would provide a limited referral of constitutional powers to the Commonwealth under subsection 51(xxxvii) of the Australian Constitution.³⁶ This resulted in the enactment of the *Water Amendment Act 2008* (Cth) (Water Amendment Act) by the Australian Parliament and the enactment of Water (Commonwealth Powers) Acts by relevant states.³⁷

Murray-Darling Basin Agreement – 2008

2.18 A new Murray-Darling Basin Agreement (Basin Agreement) was entered into on 1 December 2008, and took effect on 15 December 2008, concurrently with the

33 COAG Communiqué, 26 March 2008, p. 6, http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/index.cfm#water, accessed 17 February 2011.

34 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 3.

35 COAG Communiqué, 3 July 2008, p. 8, http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm#water, accessed 17 February 2011.

36 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 3.

37 *Water (Commonwealth Powers) Act 2008* (NSW); *Water (Commonwealth Powers) Act 2008* (Vic); *Water (Commonwealth Powers) Act 2008* (SA); *Water (Commonwealth Powers) Act 2008* (Qld).

Water Amendment Act, which inserted the Basin Agreement into the Water Act as a new Schedule 1.³⁸

2.19 The Basin Agreement provided that the Basin Commission would be abolished and its powers transferred to the Murray-Darling Basin Authority (MDBA).³⁹ In addition, the Basin Agreement conferred most of the functions of the former Murray-Darling Ministerial Council, and the Basin Commission's former role in relation to state water shares, on a new Murray-Darling Basin Ministerial Council (Ministerial Council).⁴⁰ The Basin Agreement also established the Basin Officials Committee,⁴¹ which advises the Ministerial Council.⁴²

2.20 The Basin Agreement may be amended by resolution of the Ministerial Council, with any amendment taking effect upon the registration of a legislative instrument by the Australian Government which amends Schedule 1 of the Act.⁴³ The Basin Agreement is currently being reviewed.⁴⁴

Murray-Darling Basin Ministerial Council

2.21 The Ministerial Council's functions are to:

- consider and determine outcomes and objectives on major policy issues of common interest to parties to the Basin Agreement in relation to the management of water and other natural resources of the Basin, including in relation to critical human water needs, to the extent that this is not provided for in the Basin Plan;
- make determinations about matters in the Basin Agreement;
- approve the annual corporate plan, budget and asset management plan prepared by the Murray-Darling Basin Authority; and

38 According to AGS, the 'inclusion of the...Agreement as a Schedule to the Act does not of itself give the Agreement the status of a law of the Commonwealth. [It] remains an intergovernmental agreement, with legal effect given only to those of its provisions that confer functions, powers and duties on the...Authority and...Committee' (referring to sections 18E and 18F of the Act), AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 22.

39 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 8.

40 Established by clause 7 of the Basin Agreement.

41 Subclause 17(1) of the Basin Agreement.

42 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 8.

43 See clause 5 of the Basin Agreement and section 18C of the Water Act.

44 Murray-Darling Basin Authority, 'Murray-Darling Basin Agreement', <http://www.mdba.gov.au/about/governance/murray-darling-basin-agreement>, accessed 22 February 2011.

- make any amendments to the Basin Agreement and its Schedules as it considers desirable.⁴⁵

Basin Officials Committee

2.22 The Basin Officials Committee has functions under both the Agreement and the Act.⁴⁶ Its functions under the Basin Agreement include:

- advising the Ministerial Council in relation to outcomes and objectives on major policy issues relating to the management of the water and other natural resources in the Murray-Darling Basin;
- giving effect to policies and decisions of the Ministerial Council when requested by the Ministerial Council to do so;
- exercising responsibility for high-level decision making in relation to river operations; and
- exercising the powers and discharging the duties conferred on it by the Basin Agreement or the Water Act.⁴⁷

Non-legislative implementation of water reform

2.23 The Australian Government has also used non-legislative measures to implement water reform, including water buy-backs.

2.24 In 2007, the Howard Government announced a National Plan for Water Security. Key parts of this \$10 billion program included the provision of funding to modernise irrigation infrastructure to increase the efficiency of water use and measures to address over-allocation in the Basin through assistance to reconfigure irrigation systems and retire non-viable areas.⁴⁸ More recently, the Water for the Future initiative, including the Sustainable Rural Water Use and Infrastructure Program and the Restoring the Balance in the Murray-Darling Basin Program, which are run by the Department of Sustainability, Environment, Water, Population and Communities, enable water entitlements to be purchased from willing sellers.⁴⁹

2.25 These programs link with reforms under the Water Act for the following reasons:

45 Clause 9 of the Basin Agreement.

46 See, for example, the Basin Officials Committee consultation role under sections 42, 46, 51, 86F and functions under section 201 of the Water Act.

47 Department of Sustainability, Environment, Water, Population and Communities, 'Restoring the Balance in the Murray-Darling Basin', <http://www.environment.gov.au/water/policy-programs/entitlement-purchasing/index.html>, accessed 17 February 2011.

48 Prime Minister the Hon John Howard MP, *A National Plan for Water Security*, 25 January 2007, pp 3-4, <http://trove.nla.gov.au/work/26242959>, accessed 7 June 2011.

49 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, pp 19-20.

- purchases of water will contribute to managing the impact of any Commonwealth share of reductions in or changes in reliability of water allocations under the risk assignment provisions; and
- purchased water will be managed by the Commonwealth Environmental Water Holder, which is established by Part 6 of the Water Act (discussed further below).⁵⁰

Other Commonwealth laws

2.26 In addition to the Intergovernmental Agreements, programs and the Water Act, the Australian Government Solicitor (AGS) has stated that there are also other Commonwealth laws which may impact upon water access entitlements, such as entitlements under the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth).⁵¹ Further, grants may be subject to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), water access entitlements granted to trading corporations are regulated by the *Corporations Act 2001* (Cth), and trading in water entitlements is subject to the *Trade Practices Act 1974* (Cth).

National Water Commission Act 2004 (Cth)

2.27 Pursuant to the Intergovernmental Agreement on a National Water Initiative, the Commonwealth established an independent statutory body, the National Water Commission, to assist with the implementation of that initiative. This was done under the *National Water Commission Act 2004*.⁵²

2.28 The National Water Commission's functions include:

- assisting with the implementation of, and promoting the objectives and outcomes of, the National Water Initiative;
- advising the Minister, the Commonwealth and COAG on water-related matters including:
- matters of national significance relating to water;
- Commonwealth programs relating to the management and regulation of Australia's water resources; and
- determining whether a state or territory is implementing its commitments under certain agreements between the Commonwealth and a state or territory relating to the management and regulation of water resources.⁵³

50 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 19.

51 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 17. See, for example, Section 24HA of the *Native Title Act 1993* (Cth).

52 Section 6 of the *National Water Commission Act 2004*.

53 Section 7 of the *National Water Commission Act 2004*.

2.29 Under the *National Water Commission Act 2004*, the National Water Commission is required to undertake a comprehensive review of the 2004 National Water Initiative in 2010–2011.⁵⁴ The National Water Commission is also responsible for auditing the effectiveness of the implementation of the Basin Plan and accredited water resource plans under Part 3 of the Water Act.⁵⁵

Provisions of the *Water Act 2007*

2.30 The key objectives of the Water Act are to:

- establish the Murray-Darling Basin Authority (MDBA) and the Commonwealth Environmental Water Holder (Water Holder);
- provide for the development of a Basin Plan; and
- provide for the management of the Ministerial Council and Basin Officials Committee.

Objectives of the Water Act

2.31 The objectives of the Water Act include:

- enabling the Commonwealth, NSW, Victoria, SA, Queensland and the ACT to manage the Basin's water resources 'in the national interest';
- to give effect to international agreements relevant to the use and management of Basin water resources, and to 'provide for special measures, in accordance with those agreements, to address threats to the Basin water resources';
- in giving effect to those international agreements, to promote the use and management of the Basin water resources 'in a way that optimises economic, social and environmental outcomes':
 - to ensure the return to environmentally sustainable levels of extraction;
 - 'to protect, restore and provide for the ecological values and ecosystem services of the Basin'; and
 - subject to the above two factors, to maximise economic returns to the community from the use and management of the Basin water resources;
- to improve water security of the Basin water resources; and
- to ensure that the management of the Basin water resources takes into account the broader management of natural resources in the Basin.⁵⁶

54 Subsection 7(2) of the *National Water Commission Act 2004*.

55 Part 3 of the Water Act.

56 Section 3 of the Water Act.

Murray-Darling Basin Authority

2.32 The MDBA is established by the Water Act.⁵⁷ The MDBA is a body corporate and is subject to the *Financial Management and Accountability Act 1997* (Cth).⁵⁸ Membership of the MDBA consists of a Chair and four part-time members.⁵⁹ The MDBA staff are employed under the *Public Service Act 1999* (Cth).⁶⁰

2.33 The MDBA must prepare an annual corporate plan and budget, and an asset management plan which is approved by the Ministerial Council;⁶¹ and must carry out its functions in accordance with the Basin Agreement and other corporate documents.⁶²

Functions

2.34 The MDBA has two main types of functions in relation to water management in the Basin. The first are conferred under the Water Act, including:

- preparing a Basin Plan and amendments to the Basin Plan;
- advising the Minister on accrediting state water resource plans;
- enforcing the Basin Plan; and
- monitoring the quality and quantity of Basin water resources and associated ecosystems.⁶³

2.35 The MDBA's other functions are those which were previously functions of the Basin Commission. These are conferred on the MDBA under the Water Act, which provides that the MDBA has, in a referring state or territory, the functions, duties and powers conferred on it by or under the Basin Agreement, in relation to the water and the natural resources of the Basin.⁶⁴

2.36 In addition, the MDBA is responsible for:

57 Section 171 of the Water Act; and Division 1 of Part 9 of the Water Act more generally.

58 See subsection 176(1) of the Water Act and item 154 of the table in Schedule 1 to the Financial Management and Accountability Regulations 1997.

59 Section 177 of the Water Act.

60 Section 206 of the Act.

61 Clauses 34 and 53 of the Agreement, respectively, as set out in Schedule 1 of the Water Act.

62 Subclause 29(2) of the Basin Agreement, as set out in Schedule 1 of the Water Act.

63 The functions of the Murray-Darling Basin Authority are set out under section 172 of the Water Act.

64 Section 18E of the Water Act.

- managing the River Murray and the Menindee Lakes system of the lower Darling River, with the water held in the system being shared between NSW, Victoria and South Australia under the terms of the Agreement;⁶⁵
- advising the Ministerial Council on matters related to the management of the water and other environmental resources of the Murray-Darling Basin;⁶⁶ and
- managing the River Murray in order to distribute water in accordance with the water sharing provisions in Parts XII, XIII and XIV of the Basin Agreement.⁶⁷

Basin Plan and water resource plans

2.37 Under the Water Act, the MDBA is required to prepare a Basin Plan for the responsible Minister, who is ultimately responsible for making the Basin Plan.⁶⁸ The Basin Plan works through the operation of catchment-level water resource plans, which are generally prepared by the states. New state water resource plans must be 'accredited' by the Minister and must be consistent with the Basin Plan.⁶⁹

2.38 The Basin Plan must provide for:

...the integrated management of the Basin water resources in a way that promotes the objects of [the Water] Act, in particular by providing for:

- (a) giving effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources); and
- (b) the establishment and enforcement of environmentally sustainable limits on the quantities of surface water and ground water that may be taken from the Basin water resources (including by interception activities); and
- (c) Basin-wide environmental objectives for water-dependent ecosystems of the Murray-Darling Basin and water quality and salinity objectives; and
- (d) the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes; and
- (e) water to reach its most productive use through the development of an efficient water trading regime across the Murray-Darling Basin; and

65 Item 98 of the Agreement, as set out in Schedule 1 of the Water Act. See also Murray-Darling Basin Authority, 'Basin Agreement rules applied as Authority assumes control of Menindee Lakes water', *Media Release*, 12 April 2010, http://www.mdba.gov.au/media_centre/media_releases/mr-assuming-control-of-menindee, accessed 7 June 2011.

66 Item 29 of the Agreement, as set out in Schedule 1 of the Water Act.

67 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 10.

68 Section 44 of the Water Act.

69 Sections 55 and 63 of the Water Act.

- (f) requirements that a water resource plan for a water resource plan area must meet if it is to be accredited or adopted under Division 2; and
- (g) improved water security for all uses of Basin water resources.⁷⁰

2.39 In addition, the Water Act sets out the general basis on which the Basin Plan is to be developed. In particular, the Basin Plan:

- 'must be prepared so as to provide for giving effect to relevant international agreements';⁷¹
- without limiting the first objective, the Basin Plan must also be prepared having regard to the fact that:
- 'the use of the Basin water resources has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity'; and
- 'the Basin water resources require, as a result, special measures to manage their use to conserve biodiversity';⁷²
- promote the sustainable use of the Basin water resources to protect and restore the ecosystems, natural habitats and species reliant on the Basin water resources and to conserve biodiversity;⁷³
- without limiting the first objective, promote both 'the wise use' of Basin water resources and the conservation of 'declared Ramsar wetlands', and take account of 'ecological character descriptions' of Ramsar wetlands and other key environmental sites prepared in accordance with the National Framework and Guidance for Describing the Ecological Character of Australia's Ramsar Wetlands, endorsed by the Natural Resource Management Ministerial Council;⁷⁴ and
- subject to the above considerations, the MDBA and the Minister 'must, in exercising their powers and performing their functions':
 - take into account the principles of ecologically sustainable development;
 - act on the basis of the best available scientific knowledge and socio-economic analysis; and
 - have regard to the following considerations:
 - the National Water Initiative;
 - consumptive and other economic uses of Basin water resources;

70 Section 20 of the Water Act.

71 Subsection 21(1) of the Water Act.

72 Paragraph 21(2)(a) of the Water Act.

73 Paragraph 21(2)(b) of the Water Act.

74 Subsection 21(3) of the Water Act.

- the diversity and variability of the Basin water resources and the need to adapt management approaches to that diversity and variability;
- the management objectives of the Basin States for particular water resources;
- social, cultural, Indigenous and other public benefit issues;
- broader regional natural resource management planning processes;
- the effect, or potential effect, of the Basin Plan on the use and management of water resources that are not Basin water resources;
- the effect, or the potential effect, of the use and management of water resources that are not Basin water resources on the use and management of the Basin water resources;
- the state water-sharing arrangements; and
- any other arrangements between states for the sharing of water.⁷⁵

Requirements of Basin Plan

2.40 The Water Act establishes the mandatory content of a Basin Plan.⁷⁶ Most significantly, a Basin Plan must include a specific limit on the quantity of water that may be taken, on a sustainable basis, from the Basin as a whole, and a limit on the quantities of water that can be taken from the 'water resources, or parts of the water resources, of each catchment area' (known as 'sustainable diversion limits').⁷⁷

2.41 'Sustainable diversion limits' are the amounts of water which can be used for consumption, by way of all forms of extraction, after the environmental requirements have been met.⁷⁸ These limits must reflect an 'environmentally sustainable level of take'.⁷⁹ This is the level of water extraction from a water resource which, if exceeded, would compromise the resource's key environmental assets, key ecosystem functions, productive base or key environmental outcomes.⁸⁰ Limits may be expressed as a formula or in any other way that the MDBA determines to be appropriate.⁸¹

75 Subsection 21(4) of the Water Act.

76 Section 22 of the Water Act.

77 Item 6 of section 22 of the Act.

78 Consumption includes use of water for watercourse diversions, floodplain harvesting and for water taken by farm dams and for forestry: Murray-Darling Basin Authority, 'FAQs: Sustainable Diversion Limits', http://www.mdba.gov.au/basin_plan/faqs/sdl#What_sustainable_diversion_limit, accessed 24 February 2011. See also section 23 of the Water Act.

79 Subsection 23(1) of the Water Act.

80 Section 4 of the Water Act.

81 Subsection 23(2) of the Water Act.

2.42 Other mandatory content includes:

- identification of risks to Basin water resources, such as climate change, and strategies to manage those risks;⁸²
- an environmental watering plan;⁸³
- a water quality and salinity management plan which must include objectives and targets;⁸⁴
- requirements that a state or territory water resource plan will need to comply with in order for them to be accredited;⁸⁵ and
- rules about the trading of water rights in relation to Basin water resources.⁸⁶

2.43 Under Part 2A of the Water Act, the Basin Plan must also deal with matters in relation to critical human water needs. These are defined as the minimum amount of water that can only reasonably be provided from Basin water resources, which are required to meet both core human consumptions in urban and rural areas and 'those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs'.⁸⁷

Compliance with Basin Plan

2.44 The Australian Government and its agencies must perform their functions in a manner which gives effect to the Basin Plan and water resource plans.⁸⁸ Agencies in NSW, Victoria and SA, including operating authorities and holders of water access rights, must not act inconsistently with the Basin Plan or water resource plans.⁸⁹ The MDBA has enforcement powers in relation to both the Basin Plan and water resource plans.⁹⁰

Consultation on the Basin Plan

2.45 There are consultation requirements for the development of a Basin Plan. The MDBA must consult with the relevant states and territories, the Basin Officials

82 Item 3 of section 22 of the Water Act.

83 Item 9 of section 22; and section 28 of the Water Act.

84 Item 10 of section 22; and section 25 of the Water Act.

85 Item 11 of section 22; and Division 2 of Part 2 of the Water Act.

86 Item 12 of section 22; and section 26 of the Water Act.

87 Section 86A of the Water Act.

88 Sections 34, 58 and 86G of the Water Act.

89 Sections 35, 59 and 86H of the Water Act.

90 Part 8 of the Water Act.

Committee, the Basin Community Committee,⁹¹ and members of the public.⁹² Further, when preparing water trading rules, the MDBA must obtain and consider the advice of the Australian Competition and Consumer Commission (ACCC).⁹³

2.46 After the MDBA has provided the Minister with a draft Basin Plan, the Minister may adopt the plan or require the MDBA to further consider it.⁹⁴ The Minister may not request modifications which relate to matters that are of a factual or scientific nature or relate to risk allocation.⁹⁵

2.47 Amendments to the Basin Plan are also subject to consultation requirements.⁹⁶ In addition, the MDBA may propose its own amendments to the Basin Plan.⁹⁷

Allocation of risks

2.48 Under the 2004 National Water Initiative, the Commonwealth and the states and territories agreed on a 'risk assignment framework' in relation to reductions or less reliable allocations of water.⁹⁸ The framework provides for three types of circumstances in relation to the 'risk of reductions in or less reliable water allocations', namely:

- those caused by 'seasonal or long-term changes in climate' and 'periodic natural events such as bushfires and drought' – are to be borne by water access entitlement holders;⁹⁹
- those arising as a result of the capacity of 'bona fide improvements in the knowledge of water systems' to sustain particular extraction levels' are to be borne by water access entitlement holders up to the year 2014 and, after 2014,

91 The Basin Community Committee is an advisory committee established under section 202 of the Water Act. Its function is to advise the MDBA about the performance of the MDBA's functions, including advising about: (a) engaging the community in the preparation of each draft Basin Plan; (b) community matters relating to Basin water resources; and (c) matters referred to it by the MDBA.

92 See, for example, sections 43 and 43A of the Water Act.

93 Section 42 of the Water Act.

94 Section 44 of the Water Act.

95 Subsection 44(5) of the Water Act.

96 Sections 46, 47 and 47A of the Water Act.

97 Section 45 of the Water Act.

98 COAG Communiqué, 25 June 2004, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

99 Clause 48 of the 2004 COAG Intergovernmental Agreement on a National Water Initiative, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

are to be shared in certain proportions between water access entitlement holders, the states and territories and the Commonwealth;¹⁰⁰ and

- those arising from 'changes in government policy (for example, new environmental objectives)' are to be borne by governments.¹⁰¹

2.49 The Water Act, as originally enacted, implemented this arrangement.¹⁰² However, the 2008 Intergovernmental Agreement led to an amendment of these provisions, which has resulted in the Commonwealth taking on the states and territories' share of risk in some circumstances.¹⁰³

2.50 The extent of the Commonwealth's responsibility for risk is to be specified in the Basin Plan. This occurs by allocating to each of the three categories of risk a proportion of the reduction in the sustainable diversion limit or the change in reliability.¹⁰⁴ However, the Act does not specify what steps the Commonwealth must take to manage this risk.¹⁰⁵

2.51 If the Commonwealth does not completely mitigate the impact of reductions that are its responsibility and, as a result, there is a reduction in either allocations to a person's water access entitlement or the reliability of a person's allocations, the Commonwealth can be liable to pay an amount to offset the loss in market value of the entitlement.¹⁰⁶ The Minister will determine whether a water access entitlement holder qualifies for the payment, and the quantum of any payment.¹⁰⁷ The Administrative Appeals Tribunal may review any determination made by the Minister.¹⁰⁸

100 Clause 49 of the 2004 COAG Intergovernmental Agreement on a National Water Initiative, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

101 Clause 50 of the 2004 COAG Intergovernmental Agreement on a National Water Initiative, http://www.coag.gov.au/coag_meeting_outcomes/2004-06-25/index.cfm#nwi, accessed 17 February 2011.

102 Division 4 of Part 2 of the Water Act.

103 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 13.

104 Sections 76 and 82 of the Water Act.

105 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 13.

106 Sections 77 and 83 of the Water Act.

107 Subsection 77(3) and (4); subsections 83(5) and (6) of the Water Act.

108 Subsections 77(7) and 83(8) of the Act.

State water-sharing arrangements

2.52 NSW, Victoria and SA have rights to use the Basin water, as set out under the Basin Agreement.¹⁰⁹ Further, the Basin Plan must consider conditions for triggering one of the three tiers of water-sharing arrangements:

- Tier 1 arrangements – these are essentially the same water-sharing arrangements that existed under the former Murray-Darling Basin Agreement;
- Tier 2 arrangements – these are triggered when Tier 1 arrangements will not be sufficient to ensure that there is enough water to meet water needs;¹¹⁰ and
- Tier 3 arrangements – these are triggered in circumstances of extreme and unprecedented low water availability or quality.¹¹¹

Critical water needs

2.53 The Basin Plan must also specify water quality and salinity trigger points at which the Murray-Darling becomes unsuitable for meeting critical human water needs.¹¹² If the trigger points are met, the MDBA must develop and implement an emergency response.¹¹³ The agreement of the Ministerial Council is required if the response affects the state water-sharing arrangements referred to above.¹¹⁴

Water charge rules

2.54 The Minister is able to make water charge and water market rules, subject to the ACCC's advice.¹¹⁵ The Water Act sets out objectives and principles for water

109 Clauses 88, 94 and 128 of the Basin Agreement, as set out in Schedule 1 of the Act.

110 Section 86D of the Water Act and clause 131 of the Basin Agreement, as set out in Schedule 1 of the Water Act. Once the Basin Plan takes effect, the circumstances in which Tier 1 arrangements will not be sufficient will be specified in the Basin Plan. Under Tier 2 arrangements, Tier 1 arrangements apply, subject to the provisions of a Schedule made by the Ministerial Council under clause 132 of the Basin Agreement. According to AGS, until this Schedule is made, Tier 1 arrangements apply, subject to any agreement by Ministers of the contracting states. When the Basin Plan is made, it will contain provisions that, if a Schedule has not already been made, will act as a default Schedule under Tier 2 until the Ministerial Council determines otherwise under subclause 135(10)): AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 14.

111 Section 86E of the Water Act and clause 133 of the Basin Agreement, as set out in Schedule 1 of the Act. Similarly with Tier 2 arrangements, once the Basin Plan takes effect, the circumstances that constitute unprecedented low water availability and quality will be specified in the Basin Plan.

112 Paragraph 86B(1)(c) of the Water Act.

113 Section 86F of the Water Act.

114 Subsection 86F(2) of the Water Act.

115 Part 4 of the Water Act.

charging, market and trading.¹¹⁶ The ACCC is responsible for enforcing the water charge and water market rules.¹¹⁷

2.55 The Minister may also make water market rules relating to the acts of irrigation infrastructure operators which prevent or delay the making of 'transformation arrangements'. These rules seek to enable trade of water access rights within the Basin.¹¹⁸ 'Transformation' is relevant to trade as often irrigators do not hold water access entitlements directly under state law. Often these entitlements are held collectively by irrigation infrastructure operators on behalf of their members.¹¹⁹

Commonwealth Environmental Water Holder

2.56 A statutory office of the Commonwealth Environmental Water Holder is established under the Water Act.¹²⁰ The Water Holder manages the Commonwealth's water holdings to give effect to relevant international agreements, and must be managed in accordance with the environmental watering plan which forms part of the Basin Plan.¹²¹

2.57 The Commonwealth's water holdings are largely acquired through purchasing arrangements and may only be disposed of in limited circumstances.¹²²

Information about water

2.58 The Water Act also confers functions on the Bureau of Meteorology relating to the collection, holding, management, interpretation and dissemination of Australia's water information.¹²³ A National Water Account must be published regularly;¹²⁴ and National Water Information Standards are issued which may deal with, for example, the measurement and analysis of water, and the reporting of water information.¹²⁵

2.59 The Water Act provides two mechanisms by which a person can be required to provide water information to the Bureau of Meteorology: in compliance with regulations which specifies persons or classes of persons that must provide specified

116 Schedules 2 and 3 of the Water Act.

117 Part 8 of the Water Act.

118 Section 97 of the Water Act.

119 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 16.

120 Part 6 of the Water Act.

121 Section 105 of the Water Act.

122 Section 106 of the Water Act.

123 Part 7 of the Water Act.

124 Section 122 of the Water Act.

125 Section 130 of the Water Act.

water information to the Bureau;¹²⁶ and pursuant to a requirement to give water information made by the Director of Meteorology.¹²⁷

Constitutional powers used to enact the Water Act

2.60 In its Briefing Note No. 90, the Australian Government Solicitor (AGS) advises that 'there is no express legislative power of the Commonwealth to enact a law providing for regulation of water usage' in Australia.¹²⁸ Accordingly, the Water Act relies on a number of constitutional powers under the Australian Constitution.

2.61 AGS states that the most significant constitutional powers under the Australian Constitution used to enact the Water Act are:

- the external affairs power (subsection 51(xxix)), in implementation principally of Australia's obligations under the Convention on Biological Diversity and the Ramsar Convention on Wetlands, but also obligations under other treaties listed in section 4 of the Act under the definition of 'relevant international agreement';
- the corporations power (subsection 51(xx)), in relation to the regulation of the activities of trading or financial corporations concerning water and water access entitlements;
- the interstate trade and commerce power (subsection 51(i)), in relation to the promotion and regulation of interstate trade in water access entitlements; and
- the powers relating to meteorological observations (subsection 51(viii)) and census and statistics (subsection 51(xi)), which support the Bureau of Meteorology's water information functions.¹²⁹

Constitutional powers used to amend the Water Act

2.62 As discussed earlier in this chapter, to amend the Water Act in 2008 by way of the Water Amendment Act, the Commonwealth relied upon subsection 51(xxxvii) of the Constitution, which provides that the Commonwealth may legislate in relation to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any state or states, but so that the law shall extend only to states by whose parliaments the matter is referred, or which afterwards adopt the law.

126 Section 126 of the Water Act and also Part 7 of the Water Regulations 2008.

127 Section 127 of the Water Act.

128 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 18.

129 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 18.

2.63 The relevant states and territories enacted legislation to refer powers to the Australian Parliament, which then relied on these references to support a number of the reforms implemented by the Water Amendment Act.¹³⁰

Other constitutional powers

2.64 AGS advises that section 100 of the Australian Constitution 'acts as a restriction on the use of the Commonwealth's legislative power' in relation to water.¹³¹ This section provides that:

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

2.65 AGS states that section 100 is not a source of legislative power in itself, but it provides that, when the Commonwealth enacts a 'law or regulation of trade or commerce', which affects the 'waters of rivers', the Commonwealth law 'must not impair the reasonable use of that water by a State or the residents of that State'.¹³² As a result:

...section 100 will not be relevant to significant aspects of the Water Act that are not laws of 'trade or commerce'. Where it is relevant, it only protects 'reasonable' use'.¹³³

2.66 Noting the comments of then Justice Mason of the High Court of Australia in *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 154–155, AGS concludes:

...the purpose of section 100 lies in the importance of the River Murray to [NSW], Victoria and [SA] and the residents of those States, and their apprehension as to the impact of the Commonwealth's legislative powers under subsections 51(i) (interstate and overseas trade and commerce) and 98 (navigation and shipping) of the Constitution. In particular, it appears that it is an aspect of the compromise reached in the federation debates between [SA] (which successfully argued for the Commonwealth to have power to facilitate trade and commerce, navigation and shipping on the River Murray (sections 51(i) and 98)) and [NSW] and Victoria (which

130 The mechanics of the referral are set out in the COAG Intergovernmental Agreement on Murray-Darling Basin Reform—Referral, entered into by the Commonwealth and relevant states, which includes a commitment by the Commonwealth not to amend the referred provisions of the Water Act without the agreement of the referring states, http://www.coag.gov.au/intergov_agreements/docs/murray_darling_basin_referral.pdf, accessed 22 February 2011.

131 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 18.

132 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 19.

133 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 19.

successfully argued for some limitation on this power to protect their 'reasonable use' of the water in the River Murray system (section 100)).¹³⁴

Relevant international agreements

2.67 Two of the international agreements that the Water Act relies upon are the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) and the Convention on Biological Diversity.¹³⁵

2.68 However, the Water Act defines 'relevant international agreement' to include:

- the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Desertification Convention);¹³⁶
- the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention);¹³⁷
- the Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment (China-Australia Migratory Bird Agreement – CAMBA);¹³⁸
- the Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment (Japan-Australia Migratory Bird Agreement – JAMBA);¹³⁹
- the Agreement between the Government of Australia and the Government of the Republic of Korea on the protection of Migratory Birds (Republic of Korea-Australia Migratory Bird Agreement – ROKAMBA);¹⁴⁰
- the Framework Convention on Climate Change (Climate Change Convention);¹⁴¹ and

134 AGS, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No. 90, 21 July 2009, p. 19.

135 Convention on Wetlands of International Importance especially as Waterfowl Habitat [1975] ATS 48; Convention on Biological Diversity [1993] ATS 32.

136 Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa [2000] ATS 18.

137 Convention on the Conservation of Migratory Species of Wild Animals [1991] ATS 32.

138 Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment [1981] ATS 6.

139 Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment [1988] ATS 22.

140 Agreement between the Government of Australia and the Government of the Republic of Korea on the protection of Migratory Birds [2007] ATS 24.

141 Framework Convention on Climate Change [1994] ATS 2.

- 'any other international convention to which Australia is a party' which is relevant to the 'use and management of the Basin water resources' and 'prescribed by the regulations'.¹⁴²

Recent events

Release of the Guide to the Proposed Basin Plan – October 2010

2.69 The Guide to the Proposed Basin Plan (Guide) was released by the MDBA on 8 October 2010. The Guide noted that, in order to meet the environmental objectives under the Water Act, an amount of between 22,100 and 26,700 gigalitres was required. This would require an additional volume of between 3,000 and 7,600 gigalitres annually from the current diversion limits.¹⁴³ However, the Guide noted that sustainable diversion limits in this range would 'have significant negative implications on some Basin communities, industries, enterprises and individuals' and that these effects would vary in each catchment and community, 'depending on a complex array of factors'.¹⁴⁴

2.70 As a result, the Guide stated:

In light of the severity of this impact on specific sectors and communities, the Authority has judged that in order to optimise social, economic and environmental outcomes, as it is obliged to do under the [Water Act], it can only consider Basin-wide reductions of between 3,000 and 4,000 [gigalitres per year] for the Basin (reductions of 22-29% of current diversion limits). That is, reductions in current diversions above 4,000 [gigalitres per year] have been judged to be beyond the range of acceptable reductions. A reduction in current water diversions of 3,000-4,000 [gigalitres per year] (or greater than 29%) would represent a reduction in gross value of irrigated agricultural production of around 13-17%, or \$0.8-1.1 billion per year.¹⁴⁵

2.71 As discussed earlier in this chapter, sustainable diversion limits are set according to each catchment area. The sustainable diversion limits must be implemented in state water resource plans, and the effect of these limits on individual water entitlement holders in those states is set out under those state water resource plans.¹⁴⁶

142 Section 4 of the Water Act. It does not appear that any Regulations have been made for the purpose of section 4 of the Water Act.

143 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 57.

144 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 81.

145 Murray-Darling Basin Authority, *Guide to the proposed Basin Plan*, 2010, p. 82.

146 Murray-Darling Basin Authority, 'Basin Plan Guide released for public discussion', *Media Release*, 8 October 2010, <http://www.mdba.gov.au/files/Media-release-Basin-Plan-Guide.pdf>, accessed 22 February 2011.

2.72 Following the release of the Guide in October 2010, a series of public consultations were held by the MDBA in relation to the Guide affected regions during October and November 2010. At the consultations, users of the Basin's waters expressed their strong concerns about the effect that the sustainable diversion limits would have on their livelihoods and local communities.¹⁴⁷

Other inquiries

House of Representatives Standing Committee on Regional Australia

2.73 On 14 October 2010, the Hon Simon Crean MP, Minister for Regional Australia, Regional Development and Local Government, the Hon Tony Burke MP, the then Minister for Sustainable Population, Communities, Environment and Water, and Senator the Hon Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, announced a parliamentary inquiry into the impact of the Basin Plan in regional Australia.¹⁴⁸ The inquiry was undertaken by the House of Representatives Standing Committee on Regional Australia. The Committee released its report, *Of drought and flooding rains*, on 2 June 2011.¹⁴⁹ The Chair of Committee, Mr Tony Windsor MP stated:

The findings of this report show that there are win-win solutions to a lot of the problems in the Basin and that there is a better way through. It will still mean some change, but not great pain, as had been suggested by others.¹⁵⁰

2.74 The report made 21 recommendations, including recommendations which cover:

- improving the way the MDBA proceeds in the next stages in the Basin Planning process;
- stopping all non-strategic water buybacks immediately;

147 See, for example, Anne Delaney 'Massive water meeting for Griffith', ABC Riverina, 15 October 2010, <http://www.abc.net.au/local/stories/2010/10/15/3039023.htm>, accessed 27 May 2011.

148 Joint Media Release, the Hon Simon Crean MP, Minister for Regional Australia, Regional Development and Local Government, the Hon Tony Burke MP, Minister for Sustainable Population, Communities, Environment and Water, and Senator the Hon Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, http://www.minister.regional.gov.au/sc/releases/2010/october/sc005_2010.aspx, accessed on 22 February 2011.

149 House of Representatives Committee on Regional Australia House of Representatives Standing Committee on Regional Australia, *Of drought and flooding rains: Inquiry into the impact of the Guide to the Murray-Darling Basin Plan*, 2 June 2011, p. 22, <http://www.aph.gov.au/house/committee/ra/murraydarling/index.htm>, accessed 3 June 2011.

150 House of Representatives Standing Committee on Regional Australia, 'Regional Committee release report on impacts of the Guide to the proposed Murray-Darling Basin Plan', *Media Release*, 2 June 2011, <http://www.aph.gov.au/house/committee/ra/murraydarling/media.htm>, accessed 3 June 2011.

- establishing a national water fund to invest in water saving projects, environmental works and measures, strategic purchase of water entitlements and research to improve irrigation efficiency;
- the creation of a government owned corporation, a joint venture with state and territory governments, to manage the national water fund; and
- the creation of a standalone Commonwealth Environmental Water Holder.¹⁵¹

Murray-Darling Basin Authority's social and economic study

2.75 On 17 October 2010, the MDBA announced that a detailed social and economic study would be undertaken into the 'likely social and economic impacts of the proposed Basin [P]lan on local communities'.¹⁵² While the study was due to report in March 2011, the MDBA has deferred the release of the report due to recent flooding in some communities.¹⁵³

Senate Standing Committee on Rural Affairs and Transport

2.76 On 28 October 2010, the Senate referred an inquiry into management of the Murray-Darling Basin, and the development and implementation of the Basin Plan, to the Senate Rural Affairs and Transport References Committee, for inquiry and report by 30 November 2011.¹⁵⁴

Ministerial Statement and AGS advice – 25 October 2010

2.77 On 25 October 2010, the Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities issued a Ministerial Statement on the interpretation of the Water Act.¹⁵⁵ In that statement, the Minister noted that the

151 House of Representatives Standing Committee on Regional Australia, 'Regional Committee release report on impacts of the Guide to the proposed Murray-Darling Basin Plan', *Media Release*, 2 June 2011, <http://www.aph.gov.au/house/committee/ra/murraydarling/media.htm>, accessed 3 June 2011.

152 Murray-Darling Basin Authority, 'MDBA to Commission Further Socio-Economic study of the Basin', *Media Release*, 17 October 2010, http://www.mdba.gov.au/media_centre/media_releases/mdba-to-commission-further-socio-economic-study-of-the-basin, accessed 22 February 2011.

153 Murray-Darling Basin Authority, 'Clarification of release of socio-economic study', *Media Release*, 23 March 2011, http://www.mdba.gov.au/media_centre/media_releases/clarification-of-release-of-socio-economic-study, accessed 26 April 2011.

154 *Journals of the Senate*, 28 October 2010, pp 235-236.

155 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'Murray Darling Basin Reform – Interpretation of the Water Act 2007', *Ministerial statement*, 25 October 2010, <http://www.environment.gov.au/minister/burke/2010/pubs/sp20101025.pdf>, accessed 18 February 2011.

MDBA 'has been reported as saying that the Act requires a focus on environmental issues first, with limited attention to social and economic factors'.¹⁵⁶ He advised that he had obtained legal advice from the AGS which had been provided to the Opposition, the Australian Greens and the independents.

2.78 Further, the Minister stated:

Much has been made of the international agreements which underpin the [Act] and it's been suggested that these agreements prevent socio-economic factors being taken into account. In fact, these agreements themselves recognise the need to consider these factors.

The Act specifically states that in giving effect to those agreements, the plan should promote the use and management of the basin water resources in a way that optimises economic, social and environmental outcomes.

It is clear from this advice that environmental, economic and social considerations are central to the [Act] and that the Basin Plan can appropriately take these into account.

I do not offer the advice as a criticism of the [MDBA]. What is important now is how the [MDBA] now responds to it.¹⁵⁷

Nature of the AGS advice

2.79 The AGS advice by Mr Robert Orr QC, Chief General Counsel, and Ms Helen Neville, Senior General Counsel, dated 25 October 2010, sets out the role that the social and economic factors have in the development of a Basin Plan.¹⁵⁸

2.80 In that advice, AGS observes that 'international agreements themselves recognise economic and social factors, and their relevance to decision making'. Further, AGS notes that the Water Act makes it clear that, in giving effect to those agreements, the Plan 'needs to optimise economic, social and environmental outcomes'.¹⁵⁹ AGS advises that neither the Convention on Biological Diversity or the Ramsar Convention requires contracting states to 'disregard economic and social considerations in giving effect to the environmental obligations'. Instead:

156 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'Murray Darling Basin Reform – Interpretation of the Water Act 2007', *Ministerial statement*, 25 October 2010, p. 3, <http://www.environment.gov.au/minister/burke/2010/pubs/sp20101025.pdf>, accessed 18 February 2011.

157 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, , 'Murray Darling Basin Reform – Interpretation of the Water Act 2007', *Ministerial statement*, 25 October 2010, p. 4, <http://www.environment.gov.au/minister/burke/2010/pubs/sp20101025.pdf>, accessed 18 February 2011.

158 AGS, 'The Role of Social and Economic Factors in the Basin Plan', 25 October 2010.

159 AGS, 'The Role of Social and Economic Factors in the Basin Plan', 25 October 2010, p. 1.

Both Conventions establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allows consideration of social and economic factors.¹⁶⁰

Response from the Murray-Darling Basin Authority

2.81 On 26 October 2010, the MDBA issued a media release stating that, in developing the Guide to the Murray-Darling Basin Plan, the MDBA had 'sought and relied on policy guidance' by the Minister's Department, and had consulted AGS for legal interpretation, including having the Guide reviewed by the AGS prior to its release.¹⁶¹ The MDBA's then Chair, Mr Michael Taylor AO, stated that the MDBA would 'clarify with the AGS any divergence between that advice and the position previously advised'.¹⁶²

2.82 On 1 December 2010, Mr Robert Freeman, then Chief Executive Officer of the MDBA, sought the advice of the Attorney-General's Department regarding the release of AGS advice on public interest grounds. This AGS advice related to economic and social considerations under the Water Act.¹⁶³ On 3 December 2010, the Attorney-General's Department replied that the advice in question should not be released. In particular, it noted the AGS advice 'exposes not only matters in relation to which the Commonwealth could be expected to claim legal professional privilege in any litigation surrounding this scheme, but matters which may have implications for other schemes supported by the external affairs and other powers'.¹⁶⁴

2.83 On 7 December 2010, Mr Taylor announced his resignation. His media release stated:

Mr Taylor noted that, balancing the requirements of the [Act] against the potential social and economic impact on communities will be a significant challenge. The *Guide* was developed with full regard to the requirements of the [Act], and in close consultation with [AGS]. However, the [MDBA] has sought, and obtained, further confirmation that it cannot compromise the

160 AGS, 'The Role of Social and Economic Factors in the Basin Plan', 25 October 2010, p. 8.

161 Murray-Darling Basin Authority, 'MDBA welcomes Minister's Statement', *Media Release*, 26 October 2010, http://www.mdba.gov.au/media_centre/media_releases/mdba-welcomes-ministers-statement, accessed 22 February 2011.

162 Murray-Darling Basin Authority, 'MDBA welcomes Minister's Statement', *Media Release*, 26 October 2010, <http://www.mdba.gov.au/files/Media-release-Basin-Plan-Guide.pdf>, accessed 22 February 2011.

163 Attorney-General's Department, *Answer to question on notice from additional estimates hearing 22 February 2011*, Question No. 60, p. 2.

164 Attorney-General's Department, *Answer to question on notice from additional estimates hearing 22 February 2011*, Question No. 60, p. 2.

minimum level of water required to restore the system's environment on social or economic grounds.¹⁶⁵

2.84 On 28 January 2011, the Minister appointed Mr Craig Knowles as the new Chair of the MDBA.¹⁶⁶

2.85 On 12 May 2011, the Minister announced that Mr Robert Freeman would be resigning as Chief Executive Officer of the MBDA for personal reasons, effective 1 June 2011, and would be taking a part-time role with the National Water Commission.¹⁶⁷

165 Murray-Darling Basin Authority, 'Plan for the Murray-Darling Basin – Role of Authority Chair', *Media Release*, 7 December 2010, http://www.mdba.gov.au/files/Media-release-Role-of-Authority-Chair_0.pdf, accessed 22 February 2011.

166 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'New Chair for Murray-Darling Basin Authority', *Media Release*, 28 January 2011, <http://www.environment.gov.au/minister/burke/2011/mr20110128.html>, accessed 10 May 2011.

167 The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'Appointments of new chief executive of the Murray-Darling Basin Authority & new chair of the National Water Commission', *Media Release*, 12 May 2011, <http://www.environment.gov.au/minister/burke/2011/mr20110512.html>, accessed 13 May 2011.