



National Water Commission Bill 2004

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National Water Commission Bill 2004

Date Introduced: 18 November 2004

House: House of Representatives

Portfolio: Prime Minister and Cabinet

Commencement: On the day it receives Royal Assent

Purpose

To establish the National Water Commission as an independent statutory body.¹ This Digest also refers to new clauses and amendments to the Bill introduced on 2 December 2004.²

Background

Water Resource Policy

In 1994, the Council of Australian Governments (COAG) agreed to a [Water Resource Policy](#) (also called the COAG Water Reform Framework) which established a strategic framework for water industry reform. Implementation of this framework addressed the efficient and sustainable management of Australia's water industry. The key areas of water reform were to be:

- water pricing based on full cost recovery and the amount of water used,
- the establishment of clearly specified water entitlements and the arrangements to enable trade in those entitlements,
- the allocation of water to the environment,
- the establishment of regulatory and water service institutions that have clear roles and responsibilities, and
- public education and consultation.³

Developing a new system of water allocations or entitlements was a significant aim of this policy and separation of water property rights from land title was simply a means to facilitate improvements to such a system including trading of such entitlements.

COAG decided in 1995 that implementation of the reforms would be included under the umbrella of National Competition Policy (NCP). While some of the reforms were implemented, not all the deadlines set under the NCP were met.

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In 1999 a meeting between the Committee on Regulatory Reform, the High Level Steering Group on Water, representatives from the Australian and New Zealand Environment and Conservation Council (ANZECC) and the National Competition Council considered the implementation of the water reform framework and the timeframe for implementation. July 2005 was set as the time for the implementation of a trading and allocation system in all jurisdictions.⁴

In June 2000 the Minister for Transport and Regional Services, the Hon John Anderson, publicly raised the issue of water property rights and the states providing compensation for their loss when he called for the 1994 COAG water reform agreement to be overhauled.

"Water property rights are not being recognised and the COAG agreement is effectively being used to prevent the States from investing in new water development projects or to upgrade existing infrastructure, even where they stack up ecologically."

Mr Anderson said the COAG agreement provided for the States to recognise water property rights and they therefore had a moral obligation to ensure that where these rights were removed, compensation or adjustment assistance was available.....

"If it is good enough for the Australian Constitution to require just terms compensation for the acquisition of property, it should be good enough for the States. It is a question of justice."⁵

The principle for the mandatory payment of compensation for any loss of existing water property rights was formally enunciated by the Prime Minister in releasing the Environment Policy of the Coalition for the 2001 Commonwealth Election. The Prime Minister stated:

There must also be a clear understanding that compensation should be paid where individuals give up property rights in the broader community interest.

This payment of fair compensation is not negotiable as far as the Coalition is concerned.

The Coalition will ensure that the next COAG meeting addresses definitions of property rights, including water rights, and mechanisms to deliver just compensation for the loss of these rights.⁶

While the Commonwealth expected the states to pay for such compensation, the states did not initially agree. A week before the December 2002 COAG meeting, the Queensland and NSW Premiers said that the Commonwealth should pay for any compensation.⁷ In the end COAG did not make any decisions on the issue of water property rights and compensation. The section of the COAG communiqué on water property rights said:

COAG noted progress on water reform in all jurisdictions, and reaffirmed commitment to those reforms as set out in the 1995 National Competition Policy Agreement. COAG also noted that the national principles on water allocation and

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entitlements developed by the Chief Executive Officers' Group on Water are broadly consistent with the 1995 Agreement and agreed to the release of this report for a consultation process with key stakeholders and to finalise this report by April 2003. The Council further noted that the Commonwealth had prepared a paper outlining its principles for achieving sustainable water management.⁸

The [Chief Executive Officers' Group on Water paper on water access](#) entitlements was finalised in April 2003 and made the point that:

The CEOs Group on Water is of the view that the use of the term water "property right" in itself causes false perceptions and prefers to use the term water "access entitlements".⁹

The National Water Initiative

The Minister for Transport and Regional Services, the Hon John Anderson, announced that the Commonwealth would be proposing a National Water Initiative (NWI) at the August 2003 COAG meeting.¹⁰

In July 2003 the National Farmers Federation (NFF) and the Australian Conservation Foundation (ACF) jointly issued [principles](#) for a long-term Australian water policy framework and action plan. They proposed security is needed for both the environment and consumptive users that involved:

- securing flows and establishing adaptive management to meet environmental outcomes and ensure river health;
- clarifying water entitlements and clearly defining the associated security and responsibilities;
- defining and providing structural adjustment and support;
- removing impediments and encouraging water trading within environmental limits; and
- facilitating investment in better water use.¹¹

In their joint statement, the NFF and the ACF called on all Governments to:

- commit to implementing a robust national framework providing guaranteed and tradable water entitlements, with strong safeguards for river and landscape health into the future;
- establish a Commonwealth/State fund and plan to achieve ecosystem health and sustainable water use, with defined structural adjustment, particularly within the Murray Darling River system over the next 10 to 15 years;
- establish an audit and assessment of our northern rivers and aquifers to inform future decision making, planning, and the sustainable development of new opportunities;

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- implement a national heritage rivers reserve system to protect rivers of agreed high conservation values over a 10 year period; and
- ensure a secure new source of funds to help address these and other environmental and natural resource management needs.¹²

At its 29 August 2003 meeting, COAG agreed to the scope of a proposed NWI that would:

improve the security of water access entitlements, including by clear assignment of risks of reductions in future water availability and by returning overallocated systems to sustainable allocation levels;

ensure ecosystem health by implementing regimes to protect environmental assets at a whole-of-basin, aquifer or catchment scale;

ensure water is put to best use by encouraging the expansion of water markets and trading across and between districts and States (where water systems are physically shared), involving clear rules for trading, robust water accounting arrangements and pricing based on full cost recovery principles; and

encourage water conservation in our cities, including better use of stormwater and recycled water.¹³

The Communique said that the 1994 water reform agenda should be updated in order to increase the productivity and efficiency of water use, sustain rural and urban communities, and to ensure the health of river and groundwater systems.¹⁴

The objectives of the proposed NWI were to create more certainty for water users that would result in more productive use of water, healthy rivers and aquifers, and a self adjusting water trading system that is fair to all users.¹⁵

Due to the seriousness of the problems facing the Murray River system, five of the six of the member governments of the Murray-Darling Basin Ministerial Council also agreed to at the 2003 COAG meeting to contribute \$500 million over five years to address water over-allocation in the Basin so that increased environmental flows can be allocated to the river. This was a separate agreement from the NWI. The contributions are:

- Commonwealth (\$200 million);
- New South Wales (\$115 million);
- Victoria (\$115 million);
- South Australia (\$65 million) and
- the Australian Capital Territory (\$5 million).

The [Intergovernmental Agreement for the Water Initiative](#) and the [Agreement](#) to address water overallocation and environmental objectives in the Murray-Darling Basin (MDB)

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were developed by the various governments, after consultation with various stakeholders and experts. The MDB Intergovernmental Agreement is to be consistent with the objectives, principles and actions identified in NWI Agreement. Both were agreed to by [COAG](#) on 25 June 2004. The NWI Agreement was signed by the Commonwealth Government, and the Governments of the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia and Victoria. The Agreement stated that:

Full implementation of this Agreement will result in a nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes by achieving the following:

- i) clear and nationally-compatible characteristics for secure *water access entitlements*;
- ii) transparent, statutory-based water planning;
- iii) statutory provision for *environmental and other public benefit outcomes*, and improved environmental management practices;
- iv) complete the return of all currently overallocated or overused systems to *environmentally-sustainable levels of extraction*;
- v) progressive removal of barriers to trade in water and meeting other requirements to facilitate the broadening and deepening of the water market, with an open trading market to be in place;
- vi) clarity around the assignment of risk arising from future changes in the availability of water for the *consumptive pool*;
- vii) water accounting which is able to meet the information needs of different water systems in respect to planning, monitoring, trading, environmental management and on-farm management;
- viii) policy settings which facilitate water use efficiency and innovation in urban and rural areas;
- ix) addressing future adjustment issues that may impact on water users and communities; and
- x) recognition of the connectivity between surface and groundwater resources and connected systems managed as a single resource.¹⁶

The Natural Resource Management Ministerial Council will oversee the implementation of the Water Initiative in line with detailed implementation plans to be developed by each state and territory over the next 12 months. The NWI is expected to result in:

- ~ expansion of permanent trade in water bringing about more profitable use of water and more cost effective and flexible recovery of water to achieve environmental outcomes;

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- more confidence for those investing in the water industry due to more secure water access entitlements, better and more compatible registry arrangements, better monitoring, reporting and accounting of water use, and improved public access to information;
- more sophisticated, transparent and comprehensive water planning that deals with key issues such as the major interception of water, the interaction between surface and groundwater systems, and the provision of water to meet specific environmental outcomes;
- a commitment to addressing overallocated systems as quickly as possible, in consultation with affected stakeholders, addressing significant adjustment issues where appropriate; and
- better and more efficient management of water in urban environments, for example through the increased use of recycled water and stormwater.¹⁷

The National Water Commission

Under the NWI, a National Water Commission (NWC) will be established. It will assess progress in implementing the NWI and advise on actions required to better realise the objectives of the Intergovernmental Agreement. The NWC was to be established by the end of 2004 and be comprised of seven members with relevant expertise, four (including the Chair) of which will be appointed by the Commonwealth and three by the state/territory governments. The NWC will undertake the 2005 assessment of progress with implementing water reform commitments under the National Competition Policy.¹⁸ Schedule C of the Intergovernmental Agreement outlined the role and institutional arrangements of the NWC. COAG will review the NWC's roles and functions in 2010–11 following consideration of its third biennial assessment. The role of the NWC is:

To provide advice on national water issues and, in particular, to assist with the effective implementation of the National Water Initiative (NWI) Agreement.

In particular, the NWC will provide advice to COAG on the following matters:

- a baseline assessment of water resources and governance arrangements nationally, based on existing work by the Parties and undertaking further work only where required;
- accreditation of State and Territory implementation plans developed for the NWI Agreement by each jurisdiction, in accordance with paragraph 9 of the Agreement;
- commencing in 2006-07, biennial assessments of progress with the NWI Agreement and State and Territory implementation plans, and advice on actions required to better realise the objectives and outcomes of the Agreement:
 - the third biennial assessment in 2010-11 will take the form of a comprehensive review of the Agreement;
- the performance of the water industry against national benchmarks, in areas such as irrigation efficiency, water management costs and water pricing; and

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- compliance with any outstanding commitments under the 1994 COAG strategic framework for the efficient and sustainable reform of the Australian water industry;¹⁹

On 13 September 2004, Prime Minister the Hon John Howard announced a \$2 billion Australian Water Fund to provide \$1.6 billion over five years to facilitate new water use technologies and practices (Water Smart Australia), \$200 million over five years for water accounting, groundwater assessment, conserving high value water systems and water efficiency labelling (Raising National Water Standards), and \$200 million over five years to reward a culture of wise water use (Water Wise Communities). The NWC will provide advice and recommendations on all the projects put forward under the Australian Water Fund.

It was later decided that the Water Wise Communities Program, which is to provide grants up to \$50,000 to community organisations for on-the-ground work to increase water use efficiency, improve river or groundwater health or improve community education on water saving, would be jointly administered by the Department of Environment and Heritage and the Department of Agriculture, Fisheries and Forestry.

Independence of the NWC

The Bill, as drafted and amended, provides that the NWC has a role in advising the Minister, COAG and the Commonwealth on matters relating to water. In relation to the NWC's functions under **clause 7**, the Minister instructs the NWC in relation to its tasks and receives the NWC reports. The Minister is the key conduit for the advice and appears to have the discretion to act, or not act upon the NWC's advice. The Minister is *not* required to publish the NWC's advice or recommendations.

The NWC has a structure which appears to be more what one would expect of a ministerial advisory council than an 'independent statutory authority'. The following clauses highlight concerns about the level of structural independence of this NWC model:

- **Clause 4** states that all advice and recommendations given and made by the NWC are made through the Minister
- Under **Clause 7** there is no enumeration of a power for the NWC to instigate any 'own motion' studies – the NWC's powers are triggered by directions from the Minister. The Minister has very broad control of the functions and investigations undertaken by the NWC.
- **Subclause 7(4)** provides that the NWC 'gives advice' by giving advice and making recommendations to the Minister
- **Subclause 8(2)** provides that the Commonwealth must nominate a person to be appointed as the Chair in consultation with the other parties to the NWI
- **Clause 9** provides that the Chair must keep the Minister informed of the general operations of the NWC in respect of the performance of the NWC's functions

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- Under **Clause 25**, the CEO of the NWC is appointed by the Minister
- **Subclause 44(1)** provides that assessments can only be made available to the public with the agreement of the Minister.
- **Subclause 44(2)** further provides that NWC *must not* make any other advice or recommendations available to the public; and
- **Clause 45** requires the NWC to prepare an annual report for the Minister - however there is no explicit obligation on the Minister to table the report in Parliament.

Some of the following measures would enhance the independence of the NWC:

- Allowing the NWC to instigate some own motion studies on relevant topics
- Allowing the NWC to publicly table the findings of its investigations; and
- Ensuring that NWC's annual report is tabled in the Parliament.

Therefore, whether in its operation the NWC is an independent statutory body will remain to be seen.

Funding of the Australian Water Fund

The provision of \$1.6 billion of funding for the Australian Water Fund was to be sourced from competition payments already in the budget.²⁰ However all the premiers and chief ministers [wrote](#) to the Prime Minister stating that this action breached the terms of the National Competition Policy (NCP) and hence they were suspending state and territory participation in the NWI. On 22 September 2004, the Minister for Transport and Regional Services, the Hon John Anderson MP, responded to this letter saying the competition payments were scheduled to end in June 2006, so the Australian Government would direct money beyond June 2006 to water reform because the states had themselves failed to direct competition payments there.²¹

The issue of state and territory participation in the NWI due to the linkage of the Australian Water Fund to competition payments has yet to be resolved. On 26 November 2004 the Murray-Darling Basin Ministerial Council signed off on [\\$179 million in water savings initiatives](#) of the New South Wales and Victorian governments to save 240 GL of the 500 GL to be saved as outlined by the [Living Murray First Step Decision](#). However it appears that these projects will not proceed until the state and territory Premiers agree to participate in the NWI.²² The issue about state and territory participation in the NWI may not be resolved until the 2005 meeting of COAG.²³

The Commonwealth Government was reported to be adamant that the projects will not proceed until the states and territories recommit to the NWI.²⁴ The Minister for Agriculture, Fisheries and Forestry, the Hon Warren Truss, said that the Living Murray Initiative was part of the NWI. He stated:

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The two are linked but certainly we can advance the ideas and the proposals (in the Living Murray) so they're ready to go when we get the green light (on the NWI).²⁵

It should be noted that the projects agreed to by the Murray-Darling Basin Ministerial Council specifically relate to the Agreement concerning the overallocation of water in the Murray-Darling Basin, referred to above, rather than to the NWI.

Establishment of the National Water Commission

On 22 October 2004, the Prime Minister, the Hon John Howard, announced that he would be appointing the Secretary of the Department of Transport and Regional Services, Ken Matthews, to be the first CEO and Executive Director of the National Water Commission. The NWC would be established in the Prime Minister's portfolio.²⁶

The Australian Financial Review reported that the NWC will have up to seven commissioners, a full-time Chair and a staff of 40–50.²⁷ It will be divided into three groups: the reform evaluation group; the corporate, legal and communications group; and the water programs group.

Ken Matthews said that the Australian Water Fund, which is to be administered by the NWC, is not just another grant program. He stated that:

It is a way of using the money as strategic tool for advancing the National Water Initiative. The money is there to ensure that it won't become another set of paper reforms. It is about getting other money into the equation.²⁸

Mr Matthews indicated that, in relation to the competitive grants programs under the Australian Water Fund, those bidders who propose to fund relatively more of their projects themselves will be preferred by the NWC.²⁹

Position of significant interest groups/press commentary

In responding to the 25 June 2004 COAG decision, the NFF considered the NWI would pave the way for sustainable agriculture because of the decision to share the costs of returning water to the environment between federal, state and territory governments, and farmers would ensure the certainty that farmers need to plan and invest for the future. NFF President, Peter Corish, looked forward to Tasmania and Western Australia participating in the NWI. He said:

COAG has accepted the undeniable fact that our water courses do not recognise State boundaries, and that any decision made by one jurisdiction will have impacts on others.

The continued uncertainty over reductions in water allocations was causing real concern across rural Australia.

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NFF is looking forward to working with the Federal, State and Territory Governments, the Australian Conservation Foundation and the science community to establish a new framework to ensure that the needs of the environment are met, and water users are compensated for any loss of their most vital resource.³⁰

Johnny Kahlbetzer, of the Twynam Agricultural Group, one of the biggest cotton and rice producers in the country, said the NWI was the number one wish for irrigators. He said:

I think before we worry about any of the other issues, we need to get the base framework which is the National Water Initiative, that then sets a basis for the future in security, for compensation. They're the critical things to irrigators and the regional communities at this stage.³¹

WWF Australia congratulated the Australian Government on its commitment to establish the new NWC and called on all governments to embrace the full implementation of the NWI.³² Dr Helen Foard, WWF Australia's Fresh Water Manager, said

Not adequately understanding our water resources – where the water is, how much there is and who has got it – has been and remains a key threat to Australia's water security. We now have a national plan in place that sets out the key steps needed to address and prevent Australia's water security threats. Water accounting and better application of good science to underpin water planning, management and water trading are critical elements of the plan.

There is and should be no such thing as commercial-in-confidence when it comes to water information. All water information needs to be readily and publicly available. If the National Water Initiative is implemented properly, we will generate more wealth from less water at the same time as restoring, sustaining and protecting the health of our surface and under ground water systems.

We are playing catch up. We are "water broke" in many rivers and aquifers – and that has to be brought into balance. The \$2 Billion Australian Water Fund, together with other state funding and private contributions, needs to be strategically and cost effectively invested to achieve National Water Initiative outcomes. The National Water Commission will play a pivotal role in making sure this happens by setting selection criteria to ensure smart sequencing and strategic investment in water projects in line with the National Water Initiative.³³

In response to comments by the Minister for Agriculture, Fisheries and Forestry, the Hon Warren Truss, that he hoped that the states would agree to participate in the NWI before next year's COAG meeting, the ACF said it was important that federal and state governments sort out their differences over funding of the NWI and come together again on water, but emphasized that the focus must include restoring the Murray to health and protecting rivers of high conservation value. The ACF Director, Don Henry said:

It is absolutely essential that the National Water Initiative ensure that the Murray and other river systems are restored to health while supporting efficient and productive

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water use for farmers.....We don't have any time to waste. We must address river health now before the lifeblood of our nation dies.³⁴

ALP/Australian Democrat/Greens policy position/commitments On the morning of the COAG Meeting of 25 June 2004, the Australian Democrats called for:

- An intergovernmental agreement which considers water access entitlements as defined at the point of supply, rather than delivery;
- State agreement to local target for catchment rehabilitation;
- Strict water trading rules with trading subject to an environmental assessment;
- Restricted intercatchment transfers and traded allocations defined in net not gross terms;
- Increased costs for provision of water to reflect its scarcity and importance; and
- \$60 million allocated over 5 years to establish the national heritage rivers reserve.³⁵

In response to the COAG agreements on the NWI and the Murray-Darling Basin, Kelvin Thomson, ALP spokesperson for Sustainability, the Environment and Heritage, said that it has two serious weaknesses:

1. The environmental flows for the Murray Darling of 500 GL are insufficient to restore the Murray River to health. The scientific evidence is clear that 1500 GL is what is needed to restore the Murray as a healthy working river.
2. The timeline for many of our remaining river systems is too slow. It appears that environmental flows for many other river systems will not start until 2014, on the expiry of water sharing plans which will run for the next ten years. For some river systems this is simply too long to wait.³⁶

Senator Bob Brown, of the Australian Greens, said the NWI Agreement was derelict for failing to address the parlous state of the country's rivers and praised Western Australia for not signing it. He was concerned that the Murray was down to 25 percent of its median flow and, at best, the measures in the Agreement to address water overallocation and environmental objectives in the Murray-Darling Basin would only increase this by 10 per cent over the next ten years.³⁷

In responding to the Coalition Parties announcement of the Australian Water Fund and the opposition by the states and territories to the earmarking of \$1.6 billion in competition payments to fund the water reform projects, the ALP spokesperson for Sustainability, the Environment and Heritage, Kelvin Thomson, said:

the water policy was falling apart just hours after its release. "This plan is unravelling because the Government did not consult with the states."³⁸

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The Australian Democrat spokesperson for the Environment, Senator Lyn Allison, welcomed the Australian Water Fund and believed the establishment of the NWC and the funding commitment to the NWI was extremely important. However the Democrats wanted stronger commitments on environmental flows.³⁹

The Australian Greens Senator Bob Brown Greens stated that the NWC would fail unless it was given tough targets to drastically cut the amount of water being taken from the Murray-Darling and teeth to enforce those targets.⁴⁰

Any consequences of failure to pass (e.g. potential double dissolution trigger)

If the Bill is not passed and the Australian Water Commission is not established as an independent statutory authority it is still possible that the Commonwealth could administer the Australian Water Fund by other means. The commitments to the reviews and assessments under the NWI would not be able to be met.

Main Provisions

Clause 3 sets out the object of the Act to establish the National Water Commission (NWC) as an independent statutory body as agreed to under the Intergovernmental Agreement on a National Water Initiative (NWI).

Clause 6 establishes the NWC.

Clause 7 sets out both the general functions of the NWC and its specific functions relating to implementing the NWI and the COAG Water Reform Framework. **Subclause 7(1)** outlines the general functions as being:

- to assist with the implementation of the NWI, and to undertake activities that promote the objectives and outcomes of the NWI,
- to advise and make recommendations to the Commonwealth or to COAG on matters of national significance relating to water (including the sustainable management of water resources and access to, and use of, water),
- to advise and make recommendations to the Minister on matters relating to water; and in particular the Australian Water Fund or other Commonwealth programs that relate to the management and regulation of Australia's water resources,
- to advise the Commonwealth or COAG, on whether a state or territory is implementing its commitments under any agreement (other than the NWI or the COAG Water Reform Framework) between the Commonwealth and the State or Territory relating to the management and regulation of Australia's water resources where the agreement provides for the NWC to have this function, and

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- any other function prescribed by the regulations.

Clause 7 of the Bill provides that the NWC may perform its general functions at the instigation of the Minister. The NWC then has a range of specific functions that are enumerated at **subclauses 7(2) and 7(3)**.

Amended subclause 7(1)(ba) provides that the NWC also has a role in advising and making recommendations to COAG on any water matter of ‘national significance’. A matter may be ‘nationally significant’ because of the scale of its impacts on water resources or communities, the involvement of more than one government in the matter or its contribution to water reform within a jurisdiction.

Subclause 7(2) outlines the specific functions relating to the NWI. These are:

- to undertake an initial assessment of Australia’s water resource and their governance, management and regulation and to advise COAG,
- to determine whether the commonwealth, state and territory plans for implementing the NWI are consistent with the objectives, outcomes, actions and timelines stated in the NWI, to accredit those plans, and to advise COAG of the NWC’s determination and any accreditations,
- to advise the commonwealth or COAG, on whether the parties to the NWI are implementing their commitments under the NWI,
- to monitor the impact of interstate trade in water access entitlements in the southern Murray-Darling Basin, and to advise the relevant parties to the NWI on that impact,
- to assess, every 2 years starting in 2006-07, the performance of the water industry in managing and using Australia’s water resources against national benchmarks (for example, in water pricing, water management costs and irrigation efficiency), and to advise COAG of those assessments,
- for the two year periods 2006–07 and 2008–09, to assess the progress of parties to the NWI towards achieving the objectives, timelines and outcomes stated in the NWI for COAG and recommend to COAG on actions that the parties might take to better achieve those objectives and outcomes, and
- for the two year period 2010–11, to comprehensively review the NWI for COAG, including assessing the NWI against performance; the extent to which actions taken under the NWI have improved the sustainable management of Australia’s water; and the impact of the implementation of the NWI on regional, rural and urban communities.

Subclause 7(3) outlines the specific functions relating to implementing the COAG Water Reform Framework. These are:

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- for 2005, to assess states or territories have implemented their commitments under the COAG Water Reform Framework, and to advise the commonwealth of that assessment, and
- for subsequent years, to advise the commonwealth on the progress of a state or territory that has a commitment still to be implemented under the COAG Water Reform Framework towards implementing that commitment.

Subclause 7(4) states that all advice and recommendations given and made by the NWC in this section is to be through the Minister. This raises questions about the independence of the NWC. **Amended subclause 7(4A)** provides that where advice is given to COAG that advice will also be given to the State and Territory parties to the NWI at the same times as it is provided to the Minister.

Part 3 (Clauses 8-22) outlines the Constitution of the NWC.

Clause 8 provides that the NWC will consists of a Chair (who is also a commissioner), nominated by the commonwealth, and between three and six commissioners, of which between one and three are to be nominated by the commonwealth and up to three nominated by those states and territories that are party to the NWI. The commonwealth nominations may form a majority of the NWC. It is possible that the NWC could operate solely with commissioners who are nominees of the commonwealth. This may be the case until the states and territories decide to participate in the NWI due to disagreement with the commonwealth over the funding of the Australian Water Fund with competition payments.

Clause 9 requires that the Chair must keep the Minister informed of the general operations of the NWC in respect to the performance of its functions. This goes to the matter of the independence of the NWC.

Clause 10 requires that each commissioner must act in the best interests of the NWC. It is unclear as to the interpretation of the term 'best interests'.

Clause 11 sets out a limit of three years as the length of office for a commissioner, who may be appointed by the Governor-General on a full-time or part-time basis. It also requires that the commissioners should have a high level of expertise in an area relevant to the function of the NWC; including:

- water resource management;
- freshwater ecology or hydrology;
- resource economics;
- public sector governance;
- and audit, evaluation or implementation of natural resources management programs.

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There is no requirement that the Commissioners on the NWC should have expertise covering all these areas.

Clause 12 allows for the Minister to appoint acting commissioners while there is a vacancy on the NWC or while a Commissioner is overseas or unable to perform the duties of the office.

Clause 13 sets out that the remuneration for a commissioner should be determined by the Remuneration Tribunal or, if no determination is in operation, then the remuneration should be prescribed by regulations.

Clause 15 prohibits a full-time commissioner from engaging in any paid employment without the Minister's consent. It also prohibits a part-time commissioner from engaging in paid employment that conflicts, or could conflict, with the proper performance of the Commissioner's duties without the consent of the Minister.

Clause 18 sets out the grounds under which the Governor-General may terminate the appointment of a commissioner. The reasons that apply to all Commissioners relate to mental incapacity, bankruptcy or failure to disclose direct or indirect pecuniary interests under **Clause 22**. Additional grounds relating to full-time commissioners are absence without leave for 14 consecutive days or 28 days in 12 months, or engaging in paid employment without the Minister's consent. The grounds for termination of part-time commissioners are: failure to attend three consecutive meetings without leave of absence or engaging in paid employment that conflicts, or could conflict, with the duties of the office, without the consent of the Minister.

Clause 19 requires that there should be eight meetings of the NWC each calendar year and the quorum of the meetings will be four commissioners.

Clause 22 requires that the Chair and other commissioners must declare any direct or indirect pecuniary interest in a matter to be considered by the NWC to the other commissioners as soon as practicable and must not participate in the NWC's consideration of the matter unless the other commissioners agree. The disclosure and any decision of the commissioners relating to it must be recording in the minutes of that meeting.

Part 4 (Clauses 23-37) relates to the CEO and the staff of the NWC.

Clause 24 sets out the functions of the Chief Executive Officer (CEO) to be the day-to-day management of the NWC and the administration of financial assistance from the Australian Water Fund Account and other relevant commonwealth water resource related programs for water resources related projects awarded by the Minister.

Clause 25 states that the appointment of the CEO by the Minister may be on a part-time or full-time basis and is for a maximum of three years. The CEO may also be appointed as a

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commissioner or Chair of the NWC, but one of the appointments must be made on a part-time basis.

Clause 26 allows for the Minister to appoint an acting CEO while the CEO is overseas or unable to perform the duties of the office.

Clause 27 sets out that the determination of the remuneration for the CEO should be carried out in the same manner as that described in **Clause 13** for a Commissioner.

Clause 29 sets out the requirements regarding outside employment by full-time or part-time CEO as those outlined in **Clause 15** for a full-time or part-time commissioner.

Clause 32 allows for the Minister to terminate the employment of the CEO for misbehaviour, physical or mental incapacity, matters related to a bankruptcy, absence without leave for 14 consecutive days or 28 days in a 12 month period, or if the CEO fails to notify the Minister of a direct or indirect pecuniary interest that conflicts, or could conflict, with the duties of the CEO.

Division 2 outlines who can be engaged to assist the NWC. Under **Clause 35**, staff of the NWC are to be engaged under the *Public Service Act 1999* and the NWC is to be a Statutory Agency. **Clause 36** allows the CEO to second Commonwealth and State officials to the NWC. **Clause 37** allows the CEO to engage consultants and independent contractors.

Clause 38 requires a review of the NWC's ongoing role and functions that must be conducted by the end of 2011 with the report tabled in both House of Parliament 15 days after the Minister receives the report.

Clause 39 is a sunset clause that states the Act ceases to be in force after 30 June 2012.

Clause 40 establishes the Australian Water Fund Account, which is a special account for the purposes of the *Financial Management and Accountability Act 1997*. This account represents only part of the Australian Water Fund since only the \$1.6 billion Water Smart Australia program and the \$200 million Raising National Water Standards program are administered by the NWC plus the expenses to fund the functions of the NWC. The \$200 million Water Wise Communities program is jointly administered by the Department of Environment and Heritage and the Department of Agriculture, Fisheries and Forestry.

Clause 42 sets out the purposes of the Australian Water Fund Account is to provide funds for water resource related projects awarded by the Minister and to fund the operations and functions of the NWC.

Clause 43 imposes a significant criminal penalty of up to two years in jail for breaches of confidentiality on a person who obtains information in the course of their duties under the Act and makes a record of or discloses that information.

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Clause 44 requires that specified assessments of the NWC are the only NWC that be made available to the public after the approval of the Minister. These are

- the News's initial assessment of Australia's water resources and their governance;
- management and regulation;
- the biennial assessments of the performance of the water industry against national benchmarks;
- the 2010–11 review of the NWI; and
- the assessments of the implementation of the COAG Water Reform Framework.

No other advice or recommendations is to be made available to the public and if it were, the person who disclosed such information would be subject to **Clause 43** penalties.

Clause 45 requires the NWC to prepare an annual report for the Minister that includes the financial assistance for each of the projects recommended to the Minister under the Australian Water Fund or other Commonwealth water resource related program. The Minister must give the report to the states and territories. However there is no explicit obligation on the Minister to table the report in Parliament.

Clause 46 allows regulations to be made, including 'prescribing matters necessary or convenient' for the carrying out, or giving effect' to, the Bill.

Concluding Comments

The resolution of the dispute between the commonwealth and the states and territories over the source of funding the Australian Water Fund is a key part to the continued implementation of the NWI. Without this happening some of the functions of the NWC cannot be carried out.

The NWC would have difficulty carrying out a baseline assessment of water resources and governance arrangements without state and territory cooperation. It would not be able to accredit state and territory NWI implementation plans, or carry out the biennial assessment of the NWI or the assessment of the state and territories implementation of the 2005 COAG Water Reform Framework.

However the NWC could still operate without state or territory cooperation as the commonwealth can appoint enough commissioners to constitute a quorum. It would be able to administer the funds under the Australian Water Fund for the two programs, Water Smart Australia and Raising National Water Standards. It would be able to provide advice and recommendations to the commonwealth on the Australian Water Fund or other commonwealth water resources programs.

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Endnotes

- 1 There are some aspects of the Bill which raise concerns about the level of independence that can be achieved under this model of the NWC. These will be discussed at pp. 8-9 of the Digest.
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- 12 *ibid.*
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