



Water Bill 2007

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Water Bill 2007

Date introduced: 8 August 2007

House: House of Representatives

Portfolio: Environment and Water Resources

Commencement:

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To provide the legislative framework to allow the Commonwealth to assume significant planning and management powers and responsibilities for water resources in the Murray Darling Basin.

Background

Management of the water resources of the Murray Darling Basin

The Murray Darling Basin

Located in the south-east of Australia, the Murray-Darling Basin covers over 1 million square kilometres, equivalent to 14 per cent of Australia's total area. The Basin extends over three-quarters of New South Wales (NSW), more than half of Victoria, significant portions of Queensland and South Australia, and includes the whole of the Australian Capital Territory (ACT). Well over half of the Basin is in NSW and almost one quarter is in Queensland. Often referred to as the nation's 'food basket', the Basin includes nearly 1.9 million hectares of irrigated crops and pastures, accounting for 75 per cent of the total area of irrigated crops and pastures in Australia (2000/01). The Basin is Australia's most important agricultural region, accounting for 34 per cent of the nation's gross value of agricultural production (2003).

The Murray Darling Basin Agreement

There have been various intergovernmental agreements relating to the water resources of the Murray-Darling Basin, and particularly the River Murray, dating back to 1914.

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The current Murray-Darling Basin Agreement (the MDB Agreement) was signed in 1992, and given full legal status by the passing of the *Murray-Darling Basin Act 1993* by all the contracting governments. Queensland became a signatory in 1996, and the ACT formalised its participation through a Memorandum of Understanding in 1998. The MDB Agreement provides the process and substance for the integrated management of the Murray-Darling Basin. The purpose of the Agreement (clause 1) is:

to promote and co-ordinate effective planning and management for the equitable efficient and sustainable use of the water, land and other environmental resources of the Murray-Darling Basin.¹

The MBD Agreement established the Murray-Darling Basin Ministerial Council, the Murray-Darling Basin Commission (MDBC), which is the Ministerial Council's executive arm, and the Community Advisory Committee, which advises the Ministerial Council. Collectively, this partnership between these various bodies in giving effect to the MBD Agreement is called the Murray-Darling Basin Initiative.² Further information on the history of the Murray-Darling Basin Agreement is available on the MDBC internet site.³

The Living Murray environmental program

In 2002 the MDB Ministerial Council agreed to the Living Murray First Step program, a joint funded initiative to return up to 500GL of permanent 'new water' to the River Murray as an environmental flow. The Living Murray program falls outside the Murray-Darling Basin Agreement, and is contained in the Living Murray Intergovernmental Agreement. Further information on the Living Murray program can be found at the MDBC internet site.⁴

The National Water Initiative

The 2004 National Water Initiative (NWI) represents an agreed position of Commonwealth, State and Territory governments on water reform issues. In part, its

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1. Murray Darling Basin Agreement, available at: http://www.mdbc.gov.au/data/page/44/Murray-Darling_Basin_Agreement_full.pdf, accessed 12 August 2007.
 2. See http://www.mdbc.gov.au/about/murraydarling_basin_initiative_overview
 3. Murray Darling Basin Commission, 'A brief history of the Murray-Darling Basin Agreement' available at: http://www.mdbc.gov.au/about/history_mdbc, accessed 12 August 2007
 4. Living Murray internet site: <http://thelivingmurray.mdbc.gov.au/home>; accessed 12 August 2007.

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origins can be traced back to the 1994 Council of Australian Governments (COAG) agreement on water resource policy.⁵ The overall objective of the NWI was to:

achieve 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.⁶

The NWI contains some specific provisions on the Murray-Darling Basin.⁷

It requires a review of the 1992 Murray-Darling Basin Agreement, where necessary, to ensure that it is consistent with the NWI. The Murray-Darling Basin Ministerial Council had agreed to undertake the review by 2007, but it is unclear whether this has gone ahead in view of the Government's announcement of its *National Plan for Water Security* (see below).

The NWI also required relevant Parties sign a separate agreement to address the overallocation of water and achievement of environmental objectives in the MDB ('the MDB Intergovernmental Agreement'). That agreement was signed at the same time as the NWI (June 2004).⁸

The NWI also mandated the establishment of the National Water Commission (NWC, which was subsequently done under the *National Water Commission Act 2004*). It both assesses the various governments' progress in implementing the NWI and helps its implementation by, for example acting as lead facilitator on certain actions under the Initiative such as compatible registers of water entitlements and trades, and nationally consistent approaches to pricing.

The National Plan for Water Security

On 25 January 2007, the Prime Minister, the Hon John Howard MP announced the *National Plan for Water Security* (the National Plan).⁹ In relation to the water resource planning and management in the Murray Darling Basin the National Plan stated:

The existing mechanism for the management of the Basin is the MDBC. While the current arrangements have made some substantial contributions to Basin-wide water

5. See: http://www.coag.gov.au/meetings/250294/attachment_a.htm

6. Paragraph 23.

7. Paragraph 14.

8. See: http://www.coag.gov.au/meetings/250604/iga_water_overallocation_murray_darling.pdf.

9. See: http://www.pm.gov.au/docs/national_plan_water_security.pdf

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management over the decades, the shortcomings of the current model are of concern to the Commonwealth Government and, indeed, many others.

The decisions taken by the MDBC often reflect parochial interests and do not reflect the best interest of the Basin as a whole. Examples include:

- failure to align water management with the NWI in the areas of water trading, over-allocation and pricing;
- lack of Basin-wide information has led to inefficiencies in management and decision making. For example, a Basin-wide register of water entitlements, and integrated water data systems have not been developed;
- 12 years after introducing a cap of water use, Queensland and the ACT ignore it and NSW is regularly in breach;
- the MDBC has known for several years that the cap on diversions needs to be reduced and include groundwater to be effective, but this has not been achieved;
- activities in one state or territory that cause problems in another can still take place without sanction leading to redistribution of economic and environmental wealth without an overarching management framework;
- consensus-based decision making of the MDBC means that difficult decisions are often avoided or delayed; and
- widely distributed responsibilities for the management of the Basin have led to inefficiency, blame-shifting and under-resourcing by state and territory governments.

The Proposal

It is in the national interest to secure the long-term economic and social returns to the Australian community afforded by sustainable access to the Basin's water resources. This can only be achieved through:

- significant investments in water saving infrastructure;
- new investments in water resource monitoring and water use metering;
- addressing the over-allocation problem via entitlement purchases and structural adjustment; and
- reforming the decision making processes in the Basin.

It is critical that all four strategies are implemented together.

The Commonwealth Government will request the referral of state and territory powers to enable it to manage the MDB in the national interest.

The Commonwealth Government will seek the agreement of NSW, Victoria, Queensland, South Australia and ACT governments to transfer all their powers in relation to the MDBC to enable the Commonwealth Government to oversight water management in the MDB.

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To enable system operation efficiencies in the southern Basin and to secure improved environmental outcomes there, the Commonwealth Government will also request that NSW and Victoria transfer powers to manage the Murrumbidgee and Goulburn valleys, along with the Murray Valley already managed by the MDBC. The Commonwealth Government will operate an integrated water allocation system for these interconnected valleys. It will also establish an environmental manager function for the southern Basin to maximise the benefits of environmental water allocations to our iconic river and wetlands.

We propose to reconstitute the MDBC as a Commonwealth Government agency, reporting to a single minister. We will set a new strategic plan for the Basin, incorporating a revised cap on diversions, taking into account for the first time groundwater use and other factors that will reduce river inflows in the Basin in the future. The Plan will be informed by the 2007 Murray-Darling Basin Sustainable Yields Assessment being undertaken by CSIRO on behalf of the Prime Minister and MDB State Premiers. Our significant new investments in water information will ensure that the best available data is presented to water managers from now on.

Water sharing plans for each valley in the Basin will have to be revised to satisfy new planning specifications, which will be enacted through new Commonwealth Government legislation. Each plan will need to conform with the revised Basin cap and make provision for the impacts of future climate change and flow interception activities such as farm dams and plantation development. Commonwealth Government assistance through the over-allocation and infrastructure components of the Plan will help water users in the Basin to adjust to the revised cap.

Commonwealth Government leadership in managing the MDB, supported by our considerable investments in irrigation and river system infrastructure, water information and entitlement purchases will guarantee a brighter future for the Basin.

The responsibility to react decisively to rapidly changing circumstances will be clear and Basin livelihoods will be protected and assisted to adjust to changed circumstances.

Negotiation of the Bill and Implementation of the National plan for Water Security

Following the announcement of the National Plan for Water Security on 27 January 2007, the States and the ACT held a summit to discuss the proposal on 23 February 2007. At the water summit NSW, South Australia and Queensland agreed to refer relevant constitutional powers to the Commonwealth to enable it to manage the MDB in the national interest and the ACT agreed to cooperate fully. Victoria did not agree to do so at the time but agreed to continue to negotiate with the Commonwealth to identify mutually satisfactory ways of achieving agreed outcomes.

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At the end of the water summit, the then Victorian Premier, Steve Bracks, said that Victoria would be:¹⁰

‘hoping for a bigger share’ of the \$10 billion to ensure it was not disadvantaged. Adoption of the Howard proposal would fiscally reward states with poor infrastructure and poor water efficiency, he said. ‘We don’t want to see all the money going to the worst offenders with over-allocations and over-entitlement,’ Mr Bracks said.

While the negotiations between Victoria and the Commonwealth continued over the next several months, the Victorian Government criticised the lack of inclusion of its concerns in the various draft versions of the Commonwealth legislation provided to the States.

Victorian Minister for Water, John Thwaites, stated the state's position as wanting to work with the Commonwealth in a ‘co-operative and co-ordinated’ way, rather than handing over powers.¹¹ On 17 May 2007, he was reported as saying the Victorian Government would not agree to hand over unspecified powers to Canberra under the National Water Security Plan but it was prepared to improve the management of the MDB.¹²

On 18 May 2007 the *Australian Financial Review* reported that:¹³

Victoria will not endorse the plan until it sees detailed legislation of how the money will be spent and what powers the commonwealth wants referred.

After receiving the second draft of legislation, Premier Bracks wrote to Prime Minister John Howard on 23 May 2007 saying he was ‘very concerned about the tenor of the draft’. It was reported that the Victorians were angry because they claim the proposed legislation gives the Commonwealth power over water rights, including authority to override state planning provisions, and ‘step in’ powers to take over annual allocations and control of river flows:¹⁴

‘Despite assurance that you would be seeking a highly specific, textbased referral of powers, the content of the draft bill is still extremely broad and could potentially allow the commonwealth to intervene in almost every activity within the Murray-Darling basin,’ Mr Bracks wrote.

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10. Austin, P, Grattan, M, Ker, P 2007 ‘Bracks isolated as premiers sign up for water deal’ *The Age* 24 February 2007.
 11. *ibid.*
 12. Hughes, D 2007 ‘Victoria still prepared to go it alone’ *Australian Financial Review* 17 May 2007.
 13. Grigg, A ‘Dry argument on “secret” plans’ *Australian Financial Review* 18 May 2007.
 14. Hughes, D ‘Bracks pulls plug on Murray-Darling’ *Australian Financial Review* 24 May 2007.

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On 4 June 2007 Prime Minister Howard met with Premier Bracks in Sydney and resolved some points to be included in the next draft:¹⁵

Premier Steve Bracks said the Commonwealth had agreed in principle to three major changes to its proposed legislation. These were: states keeping the right to make planning decisions on land in the Murray-Darling Basin; leaving water pricing in state hands; and the Australian Competition and Consumer Commission regulating the water market instead of the proposed Murray-Darling Basin Authority.

Premier Bracks also said that:¹⁶

he agreed the Commonwealth should have the responsibility for water caps and the power to enforce them and the responsibility for a market scrutinised by the Australian Competition and Consumer Commission.

On 4 July 2007 the Minister for Environment and Water Resources, Malcolm Turnbull gave the Victorian Government a deadline of 12 July to respond to the third draft of the legislation, saying the Victorian Government had not provided the Commonwealth with any amendments to the legislation. He also said that a group of State and Commonwealth public servants had been working very constructively on both the draft legislation and the intergovernmental agreement.¹⁷

The then Victorian State Treasurer, John Brumby, said that Victoria had sent its amendments to the Commonwealth on 11 July and it was up to Water Resources Minister Malcolm Turnbull to respond.¹⁸ However, the Commonwealth and Victoria did not reach agreement, and on 24 July the Prime Minister announced he would proceed with introducing the Bill based on the Commonwealth existing constitutional powers – that is, without relying on the States to refer powers to the Commonwealth.¹⁹

Introduction of the Bill and the Senate Inquiry

The Bill was introduced into Parliament on 8 August 2007. On the same day, it was referred to the Senate Environment, Communications, Information Technology and the Arts Committee for [inquiry](#) and report by 14 August 2007. Public hearings were held on

15. Whinnett, E. 'Murray Darling breakthrough hope' *Herald Sun* 5 June 2007.

16. Morris, S. 'Water scheme reborn through compromise' *Australian Financial Review* 5 June 2007.

17. 'Minister gives Victoria a deadline to reach agreement on Murray-Darling water plan' *PM* 4 July

18. Ruffles, M. 'Vic holds out on \$10b water plan' *Canberra Times* 13 July 2007.

19. The Hon. John Howard MP [Press conference](#) 24 July 2007.

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10 August. At the time of writing of this Digest, [submissions](#) to the inquiry were publicly available but transcripts were not.

Financial implications

As noted by the Explanatory Memorandum, implementation of the various measures in *National Plan for Water Security* (the National plan) are estimated to cost the Commonwealth some \$10.05 billion over 10 years.

However, the Explanatory Memorandum doesn't provide any budgetary details of those National Plan measures most closely associated with the Bill. Other government documents indicate that measures dealing with water information and improved metering and monitoring – all of which are contemplated by the Bill – will cost over \$1 billion.²⁰ The largest National Plan budget item – improving off-farm water distribution efficiency – is dependent, at least for the Basin States, on all relevant States signing an Intergovernmental Agreement that commits them to referring power to the Commonwealth to allow it to consolidate its legislative power over Murray-Darling water resources. No drafts of the Intergovernmental Agreement have been publicly released.

Division 4 of Part 2 of the Bill provides that water access entitlement holders may be eligible for financial payments from the Commonwealth if their water allocations are reduced in certain circumstances. The Explanatory Memorandum is silent on whether any estimates have been made as to the Commonwealth's potential liability in this regard. However, given that any water allocation reductions for which the Commonwealth has liability may not occur for some time, the possible costs involved may be too uncertain to estimate.

Key issues

Assessing the practical operation of the Bill

The Bill has been in development for several months through various intergovernmental working groups. Earlier versions have also apparently been circulated to some peak stakeholder rural, commercial and environmental groups. However, no exposure draft or outline was publicly released before introduction of the Bill into Parliament on 8 August. Presumably this is in part due to the politically sensitive nature of the negotiations regarding key principles underlying the Bill.

20. *The National Plan for Water Security – Questions and Answers*. See: <http://www.environment.gov.au/water/action/npws.html#commonwealth>

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The Explanatory Memorandum does not include a Regulatory Impact Statement (RIS). Under the government's [Legislative Handbook](#), a RIS must be prepared:

for all proposed new or amending legislation which directly affects business or which has a significant indirect effect on business or restricts competition.

One of the major benefits of having a RIS prepared and incorporated in the Explanatory Memorandum is that it often provides a useful analysis of the practical operation of how key provisions in the Bill will affect businesses and other related stakeholders.

Whilst the Explanatory Memorandum does not say why a RIS is not included, it is understood that the reason was that the Bill's focus is more of a planning and management framework, and it is only regulations or instruments made under the Bill that would have sufficient effect on business to warrant a RIS. Whilst this is arguably true, the lack of a RIS, the extremely short time allocated to the relevant Parliamentary inquiry, and the scheduling of debate less than one week after introduction, makes assessing the practical operation of the Bill difficult, particularly given the length and importance of the Bill.

The security of water access entitlements and compensation for reduction or impairment

Clause 255 of the Bill provides that nothing in the Bill or regulations authorises the Commonwealth or any other agency to compulsorily acquire a water access right or an interest in a water access right.

However, an water access entitlement²¹ may be reduced under the circumstances outlined in **clauses 74-86** (see discussion later in this digest). Where reductions occur after 2014 due to improvements in the knowledge of water systems' capacity to sustain particular extraction levels, the Bill provides that relevant State governments may have part liability to pay compensation, along with the Commonwealth. Apparently in previous drafts of the Bill, States had no liability under these circumstances – the change is due to the reduced Commonwealth power over Basin water resources resulting from the fact that the Bill is no longer constitutionally underpinned by referral of Basin State powers. The NSW government at least views this change as 'unacceptable'.²² The Commonwealth has been reported as viewing any post 2014 compensation liability is likely be small as it considers

21. This is a form of water access right.

22. NSW Submission to Senate Committee inquiry – see: http://www.aph.gov.au/senate/committee/ecita_ctte/waterbill_2007/submissions/sub06.pdf

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most water over-allocation problems should have by fixed by 2015 due to investments in infrastructure and the like under the National Plan.²³

Main provisions

Part 1 - Preliminary

This defines key terms, and outlines the constitutional basis of the Bill, including how it interacts with State laws.

Clause 3 contains the objects of the Bill. They are broad ranging, but include managing the (Murray-Darling) Basin water resources in ‘the national interest’ and giving effect to relevant international agreements in such a way that promotes the optimisation of ‘economic, social and environmental outcomes’.

Clauses 4-8 define key terms.

‘Basin water resources’ excludes *both* sub-surface water forming part of the Great Artesian Basin *and* any water prescribed in regulations.

‘State’ includes the ACT. ‘Basin States’ means New South Wales, Victoria, Queensland, South Australia and the ACT.

‘Planned environmental water’ is water, that under certain Commonwealth or State laws or instruments, is designated to achieve environmental outcomes or purposes. It cannot be used for other purposes, except where used in emergency circumstances in accordance with a Commonwealth or State law or instrument.

Clause 9 sets out the Commonwealth constitutional provisions that are relied on to support the validity of the Bill. Notably these include the Commonwealth power to legislate with respect to:

- interstate and foreign trade and commerce (s. 51(i))
- corporations (51(xx))
- external affairs (51 (xxix))
- the Territories (122), and
- matters referred to it by a State (51 (xxxvii)).

23. Morris, S. ‘Funding to flow even if Pact absent’ *Australian Financial Review* 10 August 2007.

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Clause 9 also states that the Bill relies on any ‘implied powers’ of the Commonwealth under the Constitution. Almost all of the Commonwealth’s constitutional powers are explicitly stated in the Constitution. However, there are also some implied powers – for example implied nationhood power. The High Court has said that this implied power can be ‘deduced from the existence and character of the Commonwealth as a national government...to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.’²⁴ However, the scope of the power is uncertain and largely untested.

Clause 11 contains a constitutional ‘read down’ provision. It potentially applies if the operation of a provision of the Bill, or of instruments made under it, would be invalid because of section 99 or 100 of the Constitution. These sections place certain restrictions on Commonwealth law where they are made pursuant to trade and commerce mentioned above. The practical effect of **clause 11** is that if the provision can be supported by constitutional power (say the external affairs power) that is not limited by section 99 or 100, the provision is valid to the extent it operates in reliance of that power.

Commonwealth and State Governments, and their agencies, are to be bound by the Act but not subject to prosecution or civil penalty provisions: **clause 12**. However, this protection does not apply to Commonwealth or State companies.

The Bill does not affect the operation of the *Native Title Act 1993*: **clause 13**.

Clauses 14-18 deal with how relevant Commonwealth and State law interact.

Provided there is no direct inconsistency between the Bill (or instruments made under it) and State law, they may operate concurrently: **clause 15**. In cases where a State has referred constitutional power to the Commonwealth, the State may also exclude the operation of certain Commonwealth water law provisions to specified matters: **clause 16**. **Clause 17** allows a referring State to declare that a State law that permits, authorises or requires the doing of an act to effectively override a Commonwealth water law that prohibits or penalises that act. Thus clause 17 reverses the usual situation where Commonwealth law overrides inconsistent State law. **Clause 18** allows for Commonwealth regulations to be made that, amongst other things, exclude Commonwealth water law from applying to matters dealt with by specified State law. ‘Commonwealth water law’ includes virtually all aspects of the Bill and instruments made under it.

24. *Victoria v. Commonwealth* [1975] 134 CLR 338 at 197 per Mason J.

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Part 2 – Management of Basin water resources

This part outlines the scope, development and adoption of both the ‘Basin Plan’ and ‘water resource plans’ and the key issue of what happens if the amount of water to entitlement holders is reduced or impaired. As its name implies, the Basin Plan is a broad planning instrument, whereas water resource plans may cover discrete areas within the Basin.

Clauses 19-52 deal with the Basin Plan.

The Basin Plan must give effect to the relevant aspects of international agreements: **subclause 21(1)**. The notes under subsections 21(2)-(3) suggest that this will in particular mean Articles 8 of the *Biodiversity Convention* and Article 3 of the *Ramsar Wetlands Convention*. For convenience, these are reproduced in Appendix 1.

Subject to this **subclause 21(1)** requirement, the Plan must be adopted and approved taking into account a very wide range of factors. Besides basic principles such as ecologically sustainable development, best available science and socio-economic analysis and various ‘public interest’ issues, some of these factors include:

- National Water Initiative
- the consumptive and other economic uses of Basin water resources
- the management objectives of the Basin States for particular water resources
- the links between water resources in the Basin and those outside, and
- the State water sharing arrangements.

The Basin Plan must also ensure there is no ‘net reduction’ in the ‘protection’ of planned environmental water under the Basin State water management laws that exist immediately before the Basin Plan comes into effect: **subclause 21(5)**.

The Basin Plan must not be inconsistent with the licence issued under section 22 the *Snowy Hydro Corporatisation Act 1997 (NSW)*. The Explanatory Memorandum comments that:

This requirement reflects the previous commitments made by the Commonwealth, New South Wales and Victorian Governments to allow water within the Snowy Scheme to be managed to meet the rights and obligations set out in the Snowy water licence and the principles set out in the *Heads of Agreement on the Outcomes of the Snowy Water Inquiry*.

Clause 22 lists what must be in a Basin Plan. These are set out in the relevant table in the Bill, but amongst other things the plan must include:

- the maximum long-term average quantities of water that can be diverted on a sustainable basis from both Basin water resources and water resource plan areas

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- temporary diversion provisions, and
- the requirements for water resource plans to be accredited.

Notably, **subclause 22(10)** provides that a provision of the Basin plan has no effect if it purports to directly regulate:

- land use or planning in relation to land use; or
- the management of natural resources (other than water resources); or
- the control of pollution.

Clause 23 requires that long-term average sustainable diversion limits (see **clause 22 above**), whether for Basin water resources as a whole, or part of them, ‘must reflect an environmentally sustainable level of take’.

Under **clause 24** temporary diversion provisions (see **clause 22 above**) are intended to provide a transitional level of diversions in cases where the historical average diversions have been higher than the figure fixed for long-term average sustainable diversion limits. Such transitional measures are intended to minimise social and economic impacts of reducing diversions down to sustainable limits. There are various limits on setting temporary diversion provisions in order not to compromise long-term average sustainable diversion limits.

The Basin plan must also contain a water quality and salinity management plan. This must contain specific water quality and salinity targets: **clause 25**.

The Basin plan must also contain an environmental watering plan. The key purpose of a plan is to safeguard existing environmental water, planning for the recovery of additional such water, so as to manage its use, to protect and restore Murray-Darling Basin wetlands, and other environmental outcomes. It must include targets to measure outcomes achieving overall environmental outcomes: **clause 28**.

The Basin Plan is a legislative instrument, as well as any amendments made to it: **clause 33**. The Explanatory Memorandum comments that it is ‘subject to disallowance and sunseting after a 10 year period’.²⁵ However, section 44 of the *Legislative Instruments Act 2003* states that some legislative instruments are not disallowable – amongst others those that ‘facilitate the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more of the States’. In the event that a State did refer powers to the Commonwealth for the purposes of the Act, it is perhaps arguable that any arrangements between two jurisdictions under the Bill – including

25. *Explanatory Memorandum*, Water Bill, 2007, p. 11.

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relevant aspects of the Basin plan - could be described as an intergovernmental scheme. It would be useful for the Government to clarify this.

Clause 34 requires the Commonwealth and its agencies to act consistently with the Basin Plan, except when amending the Plan. However, regulations may provide other circumstances in which that the Commonwealth does not have to act consistently.

Clause 35 imposes an obligation on certain entities not to act, or fail to act, if this would be inconsistent with the Basin Plan. These entities are:

- the Murray-Darling Basin Commission
- agencies of Basin States, and
- operating authorities, infrastructure operators and holders of water access rights.

However, the requirement on Basin States agencies only applies to acts that relate to the use or management of Basin water resources. Again, regulations may provide for circumstances in which the **clause 35** requirement does not apply.

The obligations contained in **clause 35** are subject to a set of further conditions in **clauses 36 and 37**, of which one or more must be satisfied in order for an obligation to be imposed. The conditions reflect the width of the Commonwealth's constitutional power upon which the Bill relies (see **clause 9** above).

Clause 40 provides that a State law may prescribe a lower maximum quantity of water may be taken from a water resource than the limit prescribed in the Basin plan.

Under **clause 42**, in preparing the Basin Plan, the Murray-Darling Basin Authority (the Authority)²⁶ must consult with:

- the Basin States
- the Basin Officials Committee, and
- the Basin Community Committee.²⁷

In preparing the water trading rules element of the plan, the Authority must also obtain, and have regard to, the advice of the ACCC: **subclause 42(2)**.

Following the above consultations, the proposed (ie draft) plan is put out for public consultation under **clause 43** for a minimum of 16 weeks. All submissions received during this time are to be published on the Authority website, except those that are submitted in

26. The Murray-Darling Basin Authority is established in Part 9 of the WA.

27. These Committees are established in Part 9 of the Bill.

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confidence. The Authority must ‘consider’ the submissions and may alter the proposed plan as a result. It is required to prepare a document for the Minister that summarises the submissions and ‘how it addressed those submissions’ in the context of the proposed plan.

The proposed plan may be adopted by the Minister or the Minister may suggest alterations or other matters. The Authority does not have to adopt the Minister’s suggestions in revising the plan (they may also give the Minister back an entirely unaltered plan). However, if the Minister is not satisfied with the plan that is given to him or her on this occasion, the Minister may direct the Authority to make such changes as the Minister sees fit. In such cases, the Authority must alter the plan as directed and the Minister must then adopt it.

The Basin Plan is a legislative instrument and must be laid before parliament under the *Legislative Instruments Act 2003*. In cases where the Minister has directed the Authority to alter the Plan according to his or her requirements, the direction, and the reason for it, must be laid before Parliament at the same time as the Plan: **subclause 44(7)**.

The process for amending a Plan **under clauses 45-48** is similar, except that the public consultation period is a minimum of eight weeks. Regulations may also provide specified kinds of ‘minor, or non-substantive’ amendments without going through a public consultation process (unless the regulations require such a consultation process): **clause 49**.

Clauses 50-51 cover reviews of the Basin Plan. Ordinarily this happens every ten years, however, a review may be initiated by request of the Minister or a unanimous request by the Basin States. However, a request cannot be made within the first five years of a Basin Plan, or within five years after the latest review.

Clauses 53-73 deal with water resource plans.

Each water resource area identified in the Basin Plan must have a water resource plan: **clause 53**. Water resource plans must be consistent with the Basin Plan and the relevant long-term annual diversion limit for the area (see **clause 23**).

Water resource plans may be either a plan prepared by a Basin State and then accredited by the Minister under **clause 63** or one developed by the Authority and then adopted by the Minister under **clauses 68-69**. Water resource plans are legislative instruments, but those accredited under **clause 63** are not subject to disallowance: **subclause 63(7)**.

Clause 58 requires the Commonwealth and its agencies to act consistently with a water resource plan, except when amending the plan or a Basin Plan. However, regulations may provide other circumstances in which that the Commonwealth does not have to act consistently.

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Clause 59 imposes an obligation on certain entities not to act, or fail to act, if this would be inconsistent with the relevant water resource plan. These entities are:

- the Murray-Darling Basin Commission
- agencies of Basin States, and
- operating authorities, infrastructure operators and holders of water access rights.

However, the requirement on Basin States agencies only applies to acts that relate to the use or management of Basin water resources. The obligations contained in **clause 59** are subject to a set of further conditions in **clauses 60 and 61** – these reproduce those contained in **clauses 36 and 37** which have previously been discussed.

In the interests of due process, if the Authority is considering recommending to the Minister that the plan submitted by the Basin State not be accredited, the Basin State must be allowed to make a submission to the Authority: **subclause 63(4)**. The Minister must accredit the plan if he or she is satisfied that the plan is consistent with the relevant Basin Plan: **subclause 63(6)**.

The Minister's decision whether to accredit a plan is a legislative instrument and thus laid before Parliament. If the decision does not follow the Authority's recommendation on the matter, the Minister must table a statement setting out the reasons for this. As mentioned earlier, **subclause 63(7)** states that the Minister's decision is not disallowable. The Explanatory Memorandum comments:²⁸

The purpose of this exemption is to avoid the significant uncertainty in the management of Basin water resources that would arise if an accredited water resource plan that has been given effect under Basin State law is subsequently disallowed by the Commonwealth Parliament.

Clauses 68-73 deal with the preparation of a water resource plan by the Authority and adoption by the Minister – the so-called 'step-in' power. The Explanatory Memorandum states that these provisions are:²⁹

intended to be used as a measure of last resort by the Minister, for example where absolutely necessary to ensure an accredited water resource plan that is consistent with the Basin Plan is able to be put in place.

Under **clause 68** there are a limited number of situations in which the Minister can request the Authority to develop a plan. Notably these include where the Basin State does not give a proposed water plan to the Authority or if the Minister declines accreditation of it because he or she is not satisfied it is consistent with the Basin Plan. In addition, the

28. *op. cit.*, p. 17.

29. *ibid.*, p. 18.

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Minister must negotiate in ‘good faith’ with the affected Basin State ‘with a view to dealing effectively with the circumstances without the exercise of the step-in power’: **subclause 73(1)**. There is an elaborate procedure that must be followed, including the offer of a formal mediation process, and the step-in power can only finally be exercised if, amongst other things, the Minister is satisfied that:

- [the dispute over the resource water plan], if not dealt with, will materially and adversely impact on the efficient or effective implementation of the Basin Plan
- the exercise of the step-in power would be an effective means for dealing with the circumstances, and
- there is no other feasible and effective alternative way of dealing with the circumstances (**subclause 73(14)**).

The Minister’s decision to adopt a plan under **clause 69** is a legislative instrument and laid before Parliament. Unlike the accreditation method, adoption via the step-in power is disallowable.

Clauses 74-86 deal with how the risks of reductions in water availability are to be shared between the holders of water access entitlements, the Commonwealth and Basin State Governments. Such reductions may arise when the long-term average sustainable water diversion limit for a water resource plan area, or part of an area, is reduced from current levels. If a risk is borne by the holder of a water access entitlement – such as a farmer – they may simply have less water to use or trade if water availability is reduced.

This issue is covered in the National Water Initiative (NWI) and the risk-sharing approach in the Bill appears to reflect the relevant provisions in the NWI. Paragraphs 48-50 of the NWI identify three types of reasons for reductions, with the formula for risk-sharing differing between the three. In summary, the formula is:

- where entitlements are reduced because of *seasonal or long-term changes in climate* or *periodic natural events* such as bushfires and drought, water users (entitlement holders) bear all the risk
- where entitlements are reduced because of *bona fide improvements in the knowledge* of water systems’ capacity to sustain particular extraction levels, water users bear all the risk up to 2014. Beyond 2014, reductions of up to three per cent are borne by users, but beyond that, reductions are borne by State and Commonwealth Governments, with any reduction beyond six per cent the responsibility of the Commonwealth
- if reductions result from changes in government policy (for example, new environmental objectives), relevant governments bear all the risk.

The Commonwealth share of reductions (those that arise from the last two dot points above) are reflected in **clause 75**.

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Clause 76 provides that the Commonwealth must ‘endeavour to manage the impact’ of its share of the reductions in water allocations. It also allows the Commonwealth to take ‘steps to ensure that the holders of water access entitlements do not suffer a reduction in their water allocations, or a change in the reliability of their water allocations, as a result of the Commonwealth’s share of the reduction in the limit’. The Explanatory Memorandum comments:³⁰

The Commonwealth proposes to assist water service providers and water users to improve their efficiency of use, allowing them to more easily adapt to lower water allocations. The Commonwealth may also invest in augmenting water supply works and purchase entitlements in order to increase supply and reduce the demand on the consumptive pool.

The *National Plan for Water Security* will provide considerable financial resources to allow the Commonwealth to manage reductions in preparation for and following the setting of sustainable diversion limits in the first Basin Plan.

Clause 77 provides that water access entitlement holders may be eligible for financial payments from the Commonwealth. Essentially, if the Commonwealth is not entirely successful under **clause 76** measures in managing and mitigating reductions for which is responsible under **clause 75**, and as a consequence a water access entitlement holder suffers a reduction in water allocation because of this, the Commonwealth may be required to provide a payment.

Eligibility for **clause 77** payments will depend in part on when the relevant access entitlement was granted. Decisions on eligibility and any amount payable are made by the Minister, but are subject to merits review by the Administrative Appeals Tribunal. Regulations can be made under **clause 79** to set out the detail of claiming payments – amongst other things, these may contain the method by which the change in value of the altered water entitlement (thus the potential amount of the payment) is calculated.

Clauses 80-86 deal with how the risks of changes in the reliability³¹ of water allocations (as opposed to reductions in water availability) are to be shared between the holders of water access entitlements, the Commonwealth and Basin State Governments. The Basin Plan may specify the Commonwealth share of the change in reliability of allocations. In any case, it is to be calculated with accordance with the NWI and any regulations made for the purpose. The regulations must not be inconsistent with the NWI. However, the NWI is not as prescriptive in terms of risk-sharing as it is on reductions of water entitlements.

30. *ibid.*, p. 22.

31. The concept of ‘reliability’ does not appear to be defined in the Bill. However, the Schedule B(i) of the NWI defines it as ‘the frequency with which water allocated under a water access entitlement is able to be supplied in full’.

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The remainder of the relevant provisions largely mirror those relating to risk-sharing in **clauses 74-79**. In particular, the Commonwealth may be liable for compensatory payments as discussed in relation to **clause 77**.

Part 3 - National Water Commission audits

This requires the National Water Commission to audit the ‘effectiveness of the implementation of the Basin Plan and the water resource plans’: **subclause 87(1)**. The initial audit must be completed within five years of the Act coming into force: **clause 88**. Audit reports are to be tabled in Parliament within 15 sitting days of being given to the Minister. Copies must also be given to the Basin States at the same time as the Minister.

Regulations may be made setting out the detail of what may be taken into account in carrying out the audit: **subclause 87(2)**.

Part 4 - Basin water charge and water market rules

This Part deals with water charge rules and water market rules.

Water charge rules

Clause 91 sets out the kinds of charges which are referred to broadly in the WA as ‘regulated water charges’. They include:

- fees or charges payable to an irrigation infrastructure operator
- bulk water charges – excluding urban water supply activities
- water planning and water management charges, and
- fees or charges arising from access to water service infrastructure.

The charges listed above will only be ‘regulated water charges’ if they relate to Basin water resources, or water service infrastructure which carries Basin water resources or water access rights, irrigation rights or water delivery rights in relation to Basin water resources.

Clause 92 sets out the process the Minister must follow to make water charge rules. In particular, the water charge rules establish the role of the ACCC in relation to regulated water charges.

The water charge rules deal with the following matters:

- the rules for determining the amount of regulated water charges
- the terms and conditions that may be imposed on regulated water charges generally

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- the determination or approval by the ACCC of those charges
- how the ACCC goes about making those approvals
- how the ACCC can accredit other agencies of the States to act on its behalf in relation to determinations and approvals
- that regulated water charges of some kinds will be prohibited, and
- the requirement that the person who determines the charges must publish the details of the charges and the way the amount was determined.

Clause 93 provides that the Minister must ask the ACCC for advice about the water charge rules that the Minister proposes to make and the Minister must take this advice into account. Regulations will provide the detailed process, but they must provide for consultation with Basin States and irrigation infrastructure operators. If the Minister makes a decision that in some respects does not reflect the ACCC advice, the Minister must table reasons in Parliament setting out why the ACCC's advice was not followed. The Minister's decision (that is, in making the rules and charges) are legislative instruments and are disallowable.

There are some Constitution-related conditions in **clause 94**, one of more of which must be satisfied for water charges to apply - for example that the entity imposing the charge is corporation.

The ACCC is required to monitor regulated water charges and compliance with water charge rules: **clause 95 and clause 100**.

Water market rules

Clause 97 empowers the Minister to make 'water market rules'. The rules must contribute to the objectives and principles set out in Schedule 3 of the WA, which are drawn from the National Water Initiative.³²

The rules relate to the actions of irrigation infrastructure operators³³ and are intended to free up the trade of water access rights within the Murray-Darling Basin by ensuring that policies or administrative requirements of infrastructure operators do not represent a barrier to trade. **Subclause 97(3)** provides that water market rules may deal with the restrictions that an irrigations infrastructure operator may impose in relation to 'transformation arrangements'. These are, essentially, the arrangements whereby a water access entitlement of the operator may be permanently transformed into a water access entitlement of a person other than the operator.

32. *Explanatory Memorandum*, p. 27.

33. See: clause.7 of the Bill for the relevant definition.

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Clause 98 provides that the Minister must ask the ACCC for advice about the water market rules the Minister proposes to make, and the Minister must have regard to that advice in making the water market rules.

Part 5 – Murray-Darling Basin Water Rights Information Service

Part 5 relates to the establishment of the Murray-Darling Basin Water Rights Information Service. **Clause 101** defines the following as ‘registrable water rights’:

- water access rights in relation to Basin water resources
- water delivery rights in relation to Basin water resources
- irrigation rights in relation to Basin water resources, and/or
- rights that relate to access to, or use of, Basin water resources which are described in regulations.

Clause 103 allows the Authority to provide a single information service (called the Murray-Darling Basin Water Rights Information Service) based on the contents of the registers of ‘registrable water rights’ which are kept by the State based agencies and infrastructure authorities which are listed in **clause 102**. The Explanatory Memorandum states that the intention of the Service is to support the distribution of information about water access rights and to facilitate trading in these rights.³⁴

The practical details about the form in which the Service is to be provided, the information required to be provided to the Service and the manner in which information will be accessed from the Service will be the subject of regulations: **subclause 103(2)**.

Part 6 – Commonwealth Environmental Water Holder

Clause 105 provides that the Commonwealth Environmental Water Holder (CEWH) is to manage the Commonwealth environmental water holdings and administer the Environmental Water Holdings Special Account. According to the second reading speech, the CEWH will be required to ensure that water is delivered to achieve environmental watering objectives. This would include environmental watering objectives for icon sites currently being pursued under the Living Murray Initiative, in particular provision of additional water to the Coorong and Murray Mouth.³⁵

Clause 108 defines Commonwealth environmental water holdings as being the rights that the Commonwealth holds that are water access rights, water delivery rights, irrigation

34. *Explanatory Memorandum*, p. 28.

35. M Turnbull, MP (Wentworth), Minister for Environment and Water Resources, ‘*Second reading speech: Water Bill 2007*’, House of Representatives, Debates, 8 August 2007, p. 3.

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rights and other similar rights relating to water excluding those rights that the Commonwealth holds in the performance of functions that are not related to the Bill, for example, water rights held by the Department of Defence.³⁶

Subclause 105(2) sets out what the CEWH can do in managing Commonwealth environmental water holdings. They include conducting trade in permanent water entitlements or temporary water allocations, entering into contracts for buying and selling water rights and the use of those rights, and maintaining records of the water rights owned by the Commonwealth.³⁷

According to **subclause 105(4)** the CEWH must manage Commonwealth environmental water holdings in accordance with applicable planning documents including the environmental watering plan and environmental watering schedules which are established under Part 2 of the WA.

Where the Commonwealth holds water outside the Murray-Darling Basin, the applicable planning document will be any plan that relates to environmental water in that area and which has been specified in regulations. Where there is no plan, the CEWH must have regard to both the operating rules which the Minister has set under section 109, and any relevant environmental watering schedules to which it is a party.

Clause 106 limits the CEWH's right to sell water during a water accounting period.³⁸ It may only sell water which is not required by a watering plan or in accordance with the environmental watering schedule. The reason for imposing the limitation is to ensure that the CEWH operates to meet environmental objectives rather than as a profit making enterprise.³⁹ The limitation will not apply in circumstances where proceeds from any sale can be used by the CEWH to acquire other water or water holdings which will better protect or restore environmental assets.

The Minister and Secretary are not permitted to give direction to the CEWH in the exercise of the functions which are set out in subclauses 105(2)(a) – (c). This limitation, set out in **clause 107**, is intended to safeguard the independence of the CEWH in relation to key trading decisions.⁴⁰ However, **clause 109** allows the Minister to make operating rules by legislative instrument, about those same matters. According to the Explanatory Memorandum, the operating rules will establish a general framework within which the

36. *Explanatory Memorandum*, p. 29.

37. *ibid.*, p. 28.

38. Defined in section 4 and in the table in subsection 22(1) of the WA.

39. *Explanatory Memorandum*, p. 29.

40. *ibid.*

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CEWH operates, rather than providing specific direction on individual entitlements or contracts.⁴¹

Clause 111 establishes the Environmental Water Holdings Special Account which is to be used for expenses incurred by the CEWH in undertaking its functions: **clause 113**.

Part 7 – Water information

Clause 120 provides that the Bureau of Meteorology will have additional functions to those already specified in the *Meteorology Act 1955*. They relate to matters concerned with the collecting, holding, managing and dissemination of information on water resources, its usage and availability, water accounting and the forecast of future water availability. The Bureau of Meteorology will also undertake investigations to enhance understanding of Australia's water resources.

Clause 125 defines 'water information' as any raw data, or any value added information product that relates to:

- the availability, distribution, quantity, use, trading or cost of water, or
- water access rights, water delivery rights or irrigation rights.

Under **clause 123** the Director of Meteorology is allowed to publish water information in a form that is readily accessible by the public, unless it would not be in the public interest to do so, the information is already in the public domain, or to do so would expressly identify a person's water use.

Clause 126 provides for regulations which will specify a person, or a class of persons who must provide the Bureau of Meteorology with water information in a time and manner that will also be contained in the regulations. Under **clause 127** it will be a civil penalty if a person or class of persons fails to provide water information to the Bureau of Meteorology if requested in writing to do so.

The Director of Meteorology may issue National Water Information Standards in accordance with **clause 130**. The Standards will be a legislative instrument and thus laid before parliament. **Subclause 130(2)** sets out those matters which may be contained in the National Water Information Standards such as collecting water information, measuring and monitoring water, transmitting and accessing water information and reporting water information. **Clause 132** requires the Director of Meteorology to consult with the States, and any other person who is considered appropriate, in preparing National Water Information Standards.

41. *ibid.*

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Part 8 – Enforcement

Clause 137 identifies the ‘appropriate enforcement authority’ in the event of the following contraventions:

- the Authority
 - for matters arising from the WA or regulations about the management of the basin plan or water resource plans,⁴² and
 - for matters arising out of the Authority’s information gathering powers⁴³
- the ACCC, for matters relating to the water charge rules or the water market rules and
- the Minister, for matters relating to the provision of information to the Bureau of Meteorology in accordance with National Water Information Standards.

Where a contravention of any provision of the WA or regulations, the water charge rules or water market rules has occurred, or is about to occur, the ‘appropriate enforcement authority’ has a number of options about what action can be taken.

One option is for the ‘appropriate enforcement authority’ to seek an injunction or declaration from the Court. **Clause 138** defines ‘Court’ as being the Federal Court of Australia, the Federal Magistrates Court of Australia or a court of a State or Territory. **Clause 139** specifically excludes the Federal Magistrates Court from any jurisdiction in proceedings against a State.

Clause 140 provides that the ‘appropriate enforcement authority’ can apply to Court for a prohibitory injunction to restrain a person from engaging in conduct that would contravene the WA, or a mandatory injunction to require a person to take action to prevent a contravention of the WA. Where it is considered urgent, the ‘appropriate enforcement authority’ can seek an interim injunction prior to a formal decision on the matter under **clause 141**.

A second option is provided by **clause 144**. The ‘appropriate enforcement agency’ can apply to a Court for a declaration that there has been a contravention of the WA. For example, a declaration may be sought where there is a disagreement between a State and the Commonwealth about whether certain conduct was in contravention of the Basin Plan.⁴⁴

A third option, set out in **clause 146**, relates to a contravention of those subsections of the WA, the water charge rules and the water market rules where the words ‘civil penalty’ are set out at the foot of the provision. In those cases, **clause 147** gives the ‘appropriate

42. Part 2 of the Bill.

43. Division 3 of Part 10 of the Bill.

44. *Explanatory Memorandum*, p. 36.

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enforcement agency' a period of 6 years from the date of the contravention to apply to a Court for an order that the person pay the Commonwealth a pecuniary penalty. It also sets out the maximum penalty payable and the matters to be taken into account by the Court in determining the amount of the penalty.

Clause 148 provides that contravention of a civil penalty clause is not, of itself, a criminal offence.

A fourth option is to initiate criminal proceedings against the person. **Clause 153** provides that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a civil penalty provision. This may occur even if a Court has ordered the person to pay a pecuniary penalty. However **clause 152** provides that where a person has been convicted of an offence, a Court cannot also impose a pecuniary penalty for a contravention arising out of the same conduct.

Clause 156 provides that an alternative to Court action lies where the civil penalty provision which has been contravened relates to:

- water charge rules or water market rules
- the requirement to provide water information and comply with National Water Information Standards, or
- any regulations which have been made for the purpose of this paragraph.

In that case, an infringement notice *may* be given. However, **clause 161** provides that there is no requirement that an infringement notice must be given in respect of the contravention of a civil penalty provision. It is an option that may be taken in matters where the circumstances are considered to be of a relatively minor nature and determining whether the civil penalty provision has been contravened will turn on fairly straightforward and objective criteria.⁴⁵

It should be noted that **subparagraph 156(1)(a)(i)** appears to contain an error. Reference to Part 3 should be a reference to Part 4.

Clause 157 sets out the matters which must be specified in an infringement notice, including the details of the contravention, the amount of the penalty and the time allowed in which to pay the penalty. Where a person receives an infringement notice and pays the penalty, **clause 160** provides that the 'appropriate enforcement agency' may not bring Court proceedings against the person.

Clause 163 provides a second alternative to Court action. Where the 'appropriate enforcement agency' considers that a person has contravened a provision of the WA, regulations, the water charge rules or water market rules, it can accept written undertakings from the person to do, or refrain from doing, those actions which have caused the contravention. For example, an undertaking might be to provide information

45. *ibid.*, p. 38.

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that ought to have been provided at an earlier time, within a further specified period and put in place systems that will ensure compliance with the relevant obligation to provide information in the future.⁴⁶

However, where a person has given an undertaking and the ‘appropriate enforcement agency’ considers that the person has breached the undertaking, **clause 164** empowers the ‘appropriate enforcement agency’ to apply to a Court for an Order in any or all of the following terms:

- the person must comply with their undertaking
- the person must pay an amount to the Commonwealth which is equal to the benefit the person gained by failing to adhere to their undertaking
- the person must pay compensation to any other person who has suffered loss or damage as a result of the breach of the undertaking, or
- any other matter that the Court considers appropriate.

Clause 165 provides that the Authority may issue an enforcement notice where a person has contravened, or is *likely* to contravene a provision of the WA or regulations relating to the management of Basin water resources.

This provision is very wide. It allows for enforcement notices to be issued where a person is taking, or proposing to take, action that the Authority considers is:

- inconsistent with the Basin Plan or a water resource plan
- would prejudice or have an adverse effect on the effectiveness or implementation of the Basin Plan or a water resource plan, or
- poses a threat to the health or continued availability of Basin water resources.

An enforcement notice stops or prevents conduct which, while not actually a contravention of the WA or the regulations, is conduct that runs counter to the objectives and outcomes sought to be achieved by the Basin Plan or the water resource plans.⁴⁷

Subclause 165(2) provides that the Authority must specify the action that the person is to take or refrain from taking. **Subclause 165(3)** provides that the Authority may direct the person *not* to exercise some or all of their:

- water access rights
- irrigation rights, or
- water delivery rights.

46. *ibid.*, p. 39.

47. *ibid.*, p. 40.

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Under **subclause 165(4)**, the fact that the conduct required by the enforcement notice is also an offence under a State or Territory law does not prevent the Authority from giving the notice.

Where a person who has been served with an enforcement notice fails to comply with the terms of the notice, there is a breach of a civil penalty provision. Under **subclause 166(1)** the penalty is 600 penalty units.⁴⁸ A separate contravention occurs on each and every day until the enforcement notice is complied with: **subclause 166(2)**.

Where a civil penalty provision is contravened by a body corporate, **clause 168** provides that an executive officer of the body corporate will be liable for the contravention if they:

- knew that the contravention would occur **or** were reckless or negligent about whether the contravention would occur, **and**
- were in a position to influence the conduct of the body corporate, **and**
- failed to take all reasonable steps to prevent the contravention.

In determining whether an executive officer took reasonable steps to prevent a contravention, a Court must take into account all the matters listed in **clause 169**.

Clause 170 describes the circumstances in which the conduct of a director, employees or agents of a body corporate can be taken to be the actions of the body corporate for the purposes of the WA.

Part 9 – Murray-Darling Basin Authority (administrative provisions)

This contains uncontroversial administrative provisions in relation to the Murray-Darling Basin Authority including but not limited to:

- **clause 172** – the Authority’s functions
- **clause 173** – the Authority’s powers
- **clause 178** - the appointment of members to the Authority
- **clauses 181 – 190** – the terms and conditions of Authority members
- **clauses 191 – 215** – the operation of the Authority and its staff.

Clause 175 empowers the Minister to give directions to the Authority about the performance of its functions with the exception of the following:

48. As section 4AA of the Crimes Act provides that one penalty unit is \$110.00, the amount of the penalty is \$66,000.

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- a determination under paragraph 83(2)(b)⁴⁹
- the Authority's powers in relation to information gathering
- monitoring of compliance with, or the investigations of possible contraventions of a provision of Part 2 or regulations made for Part 2⁵⁰, and/or
- its powers of enforcement under Part 8.

Part 10 – Murray-Darling Basin Authority (special powers)

Clause 216 provides that this part of the WA only has effect so far as the Constitution permits. The part provides authorised officers with the power to enter onto land for compliance and non compliance purposes.

Subclause 217(2) sets out the conditions for appointment as an authorised officer. According to **clause 218** an authorised officer must carry an identity card, as issued by the Authority, at all times when carrying out their functions. It is an offence if a person who ceases work as an authorised officer, fails to immediately return their identity card to the Authority.

An authorised officer is empowered to enter onto land to monitor compliance or for other purposes: **clause 219**. This Part sets out the rules which must be followed by an authorised officer in either of these circumstances.

An authorised officer cannot enter onto land for reasons other than monitoring compliance,⁵¹ unless, according to **clause 220** the authorised officer has:

- given reasonable written notice to the occupiers about the intention to enter the premises (unless the entry is in an emergency, for example, where there are structural problems with a dam or flooding⁵²)
- where the premises is a residential premises, the occupier has voluntarily consented to the entry
- shown the occupier his identification if requested,
- provided the occupier with a written statement about their rights and obligations in relation to the entry.

49. About the Commonwealth's share of the change in the Basin Plan.

50. About Management of Basin water resources.

51. This will generally relate to gathering information that the Authority needs to prepare the Basin Plan or amendments to the Basin Plan.

52. *Explanatory Memorandum*, p. 51.

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Subclause 220(3) provides that an authorised officer cannot be said to have obtained the consent of an occupier unless the occupier has been informed of the right to refuse consent.

Subclause 220(4) requires an authorised officer to leave the property if the consent is withdrawn.

Subclause 221(2) lists those things that an authorised officer may do while on premises, for example, affixing or placing monitoring equipment, conducting tests, or collecting samples. This is a broad list and the clause makes it clear that the authorised officer can do any of the activities to the extent that is reasonably necessary for the performance of the Authority's functions. In addition, **clause 222** requires an authorised officer to behave in a reasonable manner whilst on the premises and to minimise their impact on those premises.⁵³

An authorised officer may enter onto land to either monitor compliance (**clause 223**) or to search for evidential material (**clause 224**).

Under **clause 223** an authorised officer may enter onto land to monitor compliance only if the occupier of the premises has consented to the entry or the entry is made under a monitoring warrant (**clause 225**). This is consistent with the [Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers](#).⁵⁴ **Clause 225** sets out the steps to be taken by a magistrate before the monitoring warrant is issued, including that the magistrate is satisfied that it is reasonably necessary for one or more authorised officers to have access to the premises.

Under **clause 224** an authorised officer may enter onto land to search for evidential material only if the occupier of the premises has consented to the entry or the entry is made under a contravention warrant. **Clause 226** sets out the steps to be taken by a magistrate before a contravention-related warrant is issued including that the magistrate is satisfied that there is, or will be within the next 72 hours evidential material in or on the premises. The magistrate must specify the time of day during which entry is authorised and specify a day on which the warrant ceases to have effect. A contravention-related warrant can be issued by telephone or fax only for the reasons and in the manner specified in **clause 227**.

In all cases where an authorised officer enters premises **clause 228** requires that the authorised officer does the following:

53. *ibid.*

54. Criminal Law Policy Section, Criminal Justice Division, Attorney-General's Department, 'Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers', February 2004, p. 66.

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- shows their identity card if required by the occupier, and
- provides the occupiers with a written statement of their rights and obligations in relation to the entry on to the premises.

Under **clause 229** an authorised officer will not have the voluntary consent of the occupier to enter, unless the authorised officer has first informed the person that they have the right to refuse consent.

Where an authorised officer is entering premises under warrant, **clause 230** provides that where practicable and safe the authorised officer must announce that they are authorised to enter the premises and where possible give the occupier a copy of the warrant.

Where an authorised officer enters premises under warrant and believes on reasonable grounds that they can operate equipment on the premises without damaging it, **clause 231** empowers the authorised officer to operate the equipment to copy information or material to a storage device and then to take the storage device from the premises.

However where an authorised officer has entered premises under a warrant and information or evidential material may be accessible by operating equipment that the authorised officer does not have the expertise to operate, then **clause 232** empowers the authorised office to secure the equipment for up to 24 hours to prevent information from being destroyed or altered. Where the authorised officer believes on reasonable grounds that the expert assistance will not be available within 24 hours, they can apply to a magistrate for an extension of that period.

Under **clause 237** an occupier may accompany an authorised officer at all times whilst the authorised officer is on their premises, but cannot impede the authorised officer.

Clause 238 provides that the Authority has the power to request information relating to the preparation and implementation of the Basin Plan, the investigation of possible contraventions of Part 2 and regulations about Part 2 of the WA and other matters relevant to the Authority's functions. **Subclause 238(2)** sets out the requirements in relation to any such request. It is a civil penalty not to provide information requested or to provide false and misleading information in response to a request. **Subclause 238(5)** provides that the civil penalties do not apply where a person has a reasonable excuse for not supplying the information.

Part 11 – Transitional Provisions

On 25 January 2007, the Prime Minister, the Hon John Howard MP announced the National Plan for Water Security.⁵⁵ Schedule 4 to the WA lists some 27 water resource

55. J. Howard MP, *Speech to the National Press Club*, 25 January 2007.

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plans which were in effect on the day of the announcement. Under **clause 241** these 'transitional' water resource plans will cease to have effect only on the date which is specified in the Schedule, that is, the date that they were due to expire or be subject to review under State law. **Clause 243** deems that such plans have been accredited by the Minister under Subdivision D of Division 2 of Part 2 of the WA so that there will be no requirement upon a Basin State to prepare another plan for accreditation in relation to the water resource area covered by the transitional plan.

Clause 242 relates to 'interim' water resource plans. These plans came into effect on or after 25 January 2007. These interim plans will continue to be recognised until the first Basin plan comes into effect. **Subclause 242(3)** provides that interim water resource plans will cease at the end on the later of, 31 December 2014 or, the time occurring 5 years after the plan is made. **Clause 244** deems that such plans have been accredited by the Minister under Subdivision D of Division 2 of Part 2 of the WA. This means that, until the interim plan expires, there will be no requirement upon a Basin State to prepare another plan for accreditation in relation to the water resource area covered by the interim plan.

While there is a transitional water resource plan, or an interim water resource plan in operation for a water resource area, they will prevail over the Basin Plan where there is any inconsistency: **clause 245**.

Clause 253 provides that **before the end of 2014**, a review must be conducted of the operation of the WA and the extent to which the objects of the WA have been achieved.

Clause 255 provides that nothing in the WA or regulations authorises the Commonwealth, the Authority, the CEWH or any other agency to compulsorily acquire a water access right or an interest in a water access right. However, should an acquisition of property from a person occur, the Commonwealth is liable to pay a reasonable amount of compensation to the person: **clause 254**. Note the use of the phrase 'reasonable amount' as opposed to 'just terms' as specified in the Constitution was raised in the context of the *Northern Territory National Emergency Response Bill 2007*. For more information in relation to this point see the relevant [Bills Digest](#).

Parts 2 and 3 of Schedule 2 outline the objectives and principles for water charging. They are based on those set out in the National Water Initiative.⁵⁶

Schedule 3 contains basin water market trading objectives and trading principles.

56. *Explanatory Memorandum*, p. 58.

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Conclusion

At the same time as this Bills Digest was being finalised, the [report](#) of the Senate Standing Committee on Environment, Communications, Information Technology and the Arts into the Bill was released. While recommending that the Bill be passed, the majority report concluded:⁵⁷

The committee recognises both the broad support for the bill, the preference of most stakeholders for the original referral of powers model **and the concerns raised by parties about various aspects of the bills.** It also recognises that the IGA will be critical to the form and success of this water policy initiative. It thanks all parties for the efforts to which they went to examine the bill in the short time available. **The committee commends all submissions and suggestions it received to the Commonwealth for careful examination** [emphasis added by Digest author].

As mentioned earlier in this Digest, the Bill has been in development for several months through various intergovernmental working groups, and earlier versions have also apparently been circulated to some peak stakeholder rural, commercial and environmental groups. However, the Bill was only available for public scrutiny, including to the authors of this Digest, from 8 August 2007. Particularly in light of the Senate Committee's conclusion above, the Bill's complexity and importance warrant measured consideration by the Parliament.

57. At p. 27.

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Appendix 1

Excerpt from the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat

Article 3

1. The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.
2. Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8.

Excerpt from the Convention on Biological diversity

Article 8

Each Contracting Party shall, as far as possible and as appropriate:

- (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;
- (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
- (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;

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- (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies;
- (g) Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health;
- (h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species;
- (i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;
- (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;
- (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;
- (l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities; and
- (m) Cooperate in providing financial and other support for in-situ conservation outlined in subparagraphs (a) to (l) above, particularly to developing countries.

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