



Water Amendment Bill 2008

Angus Martyn and Juli Tomaras
Law and Bills Digest Section

Bill McCormick
Science Technology Environment and Resources Section

Contents

Purpose.	3
Background.	3
The Murray Darling Basin.	3
The Living Murray environmental program	4
The National Water Initiative.	4
CSIRO Sustainable Yields Project	5
The National Plan for Water Security and the <i>Water Act 2007</i>	5
Proposed reforms to MDB governance agreed at COAG	8
MDB Environmental Water Buyback Program	9
The current position	10
Committee consideration.	13
Political party policy positions/commitments	13
Financial implications	13

Key Issues	14
Main provisions.	15
Schedule 1	15
Schedule 2 — Other Amendments	23
Part 1 – Repeal of the Murray-Darling Basin Act 1993	23
Part 2 – Amendments	24
Legislative Instruments Act 2003.	24
Trade Practices Act 1974.	24
Water Act 2007	24
Schedule 3	28

Water Amendment Bill 2008

Date introduced: 25 September 2008

House: House of Representatives

Portfolio: Climate Change and Water

Commencement: Sections 1–3 on the day of the Royal Assent; Schedule 2 on the date of Proclamation or six months after the day of the Royal Assent, whichever is the earlier; Schedules 1 and 3 immediately after the commencement of the provisions covered by table item 3.

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 amend the *Water Act 2007* (the Water Act) to make changes to the cooperative water planning, management and regulatory regime in the Murray Darling Basin. In particular, the changes reflect agreement by the relevant States and the ACT to refer constitutional powers to the Commonwealth to broaden the Commonwealth's planning, management and regulatory powers.

Background

The Murray Darling Basin

Located in the south-east of Australia, the Murray-Darling Basin (MDB) covers over 1 million square kilometres, equivalent to 14 per cent of Australia's total area. The MDB 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 MDB is in NSW and almost one quarter is in Queensland. Often referred to as the nation's 'food basket', the MDB included 1.65 million hectares of irrigated crops and pastures, accounting for 65 per cent of the total area of irrigated land in Australia in 2005-06. The MDB is Australia's most important agricultural region, with production worth \$15 billion in 2005-06 accounting for 39 per cent of the nation's gross value of agricultural production. Gross value of irrigated agriculture production in the Basin in 2005-06 was \$4.6 billion or 31% of the Australian total, a decline of 2% since 2000-01. However the volume of water consumed in 2005-06

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

for agricultural production, 7,720 Gigalitres (GL), was 66% of Australia's agricultural water consumption.¹

In 2004-05, industries and households in the MDB used 52% of the total water consumed in Australia. The agriculture industry used 85% of the water consumed in the MDB in 2004-05. The major water users of the agricultural commodities in 2005-06 were cotton (1, 574 GL), dairy farming (1,287 GL), pasture for other livestock (1,284 GL) and rice (1,252 GL).²

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 per year of permanent 'new water' to the River Murray by 30 June 2009 as an environmental flow to protect 6 icon sites that include the [River Murray Channel](#) and five [Ramsar](#) sites: [Barmah-Millewah Forest](#); [Gunbower-Koondrook-Perricoota Forest](#); [Hattah Lakes](#); [Chowilla Floodplain and Lindsay-Wallpolla Islands](#); and [Lower Lakes, Coorong and Murray Mouth](#). Further information on the [Living Murray program](#) can be found at the MDBC website.³

To date 133 GL of environmental water has been listed on the Environmental Water Register and projects which may yield up to 375.7 GL are ready to be implemented.⁴ [Details](#) of the projects being under development and implemented can be found on the Living Murray website.

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 origins can be traced back to the 1994 Council of Australian Governments (COAG) agreement on water resource policy. Its overall objective, as expressed in paragraph 23 of the NWI, is 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.

-
- 1 B. Pink, *Water and the Murray-Darling Basin – A Statistical Profile: Australia 2000-01 to 2005-06*. Australian Bureau of Statistics 15 August 2008, available at [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/CE4D5F0DE202AFB2CA2574A50015519A/\\$File/4610055007_2000-01%20to%202005-06.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/CE4D5F0DE202AFB2CA2574A50015519A/$File/4610055007_2000-01%20to%202005-06.pdf)
 - 2 Ibid.
 - 3 Living Murray internet site: <http://www.thelivingmurray.mdbc.gov.au/home>; accessed 7 October 2008.
 - 4 See: http://www.thelivingmurray.mdbc.gov.au/programs/water_recovery/progress

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The NWI also mandated the establishment of the National Water Commission (NWC), which was subsequently created 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 NWI such as compatible registers of water entitlements and trades, and nationally consistent approaches to pricing.

The NWI contains some specific provisions on the MDB. The NWI also required relevant Parties to sign a separate agreement to address the overallocation of water and achievement of environmental objectives in the MDB ('the 2004 MDB Intergovernmental Agreement'). However, in its latest progress report, the National Water Commission noted that:

While policies, plans or management frameworks to address over-allocation or stress have largely been put in place, specific results have been less evident and possible over-allocation remains a major concern, particularly in the Murray-Darling Basin.⁵

CSIRO Sustainable Yields Project

The November 2006 MDB Water Summit decided that CSIRO was to be commissioned to report by the end of 2007 on sustainable yields of surface and groundwater systems within the Murray-Darling Basin, in light of changes in climate and other issues. CSIRO has been contracted by the National Water Commission to report on current and future water availability in the 18 regions of the MDB. These reports have been completed and the full reports and summaries are available.⁶

The National Plan for Water Security and the *Water Act 2007*

On 25 January 2007, in an address at the national press Club, the then Prime Minister announced the [*National Plan for Water Security*](#) (the National Plan). In relation to the water resource planning and management in the MDB the National Plan stated:⁷

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

5. *Update of progress on Water Reform*, February 2008, p. 4. See <http://www.nwc.gov.au/resources/documents/COAG-Update-WR-150208.pdf>

6. See: <http://www.csiro.au/partnerships/MDBSY/whatsnew.html>

7. National Plan, pp. 12-13 see http://www.nalwt.gov.au/files/national_plan_for_water_security.pdf

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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

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.

Subsequently, 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 the referral of powers at the time but agreed to continue to negotiate with the Commonwealth to identify mutually satisfactory ways of achieving agreed outcomes.

When it was introduced on 8 August 2007, the Water Bill did not include each of these four critical aspects because of the failure to reach agreement with Victoria on the constitutional referral of powers to the Commonwealth.

The Water Bill was subject to formal inquiry by the Senate Committee on Environment, Communications, Information Technology and the Arts (the Senate Committee), but only six days were allowed for the inquiry to [report](#). The Senate Committee report contained significant concerns expressed by ALP, Democrat and Green members of the Committee.⁸ However, amendments proposed in the Senate were not successful and the Water Bill was passed without amendment on 16 August 2007. The operative sections of the Water Act came into force on 3 March 2008.

8. Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Report of Inquiry into provisions of the Water Bill 2007*, pp. 29–51.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

There have been various intergovernmental agreements relating to the water resources of the MDB, and particularly the River Murray, dating back to 1914. 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*⁹ 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 MDB.

Before the commencement of the Water Act, the main governance, operational and consultative mechanisms established under it were:

- the [Murray-Darling Basin Ministerial Council](#), political decision-making body
- the [Murray-Darling Basin Commission](#), the executive arm of the Ministerial Council which advises the Council and carries out its decisions. It is required to equitably, efficiently and sustainably manage and distribute the water resources of the River Murray in accordance with the MDB Agreement.
- the [Community Advisory Committee](#), which provides the Ministerial Council with advice and provides a two-way communication channel between the Council and the community.

Some of the key features of the Water Act, so as far they are relevant to the amendments proposed in the current Bill, included:

- The establishment of the Murray-Darling Basin Authority (MDB Authority). Key functions of the MDB Authority are:
 - preparing a Basin Plan for adoption by the Commonwealth Minister, including setting sustainable limits on water that can be taken from surface and groundwater systems across the Basin¹⁰
 - advising the Minister on the accreditation of State water resource plans, and
 - developing a water rights information service which facilitates water trading across the Murray-Darling Basin
- The Australian Competition and Consumer Commission (ACCC) was given a key role in developing and enforcing water charge and water market rules.

9. Note that this Act is proposed to be repealed by Part 1 of Schedule 2 of the Water Amendment Bill 2008.

10. Where the Basin Plan specifies a reduction in the long-term average sustainable diversion limit, the Basin Plan will also identify the percentage of that reduction for which the Commonwealth is responsible. This percentage relates to the risk sharing arrangements set out in the Water Act, which are modelled on those agreed previously agreed by relevant Governments in the 2004 National Water Initiative.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Note that once Schedule 1 of this Bill comes into force, the current version of the MDB Agreement will be replaced by one signed at the July 2008 meeting of Council of Australian Governments (COAG) meeting. This Agreement (the 2008 MDB Agreement), which is itself in Schedule 1 of the Bill, reflects the various governance and other regulatory arrangements broadly agreed at the March 2008 COAG meeting and subsequently confirmed in at the July meeting.

Proposed reforms to MDB governance agreed at COAG

At the first COAG meeting after the election of the Rudd Government, the Commonwealth and NSW, Victoria, Queensland, South Australia and the ACT signed a [Memorandum of Understanding \(MOU\) on MDB reform](#). According to the Commonwealth Minister for Climate Change and Water, Penny Wong, the MOU contained an agreement for, amongst other matters:¹¹

- the establishment of the independent MDB Authority as the single body responsible for the overarching management of the MDB
- arrangements giving the Commonwealth Minister power to approve a new Basin-wide plan, including a new cap on the amount of water used in the MDB, based on independent advice from the Authority
- a commitment to provide for critical human needs and arrangements to allow South Australia to store water in upstream dams to ensure there's enough water for Adelaide and towns reliant on the Murray for drinking water, and
- continuation of the States' role in setting annual water allocations, decisions on natural resource management across the Basin and a new role to provide input to the Basin-wide plan.

The MOU was then implemented through the signing of a new [Intergovernmental Agreement on Murray-Darling Basin Reform](#).¹² Notably, this Reform Agreement required the relevant states to use their 'best endeavours' to pass legislation in their respective jurisdictions to refer constitutional powers to:¹³

- widen the mandate on the Authority as mentioned above, as well as making other changes to governance structures

11. The Hon Penny Wong, *Murray Darling Deal Delivered*, Press release 26 March 2008. See <http://www.environment.gov.au/minister/wong/2008/pubs/mr20080326.pdf>

12. See http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/Murray_Darling_IGA.pdf

13. Section 2.4 ('Mechanisms for achieving Murray-Darling Basin reform') of the Reform Agreement

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- strengthen the role of the ACCC within the Basin by extending the application of the water market rules and water charge rules to cover, respectively, all irrigation infrastructure operators and all bodies that charge section 91 regulated water charges not just those that fall within the scope of the Commonwealth's powers, and
- enable the Basin Plan to provide for critical human water needs.

The Reform Agreement also aimed to have the amendments to the Water Act in place and in force from on 1 November 2008. The current status of the State referral legislation is:

- New South Wales - *Water (Commonwealth Powers) Act 2008* received Royal Assent 25 September 2008.
- Victoria - *Water (Commonwealth Powers) Bill 2008* 2nd reading in Legislative Assembly 9 October 2008
- Queensland - *Water (Commonwealth Powers) Bill 2008* introduced into Legislative Assembly 7 October 2008
- South Australia - *Water (Commonwealth Powers) Bill 2008* introduced into House of Assembly 23 September 2008

The reform of MBD governance arrangements under the Bill are part of the Rudd government's central water policy, *Water for the Future*, release by Senator Penny Wong in April 2008.¹⁴

MDB Environmental Water Buyback Program

Details of the \$3.1 billion *Restoring the Balance in the Murray-Darling Basin* Program can be found at <http://www.environment.gov.au/water/mdb/entitlement-purchasing/overview.html>. Under a public tender process, announced in February 2008, the Australian Government allocated \$50 million to purchase water in the 2007-08 financial year. The result of the tender was that the Australian Government agreed to purchase 35GL worth of water entitlements, to a value of \$53 million.

The next round of water entitlement purchases, announced on 8 September 2008, was the first phase of the Government's \$400 million program to purchase water entitlements in the northern MDB. On 10 September 2008 the NSW and Commonwealth Governments purchased Toorale Station at the Warrego and Darling Rivers, its 14 GL of water entitlements and the rights to harvest water from the floodplain for \$23.75 million. New South Wales will take responsibility for preserving the land, and there is an agreed process for transferring the water to the Commonwealth Environmental Water Holder.

The third phase of water entitlement purchasing for the southern MDB in 2008-09 opened from 7 October 2008 and will close on 30 June 2009.¹⁵ The Minister for Water and

14. See <http://www.environment.gov.au/minister/wong/2008/pubs/sp20080429.pdf>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Climate Change, Senator Penny Wong said that environmental water purchases made in South Australia will go towards achieving the \$80 million of water buyback in South Australia announced by the Prime Minister on 14 August.¹⁶

In September 2008 the Government announced that it was offering to buy the water entitlements of small block irrigators in the MDB who agree to sell all their water entitlement to the Commonwealth this financial year.¹⁷ The Government will offer up to \$150,000 as a special exit payment, along with other transitional assistance, to eligible irrigators on 15 hectares or less. The program will cost up to \$57.1 million and yield up to 48 GL of environmental water.

The Government is also inviting groups of irrigators who may wish to develop coordinated proposals for selling their water entitlements to the Commonwealth and decommissioning or altering shared irrigation supply infrastructure under the Restoring the Balance in the Murray-Darling Basin program.¹⁸

The current position

The September 2008 MDBC Drought Update made the following comments about storage levels and the impacts on the environment of the lower lakes and Coorong:

SYSTEM STORAGE

The current volume of active storage in the Murray system (Hume Reservoir, Dartmouth Reservoir and Lake Victoria), is 1,690 GL or 20 % of capacity. This is similar to the storage level of 1,710 GL at the end of August 2007 but well below the August long term average of 5,600 GL (or 62 % capacity). There is an additional 500 GL in Menindee Lakes (which remains under control of NSW) some of which (about 220 GL) NSW plans to release into the Murray system between September and December 2008.

All the water currently in storage and under Commission control is fully committed for critical human needs, individual carryover, announced allocations, and the river and storage losses that will occur while supplying this water. A total of 990 GL is currently committed to South Australia, of which about 350 GL is expected to pass through to the Lower Lakes. However, as this is only about half the net annual evaporation for the Lower Lakes, it is expected that the water level in the Lower Lakes will continue to fall if extreme dry conditions persist.

15 See: <http://www.environment.gov.au/water/programs/entitlement-purchasing/southern.html>

16 See: <http://www.environment.gov.au/minister/wong/2008/mr20080926.html>

17 See: [http://parlinfo.parlInfo/search/display/display.w3p;query=Id:"media/pressrel/F5RR6"](http://parlinfo.parlInfo/search/display/display.w3p;query=Id:)

18 See: <http://www.environment.gov.au/water/mdb/entitlement-purchasing/irrigator-proposals.html#opportunities>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Elsewhere in the Basin, storage levels are also very low. The total volume of water in all Basin storages managed by the MDBC and State governments, is about 5,300 GL, or 23 % of capacity. In most valleys, the small volumes of water held in government storages are already earmarked for town water, stock and domestic supplies, carryover or to meet system losses. Storages in the Snowy Mountains (which are managed by Snowy Hydro) also remain at record low levels, similar to this time last year.....

THE ENVIRONMENT

The prolonged dry period across the southern half of the Basin continues to severely impact on wetland and floodplain ecosystems. Whilst portions of the Barmah-Millewa Forest have received limited flooding as recently as 2005, the last significant flooding of the mid and lower floodplains of the Murray downstream of Euston was 12 years ago (see Figure 4). Floodplain vegetation is under severe stress. The 2007 Living Murray Icon Site condition report indicates that up to 80 % of River Red Gums are declining or dead at significant wetlands along the Murray, such as Koondrook-Perricoota Forest and the Chowilla floodplain.

In November 2007, aerial surveys of waterbirds along the Murray indicated that the drought had greatly reduced the availability of wetland and floodplain habitat and this had a severe impact on waterbird abundance and breeding. The greatest number of birds was recorded in the Lower Lakes, Coorong and Murray Mouth where a total of about 250,000 birds and 42 species were observed. Most of the other Living Murray icon sites supported low numbers and very little breeding.

In May 2008 a small volume of environmental water (7.7 GL) was delivered to Gunbower Forest and this has stimulated an encouraging response from plant and animal life. Monitoring teams have reported that tortoises are breeding, frogs are spawning and ducks have arrived to feed. This response emphasizes the importance of using the small volumes of environmental water available, to maintain drought refuges along the river and avoid loss of threatened species.

Overall, however, the riverine environments across the southern and central regions of the Basin are in severe decline and this is not expected to improve until there is a very significant improvement in rainfall and system inflows.

In the northern Basin, the benefits of good summer rainfall and associated flooding are still evident at some sites. For instance, at Narran Lakes it has been estimated that over 80,000 chicks (mostly Straw-necked Ibis) have successfully fledged, and although the water is receding, the lakes are now dominated by thousands of ducks and teal. Most wetlands and lakes along the Warrego and Paroo Rivers are also drying up, but those still containing some water are supporting large concentrations of waterbirds.

THE LOWER LAKES

The flow over Blanchetown Weir (Lock 1) is being carefully managed to maintain the water quality at the major urban pumping stations between Blanchetown and

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Wellington. Also, a target flow of 900 ML/day is passing downstream to Wellington and into the Lower Lakes. This flow, along with local rainfall and reduced evaporative losses during the winter months, has allowed the water level in Lake Alexandrina to gradually rise from its record low of -0.5 m AHD in April 2008 to its current level of -0.26 m AHD. This has provided some short term relief and has delayed the potential for acidification in Lake Alexandrina. To reduce the risk of acidification in Lake Albert, water continues to be pumped from Lake Alexandrina, and this has resulted in Lake Albert's water level increasing from about -0.6 m AHD in April 2008 to about -0.20 m AHD.

However, with the arrival of warmer weather in spring, evaporative losses will start to increase, and the level of Lake Alexandrina is expected to start falling again. This will be closely monitored while short and longer term management strategies are developed to maintain Lakes Alexandrina and Albert above acidification thresholds.¹⁹

Bruce Campbell of the MDBC, in discussing the drought contingency planing for the Southern MDB, said that present drought is unprecedented.²⁰ The difference with earlier droughts is that the temperature is higher and a one degree increase in temperature means a 4% increase in evaporation. The dry year evaporation losses of the Murray between the Hume Dam and Wellington in SA are over 1100 GL per annum. The MDBC did a calculation based on minimum inflows and found a shortfall of 340 GL. He discussed the lessons learned from this problem.²¹

- We need a more robust rescue strategy
- There is significant floodplain stress with 80% of river red gums below Echuca dead or dying, Chowilla Ramsar site has not had a flood for a decade, and salt mobilisation is likely to be significant after the next flood
- Acid sulphate soils is a new emerging issue along the lower Murray and lower Lakes
- Contingency measures are addictive and less effective the next time they are used, eg with wetland disconnections
- Water trade works – Productivity Commission report says that economic impact of drought reduced by 50% by water trade
- Worse case modelling scenarios in 2030 are the same as the low flows of the past two years.

The current situation is that the drought is not over, allocations are dependent on rain and inflows, and low autumn inflows that we have had and dry winter would predict another low inflow spring.

19. *ibid.*

20. The relevant presentation can be viewed at http://www.riversymposium.com/index.php?element=CAMPBELL_BRUCEppt

21. *ibid.*

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Committee consideration

At its meeting of 25 September 2008, the Selection of Bills Committee deferred consideration of the Bill until its next meeting.

The Greens are on record as intending to refer the Bill to Committee, and will presumably seek to do so at the next meeting of the Selection of Bills Committee.²² This may affect the Government's ability to meet the COAG target date for commencement of the Bill of 1 November 2008.

It should also be noted that the Senate Rural and Regional Affairs and Transport Committee has recently tabled its [report](#) on Inquiry into *Water management in the Coorong and Lower Lakes (including consideration of the Emergency Water (Murray-Darling Basin Rescue) Bill 2008)*.²³ However, it appears the terms of reference for this inquiry also incorporate a report into broader Murray-Darling Basin Management issues, with a separate reporting date on December 2008.²⁴

Political party policy positions/commitments

The Coalition does not appear to have made any direct statement on the Bill, although have said in their additional comments in the Senate Rural and Regional Affairs and Transport Committee report that they support calls for unconditional referral of powers by the States to the Commonwealth with respect to water management in the MDB.

Greens Senator Hanson-Young and Independent Senator Xenophon have been reported as seeking the Commonwealth to pressure Victoria on MBD water issues so as to provide more water flows downstream, including for the lower lakes and Coroong wetlands.²⁵

Financial implications

According to the Explanatory Memorandum costings for the measures under *Water for the Future* (of which the amendments under the Bill are only a part) were agreed by the Commonwealth Government in April 2008 to an overall amount of \$12.9 billion ('total resourcing' basis) over 10 years. There are no separate costings for the measures directly related to amendments in the Bill.

22. Senator Siewert, *Greens will refer Water Bill to Committee*, Media Release, 25 September 2008. See: <http://www.greensmps.org.au/content/media-release/greens-will-refer-water-bill-inquiry>.

23. See: http://www.aph.gov.au/senate/committee/rrat_ctte/lowerlakes_coorong/report/report.pdf

24. See: http://www.aph.gov.au/senate/committee/rrat_ctte/lowerlakes_coorong/tor.htm

25. 'Senators pressure Rudd on Murray' *The Australian*, 29 September 2008, p. 6.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The MDB Authority will retain the fees and charges, if any, that it collects for cost-recovery purposes.²⁶

Key Issues

The Commonwealth does not have unlimited power to pass laws. The Constitution sets out a range of matters or issues that the Commonwealth may pass laws on. Most, but not all, are set out in section 51 of the Constitution. The Commonwealth does not have a direct power under the Constitution to pass laws on the environment or water resources. Generally, it has relied on indirect methods to pass laws on such matters, commonly using the corporations, interstate and overseas trade and commerce, and external affairs powers in section 51.

However, section 51(xxxvii) provides that the Commonwealth has the power to make laws about

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

The Constitutional powers on which the Water Act relies are set out in section 9 of that Act. Notably these include:

- the interstate and overseas trade and commerce power - section 51(i)
- the corporations power - section 51(xx)
- the external affairs power - section 51(xxix)
- the incidental power - section 51(xxxix)
- the Territories power - section 122

It appears that none of the powers detailed in section 9 of the Water Act are constitutionally adequate to support the proposed extension of the Commonwealth's powers and functions under the current Bill regarding MDB water resources. For example, under the 2008 MBD Agreement (and reflected in the Bill), the MBD Authority, will assume responsibility for the current functions of the MDB Commission.²⁷ One such

26. Explanatory Memorandum, p. 5.

27. As previously mentioned, the Authority is an exclusively Commonwealth body, unlike the Commission. On the relevant part of the MDB Commission website, the Commission is described as 'an autonomous organisation equally responsible to the governments represented on the Ministerial Council as well as to the Council itself. It is not a government department nor a statutory body of any individual government'. See http://www.mdbc.gov.au/about/murraydarling_basin_commission

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

function is the significant role in the ‘hands-on’ operational management of water in the MBD. This is not a function that the Commonwealth can directly legislate for, and the various indirect constitutional powers mentioned above would not support the application of Commonwealth legislation in all situations. This is why the States must refer power to Commonwealth to ensure some of the key proposed amendments in the Bill are constitutionally valid.

Main provisions

Schedule 1

Schedule 1 amends the Water Act based on referrals of power.

Item 1 inserts **proposed Part 1A** containing **proposed sections 18A–18H** after existing Part 1.

Proposed section 18A contains the definitions which are relevant to proposed Part 1A, including the terms ‘Authority’, Basin Officials Committee, Murray-Darling Basin and Murray-Darling Basin Ministerial Council. In particular the term ‘*Agreement*’ means the Murray-Darling Basin Agreement, as amended from time to time in accordance with that agreement and as set out in Schedule 1. This means that the agreement between the Commonwealth and the relevant States will be included as a permanent Schedule to the Water Act.

Proposed section 18B deals with the reference of matters by state Parliament to the Commonwealth Parliament, defining when a State is a *referring State*.

A state will be a *referring state* if the parliament of the state has referred the matters covered by the items listed in points a) and b) below, to the Parliament of the Commonwealth: **proposed subsection 18B(3)**.

a) If the State is a Basin state, the power to enact:

Part 1A The Murray-Darling Basement Agreement

Part 2A Management of the Basin water resources to meet critical human water needs

Part 4 Basin water charge and water market rules (other than for urban water supply after the removal of the water from a Basin water resource)

Part 4A Extended operation of Basin water charge and water market rules

Part 10A Transitional matters relating to the Murray-Darling Basin Commission

Part 11A Interactions with State laws, and the Schedules in the Bill included for the purposes of those Parts (Schedules 1 and 1A).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

If the State is not a Basin State, the power to enact Parts 4A and 11A, as originally enacted by the *Water Amendment Act 2008*, to the extent that they deal with matters that are included in the legislative powers of the parliament of the state.

b) a limited subject reference that permits the Parliament of the Commonwealth to make express amendments to the text referred to in paragraph (a) referred by the state in question.

Under **proposed subsection 18B(5)** a State is no longer a **referring State** if the parliament of that State repeals its initial reference of powers referred to in point a) of **proposed section 18B** above.

However, a state does not cease to be a **referring State** because of the repeal of its initial reference of powers

The *Agreement on Murray-Darling Basin Reform – Referral* (Referral IGA) will provide that the Commonwealth will not make any amendments to Parts 1A, 2A, 4, 4A, 10A and 11A and Schedule 1 as inserted into the Act by this Bill without the agreement of all referring Basin States.

Proposed section 18C provides for regulations to be made to amend Schedule 1 to update the text of the revised '*Agreement*' set out in Schedule 1. According to Note 1 to **proposed subsection 18C(1)**, amendments to the '*Agreement*' can be made with the agreement of the MDB Ministerial Council. Under **proposed subsection 18C(3)** the sunset provisions of the *Legislative Instruments Act 2003* do not apply to regulations made for the purposes of this section.

Proposed section 18D provides that any protocols made by the MDB Authority under a Schedule to the Agreement (set out in Schedule 1) are legislative instruments. According to the Explanatory Memorandum, the protocols allow the MDB Authority to develop rules and procedures to give effect to the Schedules made under the Agreement from time to time.²⁸

Proposed section 18E of **Part 1A** transfers functions, powers and duties of the MDB Commission to the MDB Authority. It also confers on the MDB Authority functions, powers and duties as contained under the Agreement, insofar as they relate to the water and other natural resources of the MDB, though requiring the MDB Authority to comply with the Agreement in exercising these functions.

However, in performing its functions under the Agreement, **proposed subsection 18E(4)** places limits on the ability of the MDB Authority to exercise its powers under **Part 10** of the Water Act which deals with special powers of the MDB Authority. An authorised officer does not have the power to enter land under **subdivision C** of **Part 10** for the

28 Explanatory Memorandum, p. 9.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

purposes of monitoring compliance of, or searching for evidence of a breach of the provisions of **proposed Part 1A**.

Proposed subsection 18E(6) qualifies the MDB Authority's power to enter land in order to gather information as part of carrying out its functions under **proposed Part 1A**. An authorised officer must not enter a premises unless they reasonably believe that it is necessary for the performance of the MDB Authority's functions. Hence, the conditions of entry are the same as those required by the MDB Authority in exercising its general powers to enter land for the purpose of gathering information.

Proposed section 18F confers on the Basin Community Committee ('the Committee), powers and duties as contained under the Agreement, insofar as they relate to the water and other natural resources of the MDB, though requiring the Committee to comply with the Agreement in exercising these functions. These functions are in addition to those listed under existing subsection 202(2) of the Water Act.

The MDB Authority is required to manage money and assets under the Agreement in accordance with the terms of the Agreement and its purpose: **proposed section 18G**.

If the [Living Murray Initiative](#) requires the MDB Authority to manage the water rights and interests held under the *Living Murray Initiative*, then the MDB Authority must do so: **proposed section 18H**.

Item 2 inserts proposed Part 2A containing proposed sections 86A–86J into the Water Act after existing Part 2.

Proposed Part 2A requires the Basin Plan to include certain arrangements for meeting **critical human water needs** as specified in the Reform IGA.

Proposed subsection 86A(2) defines *critical human water needs* as those needs for a minimum amount of water, that can only reasonably be provided from Basin water resources, required to meet:

- core human consumption requirements in urban and rural areas and
- those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs.

In formulating the Basin Plan, the critical human needs to be taken into account must be informed by the following principles agreed to in the 3 July 2008 Reform IGA:

- that critical human water needs are the highest priority water use for communities who are dependent on Basin water resources: **proposed subparagraph 86A(1)(a)** and

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- **conveyance water**²⁹ will receive first priority from the water available in the **River Murray System: proposed subsection 86A(3)**.

According to proposed subsection 86A(3) the **River Murray System** is the aggregate of:

- the main course of the River Murray upstream of the eastern boundary of South Australia
- all tributaries entering that part of the main course upstream of Doctors Point (near Albury)
- all effluents and anabranches of that part of the main course
- the watercourses connecting Lake Victoria to the main course
- the Darling River downstream of the Menindee Lakes Storage
- the upper River Murray storages, namely:
 - Lake Victoria
 - the Menindee Lakes Storage
 - the storages formed by Dartmouth Dam and Hume Dam
- the storages formed by the weirs, and weirs and locks, described in Schedule A to the Agreement that are upstream of the eastern boundary of South Australia, and
- the River Murray in South Australia.

According to **proposed section 86B** the Basin Plan must deal with the following mandatory matters:

- include a statement of the amount of water required in each Basin State that is a referring State (other than Queensland) to meet the critical human water needs of the communities in the State that are dependent on the waters of the River Murray System: **proposed paragraph 86B(1)(a)**³⁰
- include a statement of the amount of conveyance water required to deliver the water to these communities: **proposed paragraph 86B(1)(b)**
- specify water quality trigger points and salinity trigger points at which water in the River Murray System becomes unsuitable for meeting critical human water needs: **proposed paragraph 86B(1)(c)**.

29 **Conveyance water** is water in the River Murray System required to deliver water to meet critical human water needs as far downstream as Wellington in South Australia (**proposed subsection 86A(4)**).

30 **Proposed subsection 86B(2)** clarifies that the communities which are depended on the Murray River System do not include those dependent on the Edward-Wakool System downstream of Stevens Weir, near Deniliquin in New South Wales.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed section 86C sets out the additional matters that must be specified in the Basin Plan in relation to monitoring, assessment and risk management including:

- arrangements for monitoring matters relevant to critical human water needs, including monitoring the quality, quantity and flows of surface water, the health of ecosystems and social impacts on communities the process for assessing, and managing risks to critical human water needs associated with, inflow prediction:
 - in the River Murray System, and
 - in relation to works that are under the control of the body that is entitled, under the *Snowy Hydro Corporatisation Act 1997* of New South Wales, to the Snowy water licence within the meaning of that Act
- the risk management approach for inter-annual planning relating to arrangements for critical human water needs in future years.

The risk management approach will involve the making of decisions about whether water is made available, in a particular year, for uses other than meeting critical human water needs; or is set aside for critical human water needs in future years: **proposed subsection 86C(2)**.

Proposed section 86D sets out matters relating to Tier 2 water sharing arrangements.

Part X of the Agreement creates a three tier system of water sharing arrangements and provides that the triggers for moving between the tiers are laid out in the Basin Plan. Tier 1 arrangements are used in periods of normal water availability. Tier 2 arrangements are applied when there is insufficient water under Tier 1 sharing arrangements to meet conveyance water needs. Tier 3 arrangements come into force in extreme and unprecedented circumstances.

Proposed section 86D states that the Basin Plan must detail the conditions under which Tier 2 arrangements would apply and spell out a reserves policy³¹ associated with this, as well as stating the conditions for a return to Tier 1 arrangements.

The Basin Plan must also specify the arrangement for carrying water over in storage from one year to another and can provide for any other matters necessary to give effect to water sharing arrangements.

Proposed subsection 86D(3) provides that arrangements for carrying water over must recognise both (a) South Australia's right (as provided for in clauses 91 and 130 of the Agreement) to store its entitlement to water and (b) that New South Wales, Victoria and

31 This will involve creating a formula for setting and specifying the volume of water to be reserved to manage the shortfall in conveyance water.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

South Australia are each responsible for meeting the critical human water needs of their own States, and will decide how water from its share is used.

Proposed subsection 86D(4) states that ‘*State water sharing arrangements*’ relevant to New South Wales, Victoria and South Australia, are the provisions of the Agreement dealing with the sharing surface water in the Murray River System.

The Basin Plan must detail the conditions under which Tier 3 arrangements would apply as well as stating the conditions for a return to Tier 2 arrangements. The conditions under which Tier 3 arrangements would apply must be due to there being:

- extreme and unprecedented low levels of water availability in the River Murray System: **proposed paragraph 86E(2)(a)**
- extreme and unprecedented poor water quality in the water available in the River Murray System to meet critical human water needs: **proposed paragraph 86E(2)(b)**
- an extremely high risk that water will not be available in the River Murray System to meet critical human water needs during the next 12 months: **proposed paragraph 86E(2)(c)**.

Proposed section 86F provides for an emergency response process in the event that water quality or salinity trigger points determined by the Basin Plan are reached. If the MDB Authority’s proposed response plan affects State water sharing arrangements or Border Rivers water sharing arrangements, then the MDB Authority is only allowed to implement the plans as long as the Murray-Darling Basin Ministerial Council has given its consent: **proposed subsection 86F(2)**.

In relation to water resources, the Basin Officials Committee and the agencies of the Basin States that are referring State or the Australian Capital Territory, and operating authorities, infrastructure operators and holders of water access rights, are prohibited from acting in a manner that is inconsistent with any of the matters included in or specified in the Basin Plan that relate to critical human water needs: **proposed section 86H**.

Proposed section 86J sets out additional powers of the MDB Authority in terms which are similar to those in **proposed section 18E** above.

Item 3 proposes to insert proposed Part 4 consisting of **proposed sections 91–100A** after existing Part 3.

Essentially, the key amendments in **proposed Part 4** combine to give effect to the goal of creating a uniform approach to the regulation of water markets and water charges in the Basin. Significantly, the ACCC is charged with the role of developing and enforcing water charge and water market rules which are informed by the policy and reform commitments agreed to in the *National Water Initiative*. After considering the advice provided by the ACCC, the Minister is responsible for making the water charge and water market rules.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed subsection 91(1) provides for the following regulated water charges:

- fees or charges (however described) payable to an irrigation infrastructure operator for:
 - access to the operator’s irrigation network
 - changing access to the operator’s irrigation network
 - terminating access to the operator’s irrigation network
 - surrendering to the operator a right to the delivery of water through the operator’s irrigation network
- bulk water charges
- charges for water planning and water management activities
- a fee or charge (however described) that relates to:
 - access to water service infrastructure
 - services provided in relation to access to water service infrastructure
 - services provided through the operation of water service infrastructure
 - the taking of water from a water resource.

Proposed subsection 91(2) clarifies that Division 1 (water charging rules) applies to a charge referred to above only to the extent that to the charge relates to:

- MDB water resources
- water service infrastructure that carries MDB water resources
- water service infrastructure that carries water that has been taken from a MDB water resource
- water access rights, irrigation rights or water delivery rights in relation to MDB water resources.

Under **proposed section 92** the Minister may make water charge rules, applying in MDB States that are referring States and in the Australian Capital Territory. Water charge rules are legislative instruments and as such are subject to a disallowance regime.

Significantly, **proposed paragraph 92(3)(c)** provides that water charge rules may give the ACCC the power to determine or approve all regulated water charges. Similarly, **proposed paragraph 92(3)(c)** provides that the rules may give the ACCC the power to accredit arrangements under which a State agency may determine or approve a regulated water charge. In addition **proposed paragraph 92(3)(e)** allows the ACCC to accredit arrangements under which a State agency may determine or approve any type of regulated water charge.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The Minister must seek advice from the ACCC on any proposed amendments or revocations of the water charge rules: **proposed subsection 93(1)**. **Proposed subsection 93(5)** clarifies that the regulations are to establish the process which the Minister is obliged to follow in amending or revoking water charge rules.

Proposed section 94 imposes the requirement on the ACCC to monitor regulated water charges and compliance with water charge rules. Under **proposed subsection 94(2)** the ACCC is to give the Minister a report on the results of the monitoring.

Proposed section 97 sets out the water market rules. Significantly, **proposed paragraph 97(1)(a)** provides that the Minister may make *'water market rules'* applying to referring Basin States and the Australian Capital Territory, where these rules relate to an act that an irrigation infrastructure operator does, or fails to do, that prevents or unreasonably delays arrangements being made that would reduce the share component of a water access entitlement of the operator to allow:

- a person's entitlement to water under an irrigation right, or
- a part of that entitlement

to be permanently transformed into a water access entitlement that is held by someone other than the operator.

The provisions in **proposed section 98** mirror those in **proposed section 93** above.

As the Explanatory Memorandum states, **proposed section 100A** is designed to ensure that the ACCC has the necessary enforcement powers provided for in **Part 8** of the Water Act and under section 155 of the *Trade Practices Act 1974*, so that it is able to carry out its functions.³²

Item 4 inserts **proposed Part 4A** containing **proposed sections 100B–100D** before existing Part 5.

Proposed Part 4A puts into effect **Reform IGA** allowing the Basin States to extend the operation of water charge rules and/or water market rules to areas of the State outside Basin on an 'opt in' basis. It extends the geographical application of the ACCC's regulatory role in relation to the water charge rules and/or water market rules.

Significantly, it gives the States a choice of working to achieve a uniform approach to regulation across Australia. The ability to 'opt in' also applies to jurisdictions outside the Basin, including Western Australia, Tasmania and the Northern Territory: **proposed subsections 100B(1) and 100C(1) respectively**.

32 Explanatory Memorandum, p. 17.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 5 inserts **proposed Part 10A** consisting of **proposed sections 239A–239W** after existing Part 10.

This part deals with the transition of functions, duties and powers from the MDB Commission to the MDB Authority. **Proposed section 239A** contains the definitions of the terms which are relevant to the new Part.

Proposed section 239C provides that the transitional assets of the MDB Commission become assets of the MDB Authority. However, **proposed section 239D** provides that the ownership and control of River Murray Operational assets are unaffected, as is the revised Agreement to these assets. Also, **proposed Part 10A** does not affect the *Living Murray Initiative* assets: **proposed section 239E**.

Proposed section 239F provides that the transitional liabilities of the MDB Commission become those of the MDB Authority. Similarly, **proposed section 239T** provides that all monies held or controlled by the MDB Commission are ‘transitional amounts’ and must be credited to the MDB Special Account.

Item 6 proposes to insert Part 11A consisting of **proposed sections 250A-250E** after existing Part 11. **Proposed section 250B** provides that in all circumstances, the Commonwealth legislation is not intended to exclude or limit the concurrent operation of a State law. The Explanatory Memorandum provides the example of where a State sets a more stringent target. That target would not be inconsistent with the Commonwealth target and thus would continue to be operable.³³

Proposed section 250C provides that Commonwealth water legislation does not apply to matters declared by a law of a referring State to be excluded matters.

Proposed section 250D provides that a referring State can displace the operation of the Commonwealth water legislation in relation to certain provisions of State laws which would otherwise be inconsistent with the Water Act.

Item 7 inserts the MDB Agreement into existing Schedule 1 of the Water Act. This is consistent with **proposed section 18A**. **Item 7** also inserts a new Schedule 1A consisting of a map which delineates the boundaries of the MDB but does not show all of the water resources within the MDB which are covered by the Water Act.

Schedule 2 — Other Amendments

Part 1 – Repeal of the Murray-Darling Basin Act 1993

Item 1 repeals the whole of the *Murray-Darling Basin Act 1993* which provides for the approval of amendments to the former MDB Agreement relating to the appointment and

33 *ibid*, p. 22.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

terms of conditions of Commissioners and Deputy Commissioners and various miscellaneous provisions relevant to that Agreement.

Part 2 – Amendments

Part 2 contains miscellaneous amendments to a number of Acts.

Legislative Instruments Act 2003 (LIA)

Item 11 in the Table in section 7 of LIA sets out the Schedules to the former Murray-Darling Basin Agreement.³⁴ These are to be repealed.

Trade Practices Act 1974

Minor amendments are made to secure the ACCC's access to information relating to the *effect of, and compliance* with, the water charge and water charge market rules as they apply if a State or the Northern Territory chooses to 'opt in' under **proposed Part 4A**. The ACCC's regulatory powers for water markets and/or water charges will extend to areas outside the Basin in recognition that **proposed Part 4A** allows States and the Northern Territory to 'opt in'.

Proposed subsection 155AAA(21) refers to information obtained by the ACCC in relation to its functions and powers under **proposed Parts 4 and 4A**, thus bringing it under the category of 'protected information'. This is to make sure that such information is treated in the way as other information obtained by the ACCC in performing its monitoring and enforcement functions.

Water Act 2007

Items 7–37 contain consequential amendments, in particular to a number of definitions to take into account other amendments to the Water Act.

Item 42 inserts **proposed section 9A** after existing section 9 to make clear for the avoidance of doubt the Constitutional basis for the proposed new Parts to the Water Act which are contained in this Bill.

Existing subsection 21(3) provides that the Basin Plan must promote the wise use of all the Basin water resources and promote the conservation of declared Ramsar wetlands in the MDB. **Item 47** proposes that an additional consideration must be taken into account in formulating the Basin Plan. That consideration is the ecological character descriptions of:

- all declared Ramsar wetlands within the MDB and

34. Things listed in the Table in section of the LIA are deemed not to be legislative instruments for the purpose of the LIA, and thus not subject to Parliamentary disallowance.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- all other key environmental sites within the MDB

prepared in accordance with the National Framework and Guidance for Describing the Ecological Character of Australia's Ramsar Wetlands endorsed by the Natural Resource Management Ministerial Council.

Item 49 inserts **proposed subparagraph 21(4)(c)(x)** which places a requirement on the MDB Authority and the Minister to have regard to 'any other arrangements between States for the sharing of water' when developing the Basin Plan.

Item 60 inserts **proposed section 43A** which requires the MDB Authority to seek feedback from the Murray-Darling Ministerial Council on the proposed Basin Plan. In providing the Ministerial Council with its plan, the MDB Authority must also advise on the socio-economic implications of its proposed Basin Plan: **proposed subsection 43A(3)**.

The Ministerial Council has six weeks to respond in writing to the proposed Basin Plan, providing comments on any aspect of the plan that is not of a factual or scientific nature: **proposed subsection 43A(4)**. Failure to provide comments within that timeframe will be construed as the Ministerial Council having no comments: **proposed subsection 43A(5)**.

Where one or more the Ministerial Council's members disagree with any relevant aspect of the Basin Plan, **proposed subsection 43A(6)** specifies the procedure that the MDB Authority must follow. The MDB Authority must consider the matters and undertake and relevant consultations: **proposed paragraphs 43A(6)(a) and (b)**. The MDB Authority must then either confirm the proposed Basin Plan or alter the proposed Basin Plan, and give each member of the MDB Ministerial Council a copy of the altered proposed Basin Plan, together with the Authority's views: **proposed paragraph 43A(6)(c)**.

Once that has been done, the MDB Authority must prepare a document that summarises all of the following:

- any submissions it received in response to its consultations and how it addressed those submissions
- the extent (if any) to which its consideration of those submissions has affected the version of the Plan, or the views, given to the members of the MDB Ministerial Council, and
- publish on its website a copy of that document: **proposed paragraph 43A(6)(d)**.

The Ministerial Council then has three weeks to provide further written notice to the Minister about its views on the proposed Basin Plan: **proposed subsection 43A(7)**.

Item 63 provides for the insertion of **proposed subsection 44(5A)** which states that should the Ministerial Council have no feedback on the proposed Basin Plan, this does not affect the Minister's power to give suggestions or directions to the MDB Authority.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 64 inserts **proposed section 47A** which applies once the MDB Authority has complied with existing section 47 of the Water Act. Section 47 sets out the procedure to be followed by the MDB Authority when it proposes to amend the Basin Plan. **Proposed section 47A** sets the time frame and process for the MDB Authority to seek comments from the MDB Ministerial Council on a proposed amendment. This is in similar terms to **proposed section 43A**.

Item 77 inserts **proposed section 74A** in relation to the States applying the risk management framework.

The *National Water Initiative* identifies three risks of reduction or less reliable water allocation, under their *water access entitlements*, arising from reductions to the consumptive pool as a result of:

- seasonal or long-term changes in climate
- periodic natural events such as bushfires and drought, and
- bona fide improvements in the knowledge of water systems' capacity to sustain particular extraction levels.

Accordingly, the *National Water Initiative* created a risk assignment framework intended to apply to risks relating to future reductions in availability of water for consumptive use. Basically, the current situation is that water allocations or reliability for consumptive use were to be shared as follows:

- Until 2014 the risks were to be borne by users
- After 2014, the risks were to be shared in the following way:
 - *water access entitlement* holders to bear the first 3% reduction in water allocation under a *water access entitlement*
 - State/Territory governments and the Commonwealth Government to share one-third and two-thirds respectively reductions in water allocation under *water access entitlements* of between 3% and 6%, and
 - State/Territory and Commonwealth governments to equally share reductions in water allocation under *water access entitlements* greater than 6%.³⁵

In the Reform IGA, the Commonwealth agreed to take on a greater share of the risks relating to future reductions in water allocations and agreed to do so at an earlier date in those Basin States which assumed their risk sharing obligations under clauses 48 to 50 of the *National Water Initiative* (as modified by clause 10.1.3 of the *Agreement on Murray-Darling Basin Reform*), and did so by enacting legislation to give effect to this by 30 June 2009.

35 [National Water Initiative](#), pp. 8–9.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed section 74A mandates that the Minister must make a written determination as to whether a Basin State has applied the risk management framework provided for in clauses 48 to 50 of the *National Water Initiative*, as modified by clause 10.1.3 of the *Agreement on Murray-Darling Basin Reform*, in its water management law by 30 June 2009. The capacity to extend for a later date is made where it is the case that despite its best endeavours, a Basin State is unable to pass the required legislation before 30 June 2009. Such a determination is not a legislative instrument: **proposed subsection 74A(5)**. Where the Minister has not made a determination in relation to a Basin State under **proposed section 74A**, the risk allocation provision as originally enacted will continue to apply.

The Minister may revoke a determination in writing if satisfied that a State water management law no longer gives effect to that framework: **proposed subsection 74A(3)**. In considering whether to do so, the Minister may ask the National Water Commission for advice.

Where a Minister has made a determination under **proposed section 74A**, **items 76 and 79** insert amendments containing the allocation of risk in relation to reductions in water availability, which provide for the additional share of risk that the Commonwealth has agreed to take on – see table below

Reduction due to new knowledge over 10 year period	Water access entitlement holder share	State share	Commonwealth share
0 to 3%	All of the reduction to 3%	Nil	Nil
More than 3%	All of the reduction to 3%	Nil	100 % of any reduction from 3% and above

Source: Explanatory Memorandum p. 32.

Items 98–101 propose amendments to existing subsection 172(1) of the Water Act which sets out the functions of the MDB Authority. In particular, **item 99** inserts **proposed paragraph 172(1)(ea)** so that one of the functions of the MDB Authority will be to develop, in consultation with the Basin States, an integrated water model for the MDB. **Item 100** repeals existing paragraph 172(1)(g) and inserts **proposed paragraph 172(1)(g)** to allow the MDB Authority to make recommendations to the Commonwealth or an agency of the Commonwealth about matters that the MDB Authority considers could affect the quality or quantity of MDB water resources.

Items 115–117 propose amendments to existing Subdivision C of Part 9 of the Water Act which relates to the terms and conditions of employment of MDB Authority members. Each of those items omits the reference to the ‘Authority Chair and substitutes a reference

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

to the 'Chief Executive' to reflect the fact that the Chief Executive will now be the full time Agency Head.

Items 118–121 propose amendments to existing subsection 189(2) dealing with the conditions under which a Minister may terminate the appointment of MDB Authority members. Under **item 121** which inserts **proposed paragraph 189(2)(ea)**, one of the circumstances for termination is where an MDB Authority member takes on additional employment (without the Minister's approval) which conflicts or may conflict with the performance of their duties as an MDB Authority member.

Items 122–127 amend existing section 201 which relates to the Basin Officials Committee. These amendments reflect the fact that the Basin Officials Committee is now established under the revised Agreement.

Item 128 inserts **proposed sections 201A-201C**. **Proposed section 201A** provides that the Chair of the Basin Officials Committee is to be appointed by the Minister by written instrument. The Chair must be the Secretary of the Department or an SES employee: **proposed subsection 201A(2)**. The Chair of the Basin Officials Committee is to hold office for the period specified in their instrument of appointment: **proposed section 201C**.

Existing section 202 provides that the MDB Authority must establish an advisory committee, known as the Basin Community Committee. Under existing subsection 202(5) the Basin Community Committee's membership must include at least one MDB Authority member and at least 8 individuals who are '*water users*' or representatives of one or more water users. **Item 130** amends subsection 202(7) to extend the definition of 'water users' to include a person who is engaged in interception activities with a significant impact on water resources.

Items 134–136 amend existing section 205 of the Water Act to clarify that the Minister cannot give procedural directions to the Basin Officials Committee. Existing subsection 205(1) provides that the MDB Authority may give an advisory committee written directions about the way in which the Basin Officials Committee is to carry out its functions and procedures to be followed in relation to meetings. However, **item 135** inserts **proposed subsection 205(1A)** which provides that the Basin Community committee is not subject to direction under subsection 205(1) in relation to its functions, powers and duties under **proposed section 18F**.

Item 150 inserts **proposed sections 213A and 213B** in relation to the requirement for the MDB Authority to prepare an annual corporate plan and budget which will cover both its role and functions under the revised Agreement. That corporate plan may be varied at any time, except for that part of the corporate plan approved by the Ministerial Council under the revised Agreement.

Schedule 3

Schedule 3 contains transitional provisions. **Items 1-3** relate to the transfer of staff and their entitlements from the MDB Commission to the MDB Authority.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Items 4-6 relate to the appointment of the Chief Executive of the MDB Authority.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

© Copyright Commonwealth of Australia

This work is copyright. Except to the extent of uses permitted by the *Copyright Act 1968*, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

This work has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Feedback is welcome and may be provided to: web.library@aph.gov.au. Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Entry Point for referral.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2764 .

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.