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Keynote Address

A hundred years of negotiations with no end in sight – where is the Murray Darling Basin Initiative leading us?*

John Scanlon*

Commissioner, Murray Darling Basin Commission
Director, International Centre of Excellence in Water Resources Management
Vice Chair, IUCN Commission on Environmental Law

I. A pragmatic ecosystem approach – the Murray Darling Basin Initiative¹

In the late 1890's, a fierce debate raged over how the proposed Australian Constitution should address the sharing of the waters of the River Murray between the then colonies of New South Wales, Victoria and South Australia – a debate that threatened to derail the process of federation itself.

The upstream colonies of New South Wales and Victoria had claimed the sovereign right to divert the whole of the water in their tributaries and the River Murray, with some slight concession to South Australia in the form of compensation water. Not surprisingly, during the pre-federation convention debates the downstream colony of South Australia argued that the Commonwealth be given the power to manage the waters of the River Murray, which was fiercely resisted by New South Wales and Victoria. A last minute compromise was negotiated between the colonies clearing the path for the finalization of the Constitution and the creation of Australia as a nation State.

The history of the creation of the Commonwealth of Australia and the constitutional sharing of powers between the states and the Commonwealth has had a significant influence on the measures that have been taken over the past 100 years to manage the shared resources of the Murray Darling Basin (the Basin). The past century has involved an ongoing negotiation between all parties, which has resulted in a cooperative, pragmatic, and increasingly ecosystem approach² being adopted by governments and the community to managing the shared resources of the Basin.

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¹ See generally "Report of the Interstate Royal Commission on the River Murray", (1902) Report of the Commissioners; "A Short History of the River Murray Works", (1945) River Murray Commission; Crabb P, *Murray Darling Basin Resources*, (MDBC 1997); Fullerton T, *Watershed*, (ABC Books 2001); *Unchartered Waters*, (MDBC 2002); "Institutional and Policy Analysis of River Basin Management", (2005) World Bank Policy Research Working Paper 3527.

² While the Initiative institutionalized a basin management approach in 1987 the water sharing rules are still based upon the *River Murray Waters Agreement of 1914*.

The collective efforts of the Commonwealth, the states of New South Wales, Victoria, South Australia, Queensland, and the Australian Capital Territory, together with the community, are known as the Murray Darling Basin Initiative (the Initiative). The Initiative is an inter-jurisdictional compact between the Commonwealth and states that provides an institutionalized means for dealing with matters of common interest.

II. Confronting the challenges of a stressed system – the major issues in the Murray Darling Basin

The Australian Aboriginals were the first to discover the bountiful resources of the Basin, more than 40,000 years ago.³ The Basin and its floodplains shaped, and are part of, their beliefs and lives. The Basin has also shaped important elements of modern Australian history, and as the nation's first great transport network, fostered the development of towns and agricultural industry.⁴

The Basin spans across five state and territory jurisdictions, is over one million square kilometres in area, or 14% of Australia, home to two million people and is Australia's most productive region for irrigated agriculture – with over 70% of all of Australia's irrigated agriculture occurring within the Basin. The Basin produces at least 40% of Australia's agricultural output and the City of Adelaide, which lies outside of the basin and has a population of over one million, relies on the River Murray for up to 90% of its water supply in drought years.

Today the Basin enriches Australia by an estimated \$23 billion per year. This does not include the economic value of the City of Adelaide and the Iron Triangle,⁵ which rely upon one percent of the Basin's water and have an economic value of over \$16 billion per year.⁶ Agricultural produce now exceeds \$10 billion (recent figures say \$13.6 billion), mining \$3 billion, tourism and leisure around \$6.5 billion, hydro electricity generation \$0.3 billion and commercial fishing and other industries \$2.5 billion.⁷ It is a highly productive Basin.

But economic gain has taken its toll on the environment resulting in significant ecosystem degradation throughout much of the Basin, which is threatening both ongoing productivity and environmental health. The key issue is that too much water is being extracted from the Basin. The impact is most severe in the lower third of the 2,530 kilometre long River Murray. The challenges confronting the governments and community of the Basin include irrigation induced and dryland salinity, the over-allocation of water, a decline in water quality and ecological health, and the under-pricing and inefficient use of water, all of which are being addressed in one way or another.

Dealing with these challenges comes at a price. Who pays (and when and how) has involved a series of separate but related negotiations based upon Constitutional roles and responsibilities, political and social imperatives, a shared knowledge base and intensive interaction with the Basin community. Within this context governments have negotiated extensive and detailed market based measures to share the costs of ecosystem degradation to enhance the productivity of the Basin and restore its ecological health, which are seen as being inter-twined.

³ See Crabb P, *Murray Darling Basin Resources*, (MDBC 1997) at 258.

⁴ See "The Living Murray Discussion Paper", (2002) MDBC at 13. Full text available at <http://www.thelivingmurray.mdbc.gov.au/> viewed June 2006.

⁵ Both lie within the state of South Australia but outside of the Basin.

⁶ See Blackmore, D, "Protecting the Future", *Unchartered Waters*, (MDBC 2002) at 7.

⁷ See Crabb P, *Murray Darling Basin Resources*, (MDBC 1997).

III. Governance of the Initiative – still evolving to meet new challenges

In its broadest sense the Initiative involves two separate but related issues, namely:

- the sharing and distribution of the waters of the River Murray between New South Wales, Victoria and South Australia in accordance with the *Murray Darling Basin Agreement 1992* (the Agreement); and
- the development of policies and programs to promote the integrated catchment management of the Basin.

The Agreement requires the Murray Darling Basin Commission (the Commission) to examine the possible effects that the exercise of its powers or functions, or the implementation of works or measures, is having on the water, land, and other environmental resources of the Basin. In doing so it may have regard to the need to give directions that will improve water management and environmental objectives consistent with the overall framework established for the distribution of waters.⁸

The Commission does not own any infrastructure or any land,⁹ which is all owned by the Contracting Governments, normally through the Constructing Authorities.¹⁰ The Constructing Authorities build, own, and operate the joint works and measures that have either been included in, or subsequently agreed through, the Agreement for and on behalf of the Commission.¹¹ The Murray Darling Basin Ministerial Council (the Ministerial Council) or Commission therefore authorizes the joint works and measures¹² but is not responsible for their implementation, which is carried out by a nominated Contracting Government.¹³

The institutional arrangements for the Initiative, which are set out in the Agreement, are:

The Ministerial Council – the peak policy making body under the Agreement.

The Ministerial Council was established in 1985 and is responsible for considering and determining major policy issues of common interest. It is the peak body under the Initiative.

The Council consists of up to three Ministers from each state and the Commonwealth and one from the Australian Capital Territory (recently admitted as a full member). Members are drawn from Ministers who have “*prime responsibility for matters relating to water, land and environment*”.¹⁴ The Commonwealth Chairs the Council, traditionally through the Minister with responsibility for agriculture.¹⁵

The Initiative requires high-level political engagement and the establishment of the Ministerial Council in 1985 represented a significant step forward in managing the Basin as it provided a regular forum for this to occur. The Council has been described as “*almost, but not quite, a natural resources parliament for the Basin*.”¹⁶

⁸ See Clause 47 of the Agreement.

⁹ Nor does the Commission own the water resource or issue licences for its use; rather it has responsibility for controlling the bulk distribution of water in accordance with the Agreement.

¹⁰ See definition of Contracting Government and Constructing Authority in Clause 2 of the Agreement. See also “Murray Darling Basin Commission Annual Report 2004-2005”, (2005) MDBC at 34.

¹¹ The Constructing Authorities are responsible for the actual release of water from the various storages as directed by the Commission, and each jurisdiction is ultimately responsible for the delivery of water to users.

¹² And the Commission subsequently declares them to be ‘effective’ and monitors their ongoing operation.

¹³ This may become important in the context of the application of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwth).

¹⁴ See Clause 8(3) of the Agreement.

¹⁵ The current Chair being the Federal Minister for Agriculture, Fisheries and Forestry.

¹⁶ Blackmore D, “Water, Salinity and the Politics of Mutual Obligation”, (2001) Alfred Deakin Lecture. Full speech available at <http://www2b.abc.net.au/rn/deakin/disc/forum/default.htm> viewed July 2006.

The Commission – the body responsible for administering the Agreement and providing advice to the Ministerial Council.

One can trace the origins of the Commission back to 1917. Up until 1985, the Commission was the peak body under the various Agreements. Since then the Commission has answered to the Ministerial Council.

The current Commission was established under the 1992 Agreement and it requires each government to appoint two Commissioners who between them represent “*water, land and environmental resource management*.”¹⁷ Two Deputy Commissioners are also appointed by each government. An independent President, appointed by unanimous vote of the Ministerial Council, chairs the Commission.¹⁸

Traditionally, state Commissioners have been the heads of relevant state government departments, and Commonwealth Commissioners have been secretary or deputy level secretaries of the relevant Commonwealth departments.¹⁹ The first departure from this convention was through the author’s appointment as an independent²⁰ Commissioner in January 2005.²¹

The Community Advisory Committee – established by the Ministerial Council in 1987 to provide community views directly to the Council.

The Ministerial Council established the Community Advisory Committee (the CAC) as a Committee in 1986.²² It is responsible for providing direct advice to the Ministerial Council on matters referred to it by the Council and Commission, and to provide advice on the views of the Basin’s communities. Members also actively participate in Commission working groups and committees.

The CAC is comprised of an independent chair and 28 members, 21 of who are chosen on a catchment or regional basis. Of the remaining seven members, six are drawn from four peak non-government groups and there is an appointee to provide an individual Aboriginal perspective.

The CAC has at times been an active, independent, and powerful community voice in providing an alternative source of advice to Ministerial Council.²³

The Office of the Commission – the secretariat for the Commission that has been created by the Commission, which holds a wide array of delegated authority.

The Office of the Commission (the Office) is not specifically recognized in the Agreement, but the Commission has the power to employ staff, which it does through its Canberra based secretariat.

This Office of over 100 highly skilled staff has been a key driving force of the Initiative and has played a vital role in helping the Initiative get through some difficult challenges. The Office provides support to the Ministerial Council, the Commission and the CAC.

¹⁷ See Clause 20(2) of the Agreement.

¹⁸ The current President is the Rt Hon Ian Sinclair AC.

¹⁹ Current Commonwealth Commissioners are Secretary level appointments reflecting the Commonwealth Governments increasing interest in the Initiative.

²⁰ Meaning not employed as a public servant by any government.

²¹ See http://www.mdbc.gov.au/about/murraydarling_basin_commission/the_commissioners viewed June 2006. Prior to this appointment no non public servant had been appointed to the Commission, other than the head of corporatised bodies such as Goulburn-Murray Water and SA Water. This has been by tradition rather than being required by the Agreement.

²² The CAC is now recognised in the Agreement. See Clause 14(1)(a).

²³ Given the changes to the operating environment of the Initiative, it is time to revisit the composition and role of the CAC, in particular given the emergence of statutory catchment management authorities throughout the Basin. See Section V of this paper “Walking the talk – some equally real challenges”.

The work of the Office is separated into River Murray Water, an internal ring fenced business unit to manage the sharing and distribution of water in accordance with the Agreement,²⁴ and Natural Resource Management. Since 2001, an Environmental Manager has been appointed to the Office to closely monitor the environmental aspects of water options for the River Murray and its tributaries, and to provide the Commission with advice on how any arrangements could be better coordinated.

IV. Some real progress – the evolution of agreed works and measures

The finalization of the *River Murray Waters Agreement 1914* was a major achievement, coming at the tail end of decades of negotiations, as was the agreement to construct and jointly fund the built infrastructure found throughout the River Murray system. This extensive system of storages, locks, weirs and barrages has secured the ability to provide water for irrigation, urban, industrial, recreational and navigational purposes under all conditions.²⁵

The most significant contemporary measures taken under the Agreement have been by the Ministerial Council, which was first established in 1985. Recent achievements of the Ministerial Council have both enhanced productivity and improved the health of the system. They include the:

1. 1988 - 2001 Salinity and Drainage Strategy.

From 1975-85 salinity levels when measured at Morgan in South Australia exceeded the relevant Australian water quality guideline of 800 EC units 42% of the time. As a result of the implementation of the Salinity and Drainage Strategy, including groundwater management schemes costing over \$50 million, salinity levels were reduced to exceed 800 EC units 8 % of the time in 1999, with average salinity being 520 EC units. In 2004-2005 average salinity at Morgan was 395 EC units²⁶ but this figure is generally attributed to drought conditions reducing the level of salt entering the river from the floodplains.²⁷

The Salinity and Drainage Strategy provided a framework for joint action by the New South Wales, Victorian, South Australian and Commonwealth governments to deal with water logging and land salinisation in certain upstream irrigation districts of the River Murray and river salinity in the lower part of the River. Under the Strategy no state could undertake any action that would have an adverse impact on the salinity of the River unless it had previously earned 'salinity credits' by investing in salinity mitigation works, with the Commission maintaining an externally audited register of salinity debits and credits.²⁸

The basic concepts that underpinned the Strategy²⁹ were that:

²⁴ Established by the Ministerial Council in response to the 1994 Council of Australian Governments Water Related Reforms.

²⁵ See Crabb P, *Murray Darling Basin Resources*, (MDBC 1997) at 283 and Part VI – Construction Operation and Maintenance of Works and Schedule A of the Agreement. Water is also used to generate hydro-electricity at Dartmouth Dam, Hume Dam and the Yarrawonga Weir.

²⁶ See "The Salinity Audit of the Murray Darling Basin", (1999) MDBC at 11-13 and "Basin Salinity Management Strategy – 2004-2005 Annual Implementation Report", (2006) MDBC. Both reports available at www.mdbc.gov.au viewed July 2006.

²⁷ Amongst various other reasons including the source of the water. See "Murray Darling Basin Commission Annual Report 2004-2005", (2005) MDBC at 70.

²⁸ See "Murray Darling Basin Commission Annual Report 1998-1999", (1999) MDBC at 31.

²⁹ Personal communication, Phil Cole 13 July 2006 with reference to draft "Register Adjustment" paper (July 2006) MDBC.

- there would be a salinity target of less than 800 EC units for 95 % of the time³⁰ at Morgan in South Australia, being a point near offtakes for water for urban use by the City of Adelaide³¹ and Whyalla;
- salt interception schemes would be constructed by the Commission (through Constructing Authorities), which would reduce salinity when measured at Morgan by 80 EC units;
- New South Wales and Victoria would each receive salinity credits equivalent to 15/80 of each EC credit earned through investing in salt interception³² to cover the salinity impacts of constructing drains to protect irrigation areas; and
- after all of the states had used their credits, the salinity at Morgan would be reduced by 50 EC units.

As a result of a concern from irrigators in the mid section of the River – who were downstream of drains but upstream of salt interception schemes – credits and debits were based upon the cost of salinity to water users rather than the average EC at Morgan.³³ In this way the impacts on mid river irrigators was considered as a part of the assessment of proposals.

The salinity and debit system provided a consistent currency through which investments in salt interception were assessed, trade offs made and Basin-wide accountability achieved – a system that has carried over to the revised salinity strategy.

This Strategy was arguably the first time that the participating states, with the support of the Commonwealth,³⁴ agreed to tackle a major environmental problem through a common effort across jurisdictional borders, including through sharing the costs of ecosystem degradation. The Strategy, which has since been revised and replaced by the Basin Salinity Management Strategy 2001-2015 (see below), paved the way for further inter-state cooperation in promoting the sustainable use of the land, water and environmental resources in the Basin.

2. 1995 Cap on water diversions.

This is the most significant decision ever taken by the Ministerial Council, through which all jurisdictions voluntarily agreed to cap their own surface water diversions from the Basin.³⁵ An interim Cap on diversions was introduced in 1995 and made permanent in 1997.

The Cap limits the amount of surface water that may be diverted from the Basin's rivers. In regulated rivers diversions are limited to what would have been diverted under 1993-94 levels of development. In unregulated rivers the Cap may be expressed as an end-of-valley flow regime. The Cap has been applied in this way, with small variations, in New South Wales, Victoria and South Australia, which combined account for 94 per cent

³⁰ Noting that modelling and simulation against a benchmark period is used to test the target rather than real time management. The target was based upon Australian guidelines for drinking water quality and on the risks to irrigated horticulture. Personal Communication, Phil Cole 21 July 2006.

³¹ The capital city of South Australia with a population of over one million. Located outside of the Basin, the city obtains 40% of its water from the River Murray in average years and up to 90% in drought years.

³² South Australia waived its right to such credits. Personal communication, Phil Cole 13 July 2006.

³³ Costs to urban and rural users were calculated, urban costs (1988 estimates) making up 97% of the total salinity costs. A recent review has adjusted the cost functions, with agricultural costs now 24% of the total salinity costs and 96% of the costs being calculated to occur within South Australia. Personal communication, Phil Cole 13 July 2006 with reference to "Register Adjustment" paper (July 2006) MDBC.

³⁴ The Commonwealth contributed 50% of the cost of salinity mitigation investigations and 25% of capital construction costs.

³⁵ Queensland has agreed to a cap on diversions but is awaiting the finalisation of its water resources plans before it agrees on the level of diversions.

of the Basin's diverted water. Queensland and the Australian Capital Territory take a total of 6 per cent, and their Cap and the way it is determined has not yet been finalized.

The Ministerial Council implemented the Cap as a first step towards striking an appropriate balance between the economic and social benefits obtained from the development of the Basin's water resources, and the environmental uses of water in the Basin's rivers.³⁶ The Cap was not set to reflect the sustainable level of extraction. While it limits diversions, this limit is based upon prior use and not sustainable yield.

The implementation of the Cap is subject to an annual audit by the Commission's Independent Audit Group³⁷ and where it is exceeded by an agreed percentage a Special Audit³⁸ is triggered. The audit report is provided to the Ministerial Council annually and if a state is found to have exceeded its Cap in any of its valleys, it is given the opportunity to explain why this has occurred and what action it plans to take to re-align water use to bring it within the Cap.

3. 1997 Pilot Program for permanent interstate trade.

The ability to trade water both within and between jurisdictions has allowed water to move to more valuable uses and has meant that the Cap on diversions has not been a cap on development.³⁹

The pilot program for permanent inter-state trade built upon longstanding permanent and temporary trade in water within jurisdictions. It allowed, and set the rules for, cross jurisdictional trade in high security water in a defined part of the Southern Basin in order to maximise its commercial use by allowing the market to determine where water would achieve the best return. Trade was subject to environmental and social issues, and physical constraints, being assessed. It did not affect agreed water sharing rules between jurisdictions. Adjustments to volumes were made to take account of trading, which may also affect future contributions to the recurrent costs of the overall Initiative that are based upon the service received by each jurisdiction.

The pilot scheme was successful with 22.9 gigalitres of high security water permanently traded between New South Wales, Victoria and South Australia from 1998-2003. This volume is however a small proportion of the overall volume of temporary water, or annual water allocations, traded across the Basin which accounts for 800-900 gigalitres of water per annum.⁴⁰ Temporary trade in water allocations across state borders was not subject to the pilot scheme.

At its 40th Meeting in May 2006, the Ministerial Council agreed to adopt a new Schedule on inter-state water trade expanding the ability to permanently trade water within a wider

³⁶ See "The Living Murray Discussion Paper", (2002) MDBC at 17.

³⁷ The Independent Audit Group (IAG) was established in 1996 to set-up the Cap and it now reviews its implementation. The IAG is independent in that its members are not part of any partner Government.

³⁸ The IAG conducts a Special Audit of any Cap valley in which diversions have exceeded Cap targets by 20% of the average annual cumulative diversion.

³⁹ See *Property: Rights and Responsibilities – Current Australian Thinking*, (Land and Water Australia, 2002); Dyson M and Scanlon J, "Trading in Water Entitlements in the Murray Darling Basin – Realizing the Potential for Environmental Benefits", (2002) IUCN ELP Newsletter, Issue 1, 2002 at 14 available at www.iucn.org/themes/law viewed June 2006; "Understanding Water Rights and Water Allocation, 1st NARBO Thematic Workshop on Water Rights and Water Allocation", (2005) Hanoi, Viet Nam Asian Development Bank.

⁴⁰ Personal communication, Adam West 21 July 2006 with reference to "Evaluation of the Interstate Water Trade Program", (2005) Tim Cummins and Associates. See also "Rural Water Use and the Environment: the Role of Market Mechanisms", (June 2006) draft Report of the Productivity Commission Commonwealth of Australia at 198.

area of the Southern Basin. The same rationale that underpinned the pilot program underpins this expanded trading regime.

The new Schedule sets a framework for two different trading methods, 'exchange rate trade' (as was adopted under the pilot trading regime) and 'tagged trade'.⁴¹ The new Schedule, and the extensive protocols adopted (or to be adopted) under it, seeks to facilitate expanded trade through addressing a range of contentious issues including the nature of entitlements to be traded, the setting of access and exit fees, requiring environmental assessment, and addressing the impact of trade on the Cap; environmental flows; salinity; the parties' financial contributions; and the capacity of the River to deliver water.⁴² The new Schedule, unlike the pilot program, applies to both temporary and permanent trade in water.

The pilot program and expanded program are funded through each participating jurisdiction and through the Commission's River Murray Water operational budget, which is jointly funded by the jurisdictions sharing the waters of the River Murray on the basis of the level of services received.⁴³

4. 2001 Basin Salinity Management Strategy.⁴⁴

This cooperative and jointly funded strategy was developed to maintain river salinity at an agreed level, to control salt loads in all tributaries, and to control land degradation, while allowing productive activity to expand where appropriate. The Strategy builds upon earlier agreements to collectively address irrigation induced salinity to now cover both irrigation induced and dryland salinity.

The Strategy was adopted by the Ministerial Council in 2001 and it revised and replaced the 1988 Salinity and Drainage Strategy. It is given effect through a Schedule to the Agreement⁴⁵ that sets new agreed 'baseline dates', time based salinity 'baseline conditions'⁴⁶ and quantitative basin wide and river valley salinity targets. The Strategy retains the Basin wide target of less than 800 EC units for 95 % of the time at Morgan and incorporates former salinity and drainage works. The main change from the 1988 Strategy is the inclusion of salinity impacts and targets for salinity occurring in tributaries, which includes Queensland, and the creation of a new program for salt interception investment.

This new program of joint works and measures sets a target of salinity reduction of 61 EC units by 2007⁴⁷ when measured at Morgan. It allocates salinity credits to each of the three investing states, New South Wales, Victoria and South Australia, equivalent to 10/61 of each salinity credit achieved through investing in salt interception – thereby allowing an equivalent salinity debit to enable drainage disposal or, increasingly, the

⁴¹ As defined in Schedule E Clause 3. Generally speaking, exchange rate trade cancels the entitlement in the state of origin and creates an equivalent entitlement in the state of destination, tagged trading leaves the entitlement in the state of origin but allows annual allocations to be used in the state of destination.

⁴² The trading method adopted for permanent trade, and the entitlements and allocations able to be traded and across which trading zones, will further develop over time.

⁴³ The River Murray operations and maintenance budget is currently shared in the following proportions: New South Wales 38%, Victoria 35% and South Australia 27%.

⁴⁴ Replacing the 1988 Salinity and Drainage Strategy.

⁴⁵ Schedule C – Basin Salinity Management.

⁴⁶ Defined in Schedule C Clause 2 and elaborated in Clause 5.

⁴⁷ It also estimated credits of 10 EC units by 2007 to be achieved through state based activities such as targeted reforestation and improved management of remnant vegetation. See "Report of the Independent Audit Group 2004-2005", (2006) MDBC at 10.

development of new irrigation areas. The remaining 31 EC units are allocated against the anticipated 'delayed salinity impacts'⁴⁸ in tributaries required by 2007.

In addition to the Basin wide target, the 2001 Strategy sets out a process for proposing, reviewing and adopting 'end of valley targets' for tributaries,⁴⁹ and a process for each state to develop agreed programs of actions in catchments, such as reforestation, aimed at reducing dryland salinity impacts in order to achieve the 'end of valley targets'.⁵⁰ Programs are delivered through catchment management authorities linked to Commonwealth led funding programs such as the National Action Plan for Salinity and Water Quality and the Natural Heritage Trust.

The states of New South Wales, Victoria and South Australia are responsible for all actions that may have a significant effect on salinity⁵¹ taken after their baseline date of 1 January 1988, and the state of Queensland is responsible for actions taken since 1 January 2001. Dealing with other salinity impacts is a shared responsibility. An annual audit of the performance of each state jurisdiction and the Commission is carried out by the Independent Audit Group for Salinity appointed by the Commission.⁵²

The salinity register established under the 1988 Strategy has been revised to now include Registers A and B, which generally speaking distinguish between actions that have a significant effect on salinity and those actions and impacts that relate to 'delayed salinity impacts'.⁵³ Each jurisdiction acquires salinity credits and debits based upon the actions they take after their 'baseline date' in both irrigation areas and tributaries that may affect salinity levels, and are required to remain in credit overall. Credits are achieved by investing in measures to reduce salinity, with debits being assigned to actions that increase salinity and against predicted 'delayed salinity impacts' as determined every seven years.

As with its predecessor, the overall result of this Strategy has allowed productive areas to expand while achieving significant reductions in river salinity.

5. 2004 The Living Murray First Step.

A cooperative and jointly funded initiative to return up to 500 gigalitres of permanent "new water" to the River Murray as an environmental flow with an initial focus to improve the health of six agreed significant ecological assets, or icon sites, and to invest in a range of capital works and measures to make the best use of recovered water.

This initiative followed an extensive process of scientific investigation and analysis and community consultation.⁵⁴ It was concluded outside of the Agreement through The

⁴⁸ Defined in Schedule C Clause 2.

⁴⁹ Targets are proposed by state governments, reviewed by the Commission and adopted by the Ministerial Council. For general information on the process see "Basin Salinity Management Strategy Operational Protocols", (Version 2.0 – March 2005) MDBC.

⁵⁰ Defined in Schedule C Clause 2 and elaborated in Clause 8.

⁵¹ Defined in Schedule C Clause 18 as a change in average daily salinity at Morgan which the Commission estimates will be at least 0.1 EC units within 100 years after the estimate is made.

⁵² See Schedule C Clause 34.

⁵³ Register A transfers all debits and credits from the previous register and records debits and credits for actions taken under the 2001 Strategy as assessed against the revised baseline conditions, excluding actions taken to offset 'delayed salinity impacts'. Register B records 'delayed salinity impacts', being salinity impacts resulting from actions taken before the baseline dates, and it records credits for actions in catchments taken to meet end of valley targets after 1 January 2000.

⁵⁴ For a general discussion of the process of determining the environmental flow regime for the River Murray see Scanlon J, "From Taking to Capping to Returning: the Story of Returning Environmental Flows to the in the Murray Darling Basin in Australia", (2002) Stockholm International Water Institute Seminar, SIWI Report 17 at 77.

Living Murray Inter-governmental Agreement⁵⁵ otherwise known as The Living Murray First Step, a separate inter-governmental agreement between the Commonwealth, New South Wales, Victorian, South Australian and Australian Capital Territory governments. Its implementation is overseen by the Ministerial Council and externally audited by the Commission's Independent Audit Group.⁵⁶

Each state jurisdiction is set investment and water recovery targets based upon its share of consumptive water use, the indicative targets for water recovery being 269 gegalitres from within New South Wales, 214 gegalitres from Victoria, 35 gegalitres from South Australia and two gegalitres from the Australian Capital Territory. Each state is responsible for developing water recovery plans for icon sites within their jurisdictions, there being six icon sites overall. The Commission is responsible for the Basin wide environmental watering plan.

The Commonwealth is the major financial contributor to The Living Murray First Step, committing 40 percent of the \$500 million, followed by New South Wales and Victoria at 23 percent each, South Australia 13 and the Australian Capital Territory one percent. The total investment is set against annual investment targets spread over the five years of the First Step. The Commonwealth has since invested a further \$500 million in The Living Murray (and other related works and measures under the Initiative) to ensure there are no financial impediments to its success.

The works and measures, known as the Living Murray Environmental Works and Measures Program, involve an additional investment of \$150 million over eight years to 2011. It is separately funded through the capital and operational budget of the Commission, with the budget now being supplemented by the additional Commonwealth funds referred to above. Improvements in the health of the River will result from the combined impact of the additional flows and improved structural and operational management.

It is recognised that the additional flow is a first step towards recovering the health of the River Murray and more water will be needed over time to achieve this objective. The Living Murray First Step is however a major achievement in its own right, which now has a combined budget of over one billion dollars.

The five issues addressed above are all major achievements of the Ministerial Council that are aimed at collectively providing greater investment security, addressing environmental degradation and allowing the market to influence where water is used. They have all been jointly funded by the jurisdictions participating in the particular program or measure, with the share of funding being separately negotiated for each of them. The Commonwealth has exercised national leadership by using its financial power to help support and drive all of these programs and measures, and in particular The Living Murray where its investment now amounts to over \$700 million.

⁵⁵ *Inter-governmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray Darling Basin 2004* and the Business Plan developed under the Inter-governmental Agreement and adopted by the Ministerial Council.

⁵⁶ See Clause 78 of the Living Murray Inter-governmental Agreement and Clause 158 of the Business Plan.

V. Walking the talk – some equally real challenges

"I'm not happy with the progress of the Murray-Darling...I don't think there is a lot of state co-operation there. I tend to sympathise with those from South Australia who say that...I think we've got to put a bit of a bomb under the process."

Australian Prime Minister, Hon John Howard MP⁵⁷

While there have been many significant achievements over the past century, which stand as testament to the strength of the Federation of Australia and our ability to peacefully negotiate the sharing of natural resources in a pragmatic and cooperative manner, the game is significantly changing for many reasons.

All Australian governments have agreed to a bold new water reform agenda through the National Water Initiative⁵⁸ and the Murray Darling Basin Initiative now operates in an environment where:

- new secure water rights have been created;
- newly created water markets are maturing;
- full cost recovery for water services is being implemented;⁵⁹
- the environment is now seen as a legitimate user of water;
- skills based catchment management authorities play an increasingly significant role in natural resources management;⁶⁰
- available water resources are becoming scarcer;
- significant new investment is being channelled through the Commission; and
- community values have changed and expectations increased.

Collectively, these changes require us to find new and more effective ways of managing our shared resources. As will be seen below, our biggest challenge revolves around the effective implementation of the policy agenda that has already been agreed to at the highest levels of government.

In response to these changes the Initiative is going through a period of review (see below) and evolutionary change is required to the way in which the shared resources of the Basin are managed. Some of the more significant changes required are:

1. Avoiding getting cold feet and actually letting emerging water markets work.

The Living Murray Inter-governmental Agreement committed jurisdictions to invest \$500 million to recover up to 500 gigalitres of "new water" for the environment over a period of five years. The target period of five years will expire in mid 2009.⁶¹

In June 2005 the Productivity Commission⁶² advised that governments should start buying water from willing sellers in order to achieve The Living Murray First Step water recovery target. This advice is consistent with the independent advice tendered to

⁵⁷ As reported in the Australian Financial Review Friday 24 February 2006 at 78.

⁵⁸ *Intergovernmental Agreement on a National Water Initiative 2004*.

⁵⁹ Amongst other things, calling into question the manner in which the costs for water services are determined by monopoly service providers. See for example New South Wales Farmers Association "Water Reforms off the Rails", (12 July 2006) Media Release.

⁶⁰ There are now 56 regions across Australia through which Natural Heritage Trust and National Action Plan for Salinity and Water Quality funds are invested. See <http://www.nrm.gov.au/index.html> viewed July 2006.

⁶¹ As at 15th March 2006, the date of Meeting 87 of the Commission, none of the \$500 million had been invested in water recovery and no water has been recovered.

⁶² "Rural Water Use and the Environment: the Role of Market Mechanisms", (June 2006) draft Report of the Productivity Commission Commonwealth of Australia available at www.pc.gov.au viewed June 2006.

the Ministerial Council by reports from the Independent Audit Group, private consultants⁶³ and the author to the 40th Meeting of the Ministerial Council in May 2006.

The Chair of the Ministerial Council and Commonwealth Minister for Agriculture, Peter McGauran, has been reported as responding to the Productivity Commission draft Report referred to above as follows:

*"But Mr. McGauran rejected the proposal saying it would hurt farmers."*⁶⁴

The Wentworth Group of Concerned Scientists responded to this suggestion in an opinion piece⁶⁵ as follows:

"...we are being told that, if you buy water from irrigators, you'll send the rural economy into recession. What nonsense."

The water reforms that have been taken through the 1994 Council of Australian Government (CoAG) water related reforms and the National Water Initiative of 2004 have revolutionized water resources management in Australia. One of the outcomes of the reform process is that we have moved from a situation where water entitlements were short term, often annual licenses, which did not vest the holder with any property right or long term security of water access entitlement, to creating permanent tradable property rights.

Generally speaking, licenses across Australia were tied to the land and legally (as opposed to politically) able to be revoked by administrative decision without the payment of compensation to the holder, subject to the rules of natural justice being adhered to.

As the National Water Initiative states, the objective of the parties in implementing the agreement is to:

"...provide greater certainty for investment and the environment, and underpin the capacity of Australia's water management regimes to deal with change responsively and fairly."

Part of the deal was to facilitate the establishment of water markets and provide opportunities for trading, subject to interim threshold limits set within the Agreement.⁶⁶ This would allow the market over time to determine the best use of water, including for the environment.⁶⁷

While payment of a premium to pursue some appropriate infrastructure improvements to generate water savings should continue to be considered, this needs to occur in a sensible, balanced and economically sound manner as is anticipated by the National Water Initiative⁶⁸ and The Living Murray Intergovernmental Agreement and Business Plan⁶⁹, which requires measures to be assessed for their cost effectiveness.⁷⁰

The Wentworth Group appears to take a rather extreme view in support of the market. The Productivity Commission's draft Report recognizes that some infrastructure projects

⁶³ The Ministerial Council resolved to publicly release these reports, which will be available at www.mdbc.gov.au.

⁶⁴ See Breusch J "McGauran hoses down water alert", (16 June 2006) Australian Financial Review at 3.

⁶⁵ See Cosier P "Let market set the water mark", (20 June 2006) Australian Financial Review at 63.

⁶⁶ See Clauses 58-63 of the National Water Initiative.

⁶⁷ Under the National Water Initiative the threshold limits are to be reviewed in 2009 with a view to "full and open trade by 2014 at the latest". See Clause 60.

⁶⁸ See Clause 79 of the National Water Initiative.

⁶⁹ Adopted by the Ministerial Council at Meeting 36 of the Ministerial Council, November 2004.

⁷⁰ See for example Clause 32 of the Inter-governmental Agreement.

that source water may have other benefits⁷¹ and The Living Murray Intergovernmental Agreement and Business Plan supports a range of possible eligible measures for water recovery.⁷²

The views of the Wentworth Group do serve to remind us of the importance of utilizing the market mechanisms that have been established through the past decade of reforms. Its recent opinion piece concludes by saying:

“Commonwealth funds should not be used to subsidize uneconomic projects...Instead of running grants schemes that aren’t delivering water, buy it from willing sellers and let them use the money to invest in water efficiency.”

1.1 Entering the market under The Living Murray First Step

Based upon current estimates from the Independent Audit Group, 275 gigalitres of water will have been recovered within the five year target period. Jurisdictions have focused their initial effort on maximizing the amount of water that may be recovered through infrastructure improvement projects, in particular in the Australian Capital Territory, New South Wales and Victoria.⁷³

It is apparent that the target of 500 gigalitres of “new water” will not be achieved through infrastructure improvement projects alone and it will be necessary to purchase water from willing sellers if the target is to be achieved.

“...we are committed to ensuring that we meet the target of restoring 500 gigalitres to the river by 2009...the rate of progress...is simply not good enough.”

Hon Malcolm Turnbull MP⁷⁴

The purchase of water on the market – and the use of other market based measures – has already been approved by the Ministerial Council through the Living Murray Intergovernmental Agreement,⁷⁵ is entirely consistent with the National Water Initiative and is fully supported by the Productivity Commission.

In order to meet the 2009 deadline, the fastest market based measure to recover water is to purchase existing water entitlements from willing sellers through tender process or direct purchase. There are no technical or legal impediments preventing the purchase of water from willing sellers under the laws of any jurisdiction to achieve the target of 500 gigalitres. The timing of when to enter the market is a political rather than a technical decision and it is political considerations that have delayed entry into the market.⁷⁶

⁷¹ See “Rural Water Use and the Environment: the Role of Market Mechanisms”, (June 2006) draft Report of the Productivity Commission Commonwealth of Australia at 121.

⁷² See Clause 23 of the Inter-governmental Agreement.

⁷³ It is possible that Victoria will reach its jurisdictional indicative water recovery target through infrastructure improvements, but this is not the case in other jurisdictions.

⁷⁴ Commonwealth Parliamentary Secretary with responsibility for water. See Anderson L “Grants plan to raise River Murray flows”, (28 April 2006) The Advertiser.

⁷⁵ See Clause 23 (ii) of the Living Murray Inter-governmental Agreement.

⁷⁶ The purchase of water through The Living Murray in a particular jurisdiction requires the approval of that jurisdiction under Clause 43 of the Living Murray Inter-governmental Agreement and Clause 63 of the Business Plan.

Assessing market based options under The Living Murray Inter-governmental Agreement

In December 2005 the Ministerial Council directed the Commission to bring options back to Council in April 2006 on the use of market options, including purchasing entity options. A report prepared for the Commission⁷⁷ concludes that:

- the cost of purchasing water entitlements would be cost effective subject to the payment of any 'exit fees' or price effects on water entitlement markets arising from the scale of purchases.
- the purchase of 200 gigalitres would represent some 2.3% of the long term diversion Cap for the potential Living Murray water recovery districts in the Southern Murray Darling Basin.
- entitlement purchases for use under The Living Murray could be progressed within the National Water Initiative 4% annual threshold limit on the level of entitlements to be traded out of irrigation areas.
- to progress water recoveries through market measures, there are a number of existing bodies, public and private, which can or do purchase water entitlements.
- the development of robust water registers and compatible institutional and regulatory arrangements by 2007, as already agreed under the National Water Initiative, will be important in enabling the use of market measures in the timeframe for water recovery for The Living Murray First Step.

Some positive first steps to enter the market were made at the 40th Ministerial Council meeting in May 2006 through the package of measures put forward by The Hon Karlene Maywald MP, Minister for the River Murray in South Australia (Minister Maywald) under The Living Murray First Step that included the purchase of water from willing sellers and an indication from New South Wales of its preparedness to enter the market to meet its indicative targets – New South Wales having taken a lead in the “*purchase of water from willing sellers in an open market place for environmental flows*” through its “Riverbank Fund.”⁷⁸ The Hon Malcolm Turnbull MP also detailed the Commonwealth’s intention to purchase water from willing sellers by inviting tenders to sell water but on the condition that “*the water offered for sale for the environment is water that can be delivered not later than 2009 and, most importantly, is water that has become available by reason of water efficiency measures.*”⁷⁹

2. Putting into place an environmental flow regime that will ensure a healthy system while maintaining productivity.

The Ministerial Council has received consistent advice from the world’s best river ecologists that additional flow in the River Murray is the key to restoring it to good health. The Scientific Reference Panel advised that at the whole of river scale, an additional 1,500 gigalitres per year option alone would deliver at best, a moderate improvement in the health of the River – assuming it was combined with improved structural and

⁷⁷ See “Issues and Options in applying market based measures in The Living Murray First Step”, (March 2006) BDA Group. The Ministerial Council has agreed to publicly release this report.

⁷⁸ See Minister Debus “\$105 million fund to rejuvenate inland rivers and wetlands”, (30 November 2005) Media Release. This funding package is not part of The Living Murray.

⁷⁹ The tender has since been released. For initial announcement see speech of Hon Malcolm Turnbull MP, 28 April 2006 available at: <http://www.malcolmturnbull.com.au/news/article.aspx?ID=423> viewed July 2006.

operation management.⁸⁰ These conclusions were based on the conditions that prevailed in 2003, including regarding surplus or unregulated flows.

The Hon John Hill MP, then Minister for the River Murray in South Australia put it this way in a paper delivered to the Ministerial Council in 2002:

*"The Murray-Darling Basin Ministerial Council received advice last April from the very best river ecology scientists in the world that, at the very least, an additional average annual flow in the Lower Murray of 1630 gigalitres per annum would provide a moderate likelihood of a healthy working river system. I don't believe that we can contemplate a figure lower than this if we are serious about the health of the River Murray."*⁸¹

The Living Murray First Step has since been agreed through the Living Murray Inter-governmental Agreement, which seeks to return up to 500 gigalitres of "new water" to the River for environmental flows by 2009 through a collective investment of \$500 million, and the Commonwealth has now invested significant additional funds to ensure there is no financial impediment to implementation.

The Living Murray First Step is just that, an essential and significant first step along the path of returning the River Murray to good health. It is inter-twined with the finalization of the Living Murray Environmental Works and Measures Program⁸² to achieve the best possible environmental outcomes from the use of recovered water and from existing flows⁸³, including the management of surplus or unregulated flows.

It is essential that we recover the 500 gigalitres of "new water" by mid 2009, which environmental managers will be able to make best use of through the infrastructure being developed under the Living Murray Environmental Works and Measures Program. If we recover and manage the "new water" in accordance with The Living Murray First Step, we can expect some excellent environmental outcomes, especially if we also effectively manage surplus or unregulated flows (addressed below).

Access to permanently recovered water will allow environmental managers to trade water on the temporary market when all of the water is not needed for environmental purposes and to build up resources to purchase temporary water in years where we wish to manage a larger flow. The Second Step of The Living Murray can open up opportunities to pursue other more novel market based measures such as leasing water and purchasing options.⁸⁴ These different market based options should not be pursued as a part of First Step, which should continue to focus on permanently recovering 500 gigalitres of "new water".

The Commonwealth has exercised strong national leadership, including through making a substantial unilateral investment in The Living Murray First Step to get it back on track. It is open to the Commonwealth to further support the implementation of The Living Murray by enhancing its use of existing Commonwealth laws and related conventions.

⁸⁰ See "Scientific Reference Panel, Ecological Assessment of Environmental Flow Reference Points for the River Murray System", (October 2003) CRC for Freshwater Ecology.

⁸¹ "Environmental Flows in the River Murray", Ministerial Council Meeting 32 Adelaide November 2002.

⁸² Based upon MDBC budget projections in March 2006, the Environmental Works and Measures Program target completion year of 2011 would have been extended by almost 10 years to 2020. The Commonwealth injection of \$500 million has put the programme back on track.

⁸³ Through Clauses 108-110 of the Business Plan.

⁸⁴ The various market based options are addressed in "Issues and Options in applying market based measures in The Living Murray First Step" (March 2006) BDA Group, "Rural Water Use and the Environment: the Role of Market Mechanisms", (June 2006) draft Report of the Productivity Commission Commonwealth of Australia, and the submission presented to the Productivity Commission by the Australian Conservation Foundation (July 2006) available at www.pc.gov.au viewed June 2006.

2.1 The Ramsar Convention and the Montreux Record

Wetlands included on the List of Wetlands of International Importance (the List) under *The Convention on Wetlands of International Importance especially as Waterfowl Habitat* 1971, most commonly known as the Ramsar Convention,⁸⁵ are selected on the basis of their “*international significance in terms of ecology, botany, zoology, limnology or hydrology*”.⁸⁶ Once a wetland is included on the List by a contracting party, the State is obliged under the terms of the Convention to, amongst other matters, “*Formulate and implement their planning so as to promote the conservation of wetlands included in the List...*”

The Ramsar Convention provides for the Contracting Parties to adopt recommendations to promote the functioning of the Convention and for them to take such recommendations into account in managing wetlands.⁸⁷ The Conference of the Parties to the Ramsar Convention has created a public register to draw attention to sites where an adverse change in ecological character has occurred or is occurring, or is likely to occur, and the site is therefore in need of priority conservation attention. The register is known as the ‘*Montreux Record*’.⁸⁸

The Commonwealth is able to request the Ramsar Secretariat to include a Ramsar listed site that is in need of priority conservation attention on the *Montreux Record*. It is also open to anyone to raise the issue with the Ramsar Secretariat, which will in turn bring to the attention of the Contracting Party. Including a site on the *Montreux Record* (and subsequently removing a site) is always a matter for the Contracting Party.⁸⁹

2.2 The Environment Protection and Biodiversity Conservation Act 1999

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) is essentially divided into two parts. The first part deals with the assessment and approval of actions that have, will have, or will be likely to have a significant impact on “*matters of national environmental significance*”. The second part deals with the listing and management processes associated with biodiversity conservation and heritage.⁹⁰

Under the EPBC Act no “action” can be undertaken that will have “*a significant impact on the ecological character*” of a Ramsar wetland⁹¹ without the prior approval of the Commonwealth Environment Minister.⁹² The Commonwealth and each Commonwealth

⁸⁵ Placing a wetland on the List of Wetlands of International Importance under the Ramsar Convention is a decision for each Contracting Party to the Convention. Australia was one of the first parties to join the Convention in 1975.

⁸⁶ Today there are 1,590 wetlands included on the List by the Conventions 150 contracting parties, 64 of which are included in Australia with 11 being in the Murray Darling Basin. See <http://www.ramsar.org/> and <http://www.deh.gov.au/> viewed June 2006.

⁸⁷ Conferences of the Parties have included recommendations on many issues, including “environmental flows.”

⁸⁸ Full text of resolution available at http://www.ramsar.org/key_montreux_record.htm viewed July 2006.

⁸⁹ There are at present 57 sites listed on the *Montreux Record* including sites in the UK and USA. No Australian Ramsar sites have been listed to date.

⁹⁰ The EPBC Act lists seven matters of national environmental significance, national heritage places having been added since the passage of the Act in 1999. The EPBC Act seeks to give effect to Australia's international environmental obligations under a range of international conventions and to deal with the management of Commonwealth places, including heritage places. More information on the EPBC Act is available from the EPBC Act home page at <http://www.deh.gov.au/epbc/index.html> viewed July 2006.

⁹¹ See Section 16 EPBC Act.

⁹² Any action that reduces the surface flow of the River Murray or its tributaries, for example when a prescribed volume is exceeded, could be investigated as a new matter of national significance under the EPBC Act thereby requiring the consideration of the Commonwealth Environment Minister before the action proceeds. The precise description of such a trigger would require further thought and analysis. The

agency are also obliged to take all reasonable steps to “ensure it exercises its powers and performs its functions in relation to a wetland in a way that is not inconsistent with...the Ramsar Convention”.⁹³

2.3 The Coorong and Lower Lakes – The Ramsar Convention and the EPBC Act

In 1985 the Coorong and Lakes Alexandrina and Albert Wetland located at the mouth of the River Murray in South Australia (the Coorong and Lower Lakes) were recognized as a wetland of international importance and included on the List.

The words of author Colin Thiele in his book *Storm Boy* vividly describe the wild beauty of the area that is the Coorong:

*“His home was the long, long snout of sandhill and scrub that curves away south eastwards from the Murray mouth. A wild strip it is, windswept and tussocky, with the flat shallow water of the South Australian Coorong on one side and the endless slam of the Southern Ocean on the other...They call it the Ninety Mile beach. From thousands of miles round the cold, wet underbelly of the world the waves come sweeping in towards the shore and pitch down in a terrible ruin of white water and spray. All day and all night they tumble and thunder.”*⁹⁴

In 1981 the River Murray mouth closed, “the only occasion since non-indigenous settlement” and in 2003-2004 “only dredging enabled it to stay open.”⁹⁵ Low flows and their effects at the end of the system are not a new phenomenon. What is new is the frequency at which low flow events occur, with the median flow now 27% of what it was under natural conditions and low flows occurring 66% of the time under regulated conditions as compared with 7% of the time under natural conditions.⁹⁶

The Coorong and Lower Lakes is one of the six significant ecological assets under The Living Murray. Recent reports have described a significant decline in the ecological health of the Coorong and Lower Lakes, largely attributable to a lack of sufficient water flowing through the lower reaches of the River Murray.⁹⁷

The state of health of the mouth of the River Murray and the Coorong and Lower Lakes is the most obvious and emotionally evocative indication of our success or failure in managing the shared resources of the Basin.⁹⁸ Minister Maywald from South Australia

Environmental Defender's Office of New South Wales has considered a possible water extraction trigger. For information see <http://www.edo.org.au/edonsw/site/default.php> viewed July 2006. Section 100 of the Constitution provides that the Commonwealth shall not “by any law or regulation of trade or commerce, abridge the right of a State or the residents therein to the reasonable use of the waters of rivers for conservation or irrigation”, a provision that has never been fully tested. The Commonwealth has used many heads of power to legislate on environmental issues, including legislating for the domestic implementation of international treaties under its ‘external affairs’ power.

⁹³ See Section 334 EPBC Act.

⁹⁴ Thiele C, *Storm Boy* (Rigby, Adelaide 1963) taken from Muirhead P, “The Changing face of the River Murray” (undated) ABC News Features available at <http://www.abc.net.au/news/features/ocean/adelaide.htm> viewed July 2006.

⁹⁵ “The Lower Lakes, Coorong and Murray Mouth Asset Environmental Management Plan for 2005/2006”, (2005) MDBC at 39.

⁹⁶ See Walker D “The Behaviour and Future of the River Murray Mouth”, (2002) Centre for Applied Modeling in Water Engineering, University of Adelaide at 3 available at http://www.thelivingmurray.mdbc.gov.au/reports/archived_reports viewed July 2006.

⁹⁷ See for example “Ecological Character of the Coorong, Lakes Alexandrina and Albert Wetland of International Importance – working draft for public consultation”, (October 2005) Department for Environment and Heritage, South Australia.

⁹⁸ Dredging has been underway at the Mouth of the River since October 2002, at a total cost of \$15 million to June 2005. See “Murray Darling Basin Commission Annual Report 2004-2005”, (2005) MDBC at 32. The total cost of dredging operations from October 2002 to June 2006 is \$22.006 million. The cost of dredging

has long advocated that “if we can get it right at the end of the system the rest will follow”.⁹⁹

All of the reports now available warrant consideration of including the Coorong and Lower Lakes on the *Montreux Record* under the Ramsar Convention. Placing the Coorong and Lower Lakes on the *Montreux Record* will provide very public recognition of the plight of the area and reinforce the Commonwealth’s commitment to fulfilling its responsibilities under the Ramsar Convention, other relevant conventions,¹⁰⁰ and the EPBC Act.

3. Seriously addressing the six risks to shared water resources and managing unregulated flows for the benefit of the whole basin.

The CSIRO has identified six risks to the shared resources of the Basin,¹⁰¹ appropriately described by some as “*flow reducing activities*” given that the impacts of most of them have been felt within the Basin for over a decade and have already eroded surface flows since the introduction of the Cap.¹⁰² The six risks could reduce surface water flows by anywhere between 2,500 gegalitres and 5,500 gegalitres over the next 20 years.¹⁰³ The six risks are:

- climate change;
- changes in stream flow due to afforestation (large scale planting);
- groundwater extraction;¹⁰⁴
- irrigation water management;
- farm dams; and
- bushfires.

Two of these risks are beyond the direct control of the parties and they are climate change and bushfires. A third risk, irrigation water management, refers to reduced return flows as a result of greater irrigation efficiencies. This is a consequence of improved irrigation practices, which should have been addressed at the time water entitlements were created by granting net rather than gross entitlements.¹⁰⁵

There are however three risks that are within the direct regulatory control of the parties yet there remains ongoing reluctance to promptly dealing with them. They are afforestation, groundwater extraction and farm dams, the potential impact of which has been known for a decade or more. The estimates included in the CSIRO reports predict

has been shared equally by the Commonwealth, New South Wales, Victoria and South Australia. Personal communication, Geoff Haberfield Office of the Commission 26 July.

⁹⁹ Personal communication July 2006.

¹⁰⁰ Australia has also entered into separate treaties with China in 1988 (CAMBA) and Japan in 1981 (JAMBA) for the protection of migratory birds that migrate between their respective countries (which were negotiated under the framework of the *Convention on Migratory Species 1979*, to which Australia is a party). Migratory birds protected under these treaties migrate to the Coorong and Lower Lakes.

¹⁰¹ See “CSIRO, The Shared Water Resources of the Murray-Darling Basin”, (February 2006) MDBC 21/06 and “CSIRO, Risks to the Shared Water Resources of the Murray Darling Basin”, (February 2006) MDBC 22/06 both available at www.mdbc.gov.au viewed June 2006.

¹⁰² Personal Communication Professor Mike Young, 17 July 2006. Professor Young also notes that the impacts of “*flow reducing activities*” need to be assessed as from the date of the Cap.

¹⁰³ And in 50 years by between 4,500 gegalitres and 9,000 gegalitres.

¹⁰⁴ An impact that is not accounted for is the reduction in flows caused by salt interception schemes.

Personal communication, Professor Mike Young 17 July 2006.

¹⁰⁵ See “Rural Water Use and the Environment: the Role of Market Mechanisms”, (June 2006) draft Report of the Productivity Commission Commonwealth of Australia at 25 and for a detailed discussion see Young M and McColl J” Robust reform: implementing robust institutional arrangements to achieve efficient water use in Australia”, (2003) CSIRO Land and Water.

that these three risks could reduce surface water supply by between 1,075 gigalitres and 4,100 gigalitres in the next 20 years – afforestation between 550-700 gigalitres, farm dams between 250-3,000 gigalitres and groundwater between 275-550 gigalitres.

This volume needs to be considered in the context of the following figures taken from the CSIRO reports:

- average general run off within the Basin is 24,000 gigalitres;
- total diversions in the Basin are about 11,000 gigalitres per year, about 95% of which is used for irrigation;
- discharge at the mouth of the River Murray is 3,000 gigalitres;
- The Living Murray seeks to recover 500 gigalitres of “new water” for environmental flows.

The CSIRO reports reveal a serious challenge to river health and productivity.

While we spend one billion dollars to secure and manage an additional 500 gigalitres of water for environmental flows we allow a situation to continue in relation to the three risks that are within the control of jurisdictions that is projected to decrease flows over the next 20 years by between two and eight times this volume. And this is occurring in the context of the best science telling us an additional 1,500 gigalitres per year is required to deliver a moderate improvement in the health of the River.

We cannot afford to continue to create new, compensable rights to water resources in light of this knowledge. Creating new rights now will severely impact upon the resource security of existing water users and impose an additional cost on taxpayers into the future as newly created water rights are purchased to provide for environmental flows.¹⁰⁶

The Productivity Commission has called for groundwater to be included within the Cap.¹⁰⁷ There is no need for a moratorium on taking water or prohibiting the establishment of new areas for afforestation. What is needed is for each proposal, with reasonable exceptions for some small farm dams, to be assessed in terms of its impact on the surface water flows of the River Murray. If it will have an impact the proposal can still proceed but only if a surface water allocation is first obtained within the Cap. It is open to jurisdictions to do this under their own laws without extending the Cap.

The response from some respected colleagues is that if they cannot access groundwater they will have no where to go for additional water. Firstly, they do have somewhere to go and that is to access water from within the Cap. Secondly, we all know there is a limit to the available resource, something South Australia recognised in 1969 when it put into place a self imposed cap on diversions from the River.

This is a critical matter for the parties to address. The Ministerial Council and Commission are responding to the six risks through undertaking further studies and analysis and at its 40th Meeting in May 2006 the Ministerial Council agreed that the issue become a standing item for all future meetings of the Council until strategies are in place to deal with the risks.¹⁰⁸ All of this is good and proper but in light of all of the available knowledge and the regime we have put into place through the CoAG water related reforms and National Water Initiative, we must act now to stop creating new water rights that may impact upon the surface water resources of the Basin unless sourced within the Cap. This can all be achieved in the context of the states existing legislative regimes,

¹⁰⁶ And we cannot assume continuing budget surpluses to spend on recovering water.

¹⁰⁷ See “Rural Water Use and the Environment: the Role of Market Mechanisms”, (June 2006) draft Report of the Productivity Commission Commonwealth of Australia at 11.

¹⁰⁸ See Ministerial Council Communiqué available at <http://www.mdbc.gov.au/> viewed July 2006.

with the possible exception of some farm dams, which may require legislative (as opposed to regulatory) change.¹⁰⁹

3.1 Unregulated or surplus flows

The Independent Audit Group reviewed the progress of The Living Murray First Step and has stated that the potential impact of unregulated or surplus flows (unregulated flows) management (including for local environmental benefits) on the achievement of the overall objectives of The Living Murray is the most significant risk it identified in its audit.¹¹⁰

The Independent Audit Group also noted that the decisions taken through The Living Murray were premised upon a general baseline that assumed the 2003 distribution of unregulated flows in the River Murray System. This includes the reports provided by the Scientific Reference Panel on the volume of water that was required to be recovered to restore the River to good health.

Median unregulated flows in the Lower Murray below Wentworth in New South Wales under the conditions that prevailed in 2003 was 4,500 gigalitres. Any significant reduction in this flow will change the general baseline assumed by the Scientific Reference Panel, which was the scientific basis upon which The Living Murray was developed.

The volume of water recovered through The Living Murray First Step is small compared to the volume of water available through unregulated flows and it does not match the amount of available water that may be lost to the system through the six risks to shared water resources, estimated at being between 2,500 gigalitres and 5,500 gigalitres per year by 2023.

A failure to adequately address the issue of unregulated flows will seriously undermine the objectives of The Living Murray First Step, especially when considered in conjunction with the six risks to shared resources. The Ministerial Council recognized the significance of unregulated flows through incorporating the following provisions into the Business Plan:

- requiring the Commission by June 2005 to propose options for achieving improved environmental outcomes for the River Murray through the management of unregulated flows and to provide a report to the Council in October 2005.¹¹¹
- requiring the Living Murray Environmental Watering Plan to include rules for the management of unregulated and/or surplus flows.¹¹²
- requiring a Basin wide account to be developed to enable monitoring and reporting on the volume and spatial distribution of unregulated flows in the Murray Darling Basin over time.¹¹³
- requiring jurisdictions, while they retain responsibility for unregulated flows, to comply with Clause 46 of the Murray Darling Basin Agreement at any time when the assignment of water resources to tributary ecological assets is being considered in order to assess the relative merits of the various options.¹¹⁴

¹⁰⁹ See Dyson M, "Risks to Shared Water Resources, Overview of Statutory Frameworks", (October 2005) MDBC. Also see footnote 92 regarding a possible role for the Commonwealth under the EPBC Act.

¹¹⁰ See "Review of The Living Murray Implementation" presented to the Ministerial Council at Meeting 40, May 2006.

¹¹¹ An options paper or report has not yet been prepared by the Commission.

¹¹² Rules have not yet been prepared.

¹¹³ A Basin wide account has not yet been prepared.

¹¹⁴ No proposals have been submitted to the Commission under Clause 46.

Minister Maywald from South Australia took the matter further in a statement delivered to the 40th Ministerial Council in May 2006¹¹⁵ and secured resolutions that the Council:

“Recognises that the management of all environmental flows for the River Murray, including unregulated flows, requires a “One River” approach. In this respect, the appropriate vehicle is an agreed Living Murray Watering Plan, as amended from time to time...

Directs the Murray-Darling Basin Commission to include in its report advice on how unregulated flows within the Murray-Darling Basin might be clearly defined, quantified, managed, monitored and reported on in The Living Murray Initiative...”

3.2 Minimizing the need to recover additional new water

Jurisdictions are finding it challenging to recover the 500 gigalitres of water for the River as is required by the First Step of The Living Murray. Additional volumes of “new water” will need to be recovered under subsequent steps of The Living Murray in order to restore the River to good health. How any such water is recovered remains open.¹¹⁶

The Commission, and each jurisdiction, wishes to minimize the amount of additional “new water” that is recovered from consumptive users, including from irrigators, following the successful implementation of the First Step in restoring the River to good health. The only future option available to the Ministerial Council to achieve this objective through better flows – other than recovering additional “new water” from consumptive users – is to better manage unregulated flows¹¹⁷ and we need to get this right.

The optimal management of unregulated flows to achieve specific environmental outcomes for the six significant ecological assets and other local assets may reduce the additional volume of “new water” that will need to be recovered after the implementation of the First Step to restore the River to good health.

If unregulated flows are not collectively managed for the health of the overall river system its health will continue to decline and pressure to recover significant additional volumes of “new water” from consumptive users will only increase.

4. Creating modern and effective governance and compliance arrangements.

The importance of ‘good governance’ for sustainable development¹¹⁸ and of effective water governance has been universally recognised.¹¹⁹ Governance arrangements are not static; they evolve over time to adapt to changing circumstances.

The governance of the Commission has evolved over the years. In 1987 it was expanded from one commissioner per jurisdiction to two commissioners. Its role was also revised to include advising the new peak body under the Agreement, the Ministerial Council. The time has arrived for the further reform of the Commission¹²⁰ in order to:

¹¹⁵ “Unregulated Flows – An Immediate Threat”, Murray-Darling Basin Ministerial Council Meeting No 40, May 2006.

¹¹⁶ Which could be through the use of an array of other market based measures including leasing water and purchasing options.

¹¹⁷ Addressing the six risks to shared water resources does not provide additional water.

¹¹⁸ The World Summit on Sustainable Development Johannesburg Plan of Implementation stated that “good governance within each country and at the international level is essential for sustainable development”.

¹¹⁹ And numerous initiatives have been launched to promote water governance such as the joint initiative of the United Nations Development Programme and Stockholm International Water Institute through the Water Governance Facility available at <http://www.watergovernance.org/> visited July 2006 and the Global Water Partnership available at <http://www.gwpforum.org/servlet/PSP>.

¹²⁰ Having viewed the Initiative from many different perspectives, including as a Chief of Staff to a member of the Ministerial Council, Commissioner, Chief Executive of a government agency responsible for *inter alia* water resources management, and now independent Commissioner.

- provide the Ministerial Council with a more independent source of advice;
- give it the capacity to more effectively implement decisions of the Ministerial Council;
- more clearly define its roles and responsibilities; and
- be more open, transparent and accountable to governments and the community for its actions.

In 2001 the South Australian Parliament released a report supported by all political parties that recognised the need to reform the Commission.¹²¹ More recently the Commonwealth, as a pre condition to investing an additional \$500 million in The Living Murray, has required the parties to the Agreement to “*undertake a review of the governance and financing of the Murray Darling Basin Commission...*”¹²².

Views expressed in evidence before a Select Committee of the South Australian Parliament, the downstream state, in 2000 on the need to reform the Commission (see below) remain equally valid today.¹²³

Heads of government agencies work very closely with Ministers, and while not political in a party political sense, are quite properly close to the politics of government. They are contracted to carry out the government's policy agenda¹²⁴ and the expectations of the government of the day and obligations to the Basin under the Agreement may not always coincide. This stands in contrast to the intended role of Commissioners under the Agreement to act in the best interests of the Basin without regard to political borders, although this obligation is not expressly stated.¹²⁵

The Commission has been inclined to shadow the political debate, to reflect jurisdictional positions and to exercise excessive caution in the nature of the advice it provides to the Ministerial Council. Advice from a body of this nature should be frank and fearless and the politics of the Basin should be left for the elected members to debate, namely the Ministers who comprise the Ministerial Council, not the Commission.¹²⁶

Since returning to the Commission in 2006, it is now equally apparent that a level of independence is also required in the implementation of measures agreed under the

¹²¹ House of Assembly Select Committee on the River Murray (3 May 2000 and 13 March 2001), Official Hansard Report, Parliament of South Australia available at: <http://www.parliament.sa.gov.au/committees/committee.asp?doCmd=show&intID=11> viewed June 2006. Committee Chair, the Hon David Wotton, is now the Chair of the South Australian Murray Darling Basin Natural Resources Management Board and Committee Member, the Hon Karlene Maywald MP, is now South Australia's Minister for the River Murray.

¹²² See Agenda Item 5A Ministerial Council Meeting 40 – May 2006. See also Hon Malcolm Turnbull MP “Commonwealth Injects \$500 Million, New Urgency Into Water Recovery For Murray Darling Basin”, Media Release available at <http://www.malcolmturnbull.com.au/news/default.asp?action=article&ID=441> viewed June 2006.

¹²³ See transcript of Scanlon J, House of Assembly Select Committee on the River Murray (3 May 2000 and 13 March 2001), Official Hansard Report, Parliament of South Australia available at: <http://www.parliament.sa.gov.au/committees/committee.asp?doCmd=show&intID=11> viewed June 2006. See also Scanlon, J “The Need to Reform the Murray Darling Basin Commission”, (2001) 18 Environmental and Planning Law Journal at 230.

¹²⁴ Department heads today are typically placed on three to five year contracts and subject to one to three months notice of removal without cause, and contracts of employment require the promotion of the government's policy agenda. By way of example, the author's own contract with the then Premier of South Australia as head of department said that he was to “*faithfully serve the SA Government and at all times use his [my] best endeavours to promote the interests of the SA Government*”. There was nothing unusual or inappropriate about this, and the government of the day quite reasonably expects its Chief Executives to give effect to its policies.

¹²⁵ This role would be clearer if the Commission was treated as body corporate. For a discussion of this issue see Clark, SD, “Divided Power, Co-operative Solutions”, *Uncharted Waters*, (MDBC 2002) at 15.

¹²⁶ The Commission has achieved a lot over the years, and there have been many excellent and committed Commissioners. This is no criticism of individual Commissioners or their personal commitment to the Basin.

Agreement. Under current arrangements the heads of state agencies responsible for the implementation of many measures, and related federally funded programmes, sit on the Commission, which is also often responsible for overseeing, reviewing or advising the Ministerial Council on the implementation of the very same initiatives.

It is time to have a more independent Commission; one that is skills based¹²⁷ with members obliged to act in the best interest of the Commission and able to dedicate sufficient time to the significant task at hand. However, to be effective, the Commission also requires good links into state and Commonwealth agencies that possess significant knowledge and expertise and remain critical to the success of the Initiative.

The challenge in reforming the Commission is to achieve an appropriate level of independence while retaining strong links to these agencies. This can be achieved through a Commissioner being appointed by each party from within government as an *ex officio* non-voting member, which is further discussed below, the continued involvement of agency staff on committees of the Commission and through the ongoing role of the network of departmental liaison officers.

A selection process for independent members of the Commission was recommended in evidence before the Select Committee¹²⁸ that closely followed the process used at Commonwealth level for appointments to research and development cooperation boards. This process should be adapted and applied to the appointment of a skills based Commission. It would involve the Chair of the Ministerial Council appointing a selection panel following consultation with all members of the Council, an open process of inviting expressions of interest in being appointed to the Commission, and the Panel making nominations to the Chair based upon established selection criteria. The Minister's discretion to reject nominations would be constrained but if exercised would require the process to be repeated. The evidence presented to the Select Committee included the following:

"So your Murray Darling Basin Commission would be comprised of a president, six skills based individuals, the chair of the Community Advisory Committee (CAC), the chief executive of the office, and a government officer from each of the participating states. However, the only voting members of the commission would be the president and the six skills based officers appointed following that selection process. That would ensure that the ministerial council does have access to a skills based commission, but it would also ensure that the commission retains its linkages through to government agencies of all participating jurisdictions and also retains linkages with the CAC and the office."

The Select Committee's recommendations closely followed this evidence, with the Committee's findings including recommendation 4, which states that¹²⁹:

"The Murray-Darling Basin Ministerial Council give consideration to the composition of the Murray-Darling Basin Commission with the aim of changing it to an independent, expert (skills-based) Commission. The Commission must contain skills

¹²⁷ Membership should be drawn from appropriate disciplines including finance, business management, science and technology, law, engineering, conservation and management of natural resources, and government.

¹²⁸ See transcript of Scanlon J, House of Assembly Select Committee on the River Murray (3 May 2000 and 13 March 2001), Official Hansard Report, Parliament of South Australia available at: <http://www.parliament.sa.gov.au/committees/committee.asp?doCmd=show&intID=11> viewed June 2006.

¹²⁹ South Australian Select Committee on the Murray River Final Report – 2001 Parliament of South Australia at 6 available at: <http://www.parliament.sa.gov.au/committees/committee.asp?doCmd=show&intID=11> viewed June 2006.

in ecology and natural resource management, irrigation technology, engineering, finance and business administration, resource economics, law, regional development and public administration.

- *The structure of the new Commission be:*

- *an independent President*
 - *six Commissioners who between them have extensive experience and/or qualifications in the disciplines of ecology and natural resource management, irrigation technology, engineering, finance and business administration, resource economics, law and regional development*
 - *a senior bureaucrat from each of the Murray-Darling Basin Initiative partners*
 - *Chair, Community Advisory Committee (non-voting member)*
 - *Chief Executive Officer, Office of the Murray-Darling Basin Commission (non-voting member).*
- *The model used to appoint Directors to Research and Development Corporations under the Commonwealth's Primary Industries and Energy Research and Development Act, 1989 be applied to the appointment of Commissioners, with responsibility for the selection process delegated to the Chair, Murray-Darling Basin Ministerial Council.*
 - *The appointment process, where possible, seek to obtain a reasonable geographic spread of Commissioners from across the various Basin states."*

In addition to this recommendation¹³⁰ we also need to clearly set out in the Agreement and implementing legislation that Commissioners are to act in the best interest of the Commission, establish the Commission as a statutory board to direct, govern, guide, monitor, oversee, and supervise the work of the Office of the Commission, recognise and describe the role and function of the Office, and include requirements for the more open and transparent transaction of the Commission's business.

4.1 Moving ahead with Independent Commissioners

Learned writers such as Professors Clark and Cullen have expressed a variety of views on reform of the Ministerial Council and Commission.

Of particular note are the opinions expressed by Professor Sandford D. Clark¹³¹ in an article written in 2002 that drew upon many years of experience.¹³² Amongst a variety of options Professor Clark expressed the view that:

*"The present principle of unanimity should...be abolished in favour of decisions by a majority of ministers or commissioners voting on any issue. Further, legislation in each jurisdiction should require that any person appointed as a Commissioner or Deputy Commissioner must have such skills, experience and background relevant to the business of the Commission as will allow that person to understand and participate effectively in making decisions upon issues determined by the Commission."*¹³³

The notion of appointing Commissioners on the basis of their skills was also supported by Professor Peter Cullen through a recommendation made to the Government of South

¹³⁰ The author would appoint government members as *ex officio* non voting members.

¹³¹ A long time legal adviser to the Commission.

¹³² An early contribution being his submission to the River Murray Select Committee and Working Party in March 1975 titled "Possible Changes in River Murray Administration" available from the Office of the Commission.

¹³³ Sandford D Clark, "Divided Power, Co-operative Solutions?", *Unchartered Waters*, (MDBC 2002).

Australia as an 'Adelaide Thinker in Residence' in 2004.¹³⁴ Professor Cullen recommended that:

"Recommendation 7

South Australia should appoint one of its Murray Darling Basin Commissioners to speak from a whole of government perspective. The second Commissioner position should be used as an opportunity to appoint an expert in a relevant area..."

The South Australian Government took the lead under the Agreement when it implemented this recommendation in January 2006 through the appointment of the author as Australia's first independent commissioner, with terms of reference that included providing:

"Strategic advice...on improving communication and collaboration between government agencies, academia and industry...maximising Commonwealth involvement and commitment to the MDBC¹³⁵ and the development of appropriate policy; an independent assessment of issues raised at the MDBC; leadership and knowledge at the MDBC."

Minister Maywald also encouraged other governments to follow South Australia's lead. To date no other independent commissioners have been appointed.

4.2 Utilizing Majority Voting – a first for the Commission

While most of the decisions required to administer the Agreement needs the unanimous vote of all Commissioners present and constituting a quorum,¹³⁶ the Commission can provide advice to the Ministerial Council by majority vote.¹³⁷ In the case of a majority vote, the President and each Commissioner may tender separate advice to the Council.

This option was exercised for the first time under the Agreement in March 2006 – with advice on The Living Murray being provided to the Ministerial Council by both a majority of Commissioners and the author's minority report. At the heart of the issue was the nature of the advice to be provided to the Ministerial Council on the progress being made in implementing The Living Murray First Step.

The minority report provided unequivocal advice to the Ministerial Council that The Living Murray First Step was not going to be implemented within the agreed timeframes for a variety of reasons, including due to a significant underinvestment by participating jurisdictions¹³⁸ and reluctance to purchasing water from willing sellers.¹³⁹

4.3 Majority Voting – removing the veto from the Ministerial Council

The Ministerial Council takes all of its decisions by a unanimous vote of all Ministers present who constitute a quorum.¹⁴⁰ This has, on occasion, led to a situation where one jurisdiction has held out and effectively vetoed progress on reform.¹⁴¹ There are many examples around of political bodies adopting voting requiring a qualified majority or

¹³⁴ See report of Cullen P, *Water Challenges for South Australia in the 21st Century*, (Government of South Australia September 2004).

¹³⁵ Murray Darling Basin Commission.

¹³⁶ See Clause 32 of the Agreement.

¹³⁷ See Clause 17 of the Agreement.

¹³⁸ The Commonwealth Government came to the financial rescue of The Living Murray by unilaterally agreeing to invest a further \$500 million thereby ensuring there was no financial impediment to implementation.

¹³⁹ See Agenda Item 9.3 Ministerial Council Meeting 40 – May 2006 referenced by Minister Maywald in Agenda Item 9.4.

¹⁴⁰ See Clause 12(3) of the Agreement.

¹⁴¹ See generally Clark, SD, "Divided Power, Co-operative Solutions", *Unchartered Waters*, (MDBC 2002).

super majority, rather than either a unanimous decision or simple majority vote, of which the European Council of Ministers is one.

A move to majority voting by the Ministerial Council should be promoted but the majority should require five of the six participating governments, thereby ensuring strong support for a measure but preventing a veto. The extension of qualified majority voting to all decisions of the Commission should also be incorporated into the Agreement to facilitate its administration.

5. Fully implementing major initiatives of the Ministerial Council and in particular the Cap on water diversions, Basin Salinity Management Strategy, Living Murray First Step and inter-state trade.

These initiatives represent major achievements of the Ministerial Council but a closer analysis of the independent audits and the facts reveals that we are still falling short on implementation. For example, the Cap targets have still not been established in all jurisdictions ten years after it was agreed to cap diversions,¹⁴² the Registers required under the Basin Salinity Management Strategy have not been created in accordance with the Operational Protocols and cannot be used with confidence,¹⁴³ water has not yet been recovered under The Living Murray, the decisions on unregulated flows have not yet moved forward,¹⁴⁴ and implementing the expansion of inter-state trade is not fully across the line.

It is not the purpose of this paper to run through the implementation challenges in detail, rather it is to highlight the importance of ensuring we maintain our focus on implementation and not be unduly distracted by the next emerging policy initiative.

Effective 'on ground' implementation is the true test of policy success. Implementation does not happen by itself. It requires people with the necessary skills to deliver 'on ground' results and an ongoing process of building capacity.

Implementation of the Initiative is essentially a matter for state agencies and the Commission, with success being inextricably linked to having the capacity to deliver on Australia's broad and ambitious reform agenda at a time when state agency, and until recently Commission, budgets are shrinking. Many of the measures and programs developed through the Initiative are highly complex and demand significant professional expertise and experience. Successful implementation will require sustained levels of investment at agency and Commission levels.

6. Achieving compliance with the National Water Initiative.

"For the first time, all Australian governments have committed to a national blueprint for water reform... The National Water Initiative is the agreed blueprint for the reform of water management throughout Australia."

Australian Prime Minister, Hon John Howard MP.¹⁴⁵

The National Water Initiative has set an ambitious water reform agenda that makes good use of market based measures to address our water resources challenges. As with other bold policy initiatives implementation is the key, and in this case implementation

¹⁴² See "Review of Cap Implementation 2004/5, Report of the Independent Audit Group", (March 2006) MDBC.

¹⁴³ See "Report of the Independent Audit Group for Salinity 2004-2005", (April 2006) MDBC at 6.

¹⁴⁴ See Agenda Items 9.3 and 9.4 Ministerial Council Meeting 40 – May 2006.

¹⁴⁵ Transcript of the Prime Minister, the Hon John Howard MP "Address to the Committee for Economic Development of Australia" and "Securing Australia's Water Future July 2006 Update", (17 July 2006) Sydney Convention and Exhibition Centre.

essentially rests with the states. Unlike the 1994 CoAG Water Related Reforms¹⁴⁶, compliance with the National Water Initiative is not tied to competition payments, nor does it include any legislative compliance options.

If the National Water Initiative is to be implemented within agreed timeframes then, at a minimum, we will need to start directly linking compliance to funding. This will be important for the recovery of the health and ongoing productivity of the River Murray.

The National Water Initiative requires the Murray Darling Basin parties to review the Agreement to ensure it is consistent with the National Water Initiative.¹⁴⁷ Steps are underway to carry out this review, which includes determining its consistency with the requirements of the National Water Initiative in relation to integrated water resources management, adaptive management and managing the shared risks to water resources referred to above. In this context the Murray Darling Basin Initiative's water sharing rules¹⁴⁸ and the way in which they are administered is of particular significance. Unlike many other aspects of the Agreement, the water sharing rules have changed little since the time of the *River Murray Waters Agreement of 1914* and judged by today's standards they are inconsistent with both the National Water Initiative and the Living Murray Intergovernmental Agreement, in particular with regards to recognising the "environmental and other public benefit outcomes sought for water systems".¹⁴⁹

The Commonwealth, as a pre condition to investing an additional \$500 million in The Living Murray Initiative, has required a wide ranging review of the Agreement.¹⁵⁰ This review will address the governance and financing of the Commission and Basin water sharing and natural resource management arrangements generally, including the case for creating a new legal entity to hold and operate water entitlements acquired by the Commission.

The requirement for these reviews gives the parties the opportunity to address each of the challenges referred to above. It also provides the opportunity for the Commonwealth to consider whether to start tying funding under the National Water Initiative and its ongoing investment in the Murray Darling Basin Initiative to achieving necessary reform.

¹⁴⁶ The National Competition Policy was an agreement between the Commonwealth and state and territory Governments to progress a nationally coordinated approach to microeconomic reform in return for a series of national competition tranche payments, based upon the effective implementation of the reform agenda. The reform agenda included so called 'related' reforms, including the strategic framework for the reform of the Australian water industry, adopted by all Australian governments in 1994. Through including the 'related reforms', the National Competition Policy entrenched the following issues on the national agenda:

- identifying and managing assets;
- efficient pricing;
- trade in water rights;
- environment flows; and
- community involvement.

More specifically, this strategic framework included provisions relating to urban and rural pricing, separating water allocations or entitlements from land title, institutional reform, water trading, third party access to infrastructure, environment flows and community consultation.

¹⁴⁷ See Clause 14 of the National Water Initiative.

¹⁴⁸ See Part X – Distribution of Waters of the Agreement.

¹⁴⁹ See for example Clauses 78-79 of the National Water Initiative.

¹⁵⁰ See Agenda Item 5a: Australian Government Funding Package paragraph 5(h), Ministerial Council Meeting 40 – May 2006.

VI. A never ending story – creating the framework for ongoing negotiations

We are now just over one century into the negotiating process, which will continue on in perpetuity as governments and the community adapt to changing economic, social and environmental conditions by utilizing innovative tools to enhance productivity and improve the ecological health of the Basin, and so it should be.

High tension over the sharing of the resources of the River Murray, and later the Murray Darling Basin, can be traced back to the 1880's, being the time when irrigation schemes first started to emerge in one of the up stream colonies causing alarm to the down stream colony that had invested heavily in navigation to promote trade and communications.

Many Royal Commissions and government and community based conferences have been held both prior to and since the creation of the Commonwealth of Australia in 1901 and strongly held negotiating positions have been argued with great vigor. However, a sense of shared ownership and responsibility has prevailed as the parties have strived to work with the Basin community to find pragmatic and cooperative solutions to the economic, social, and now increasingly environmental challenges that confront the Basin, its governments and its community.

The legislative framework created in 1915 has changed ever since, including in 1987 to cover the entire Murray Darling Basin and to incorporate all jurisdictions and the community into the process. The Initiative's solid legislative framework and the willingness to review and adapt this framework over time has provided a sound and robust negotiating environment within which to operate and confront new challenges as they emerge.

Over the past century we have done some truly great things in the Basin along with some things that, with the benefit of hindsight, we might have done differently. We now have the benefit of a significant knowledge base, which gives us the foresight to better understand the consequences of our current and future actions.

The latest version of the Agreement has been in place since 1992 (revised in 1996). As has been described in this paper, we have now entered an era where we are confronting new and significant challenges. The inescapable conclusion from all of the knowledge available is that changes are required to the Agreement and how we administer it if we are going to successfully implement what has been agreed by all governments needs to be done to restore the system to good health and to maintain productivity.

If we make the necessary changes we will be heading in the right direction and pass on a healthy and productive Basin to the next generation of Australians – if not, a steady decline in the health and productivity of the system is assured.

Which direction we decide to take is up to all of us.

31 July 2006