Submission No 289

INQUIRY INTO FLOODPLAIN HARVESTING

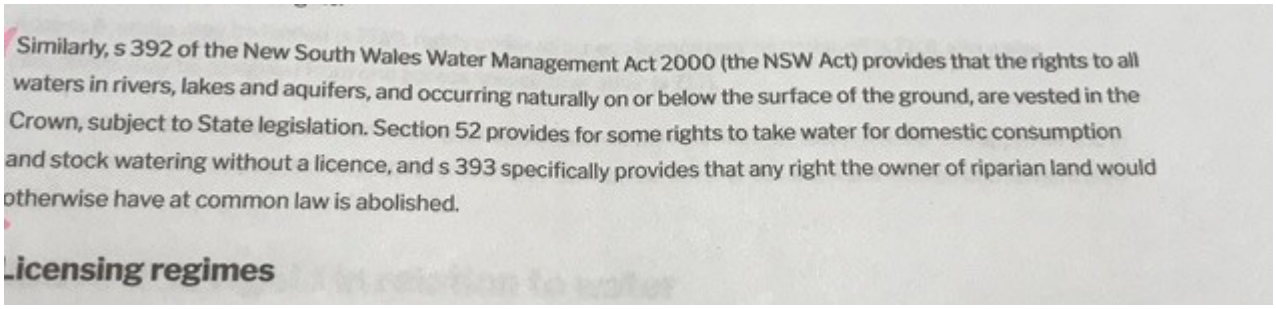
Name: Mr Dugald Bucknell

Date Received: 19 September 2021

Thank you for the Opportunity to make a submission.
Please accept my submission to the panel in regard to the NSW UPPER HOUSE INQUIRY INTO FLOODPLAIN HARVESTING.

I live in Quambone, NSW, running 9 properties, grazing cattle in & beside the Macquarie marshes floodplain.

I would like to draw to your attention to the Legal Briefing No. 90 done by the Australian Government Solicitor (AGS) dated from the 21st of July, 2009 (full legal advice below my sub). In particular,

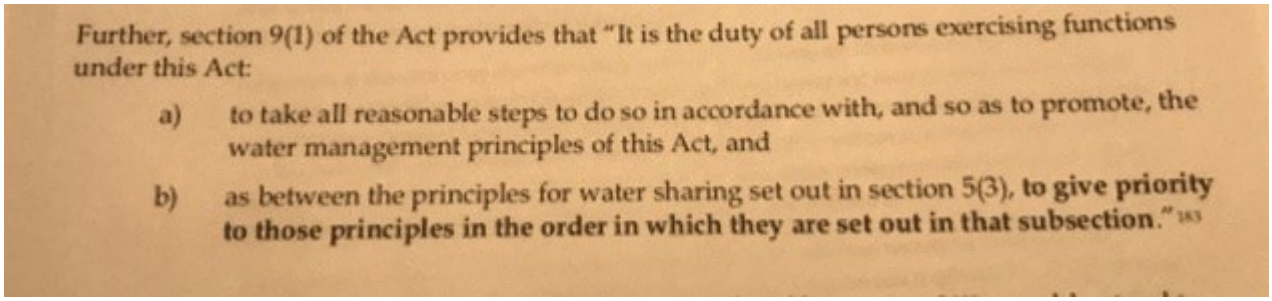


Similarly, s 392 of the New South Wales Water Management Act 2000 (the NSW Act) provides that the rights to all waters in rivers, lakes and aquifers, and occurring naturally on or below the surface of the ground, are vested in the Crown, subject to State legislation. Section 52 provides for some rights to take water for domestic consumption and stock watering without a licence, and s 393 specifically provides that any right the owner of riparian land would otherwise have at common law is abolished.

Licensing regimes

This legal advice is not included in the legal advices noted in the South Australian Royal Commission, of which only one is publicly available, dated 26th of the 10th 2010 (attached below as Sub 54-Kelly).
Robert Orr QC was chief general counsel for both legal advices. Therefore the government accepted the first, or he wouldn't have been asked to do the second. interestingly, Alice Kingsland, Counsel,
was working for the MDBA at the time of the Legal Briefing No 90 advice and thus the MDBA should be fully aware of its contents.

Clearly the AGS believe that floodplain harvesting (FPH) has no common law rights and under section 52, it is not stock watering or domestic consumption and floodplain harvesting is unlicensed, so it has no statutory rights.
IF there is any doubts about the rights of FPH it is resolved by section 9 (1) ab) of the Water Management Act (WMA) which sets out the priority in which the principles of the act have to be carried out.

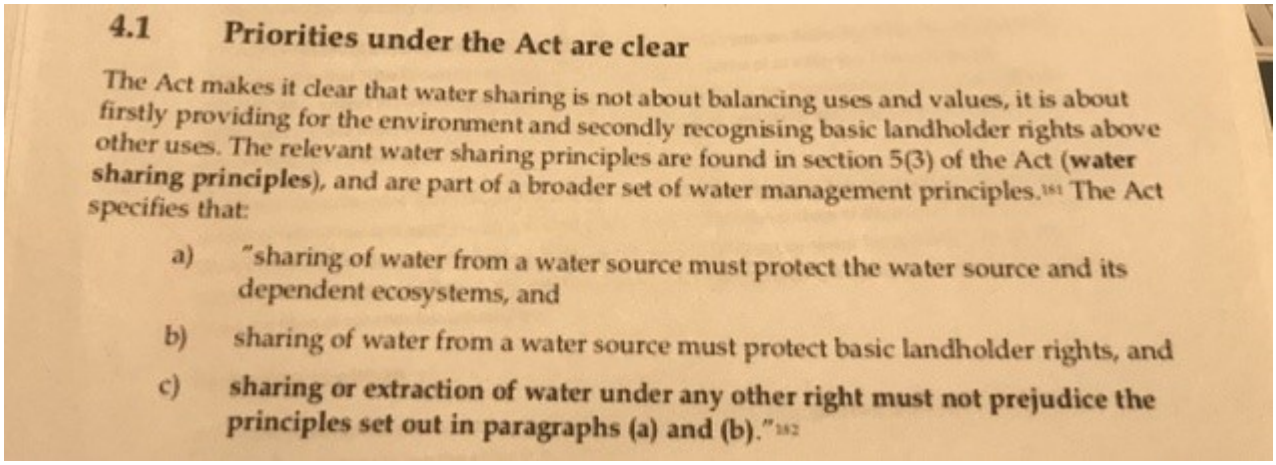


Further, section 9(1) of the Act provides that "It is the duty of all persons exercising functions under this Act:

a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and

b) as between the principles for water sharing set out in section 5(3), **to give priority to those principles in the order in which they are set out in that subsection**."[183]

The following photo sets out the order in which the principles have to be carried out
.



4.1 Priorities under the Act are clear

The Act makes it clear that water sharing is not about balancing uses and values, it is about firstly providing for the environment and secondly recognising basic landholder rights above other uses. The relevant water sharing principles are found in section 5(3) of the Act (**water sharing principles**), and are part of a broader set of water management principles.[181] The Act specifies that:

a) "sharing of water from a water source must protect the water source and its dependent ecosystems, and

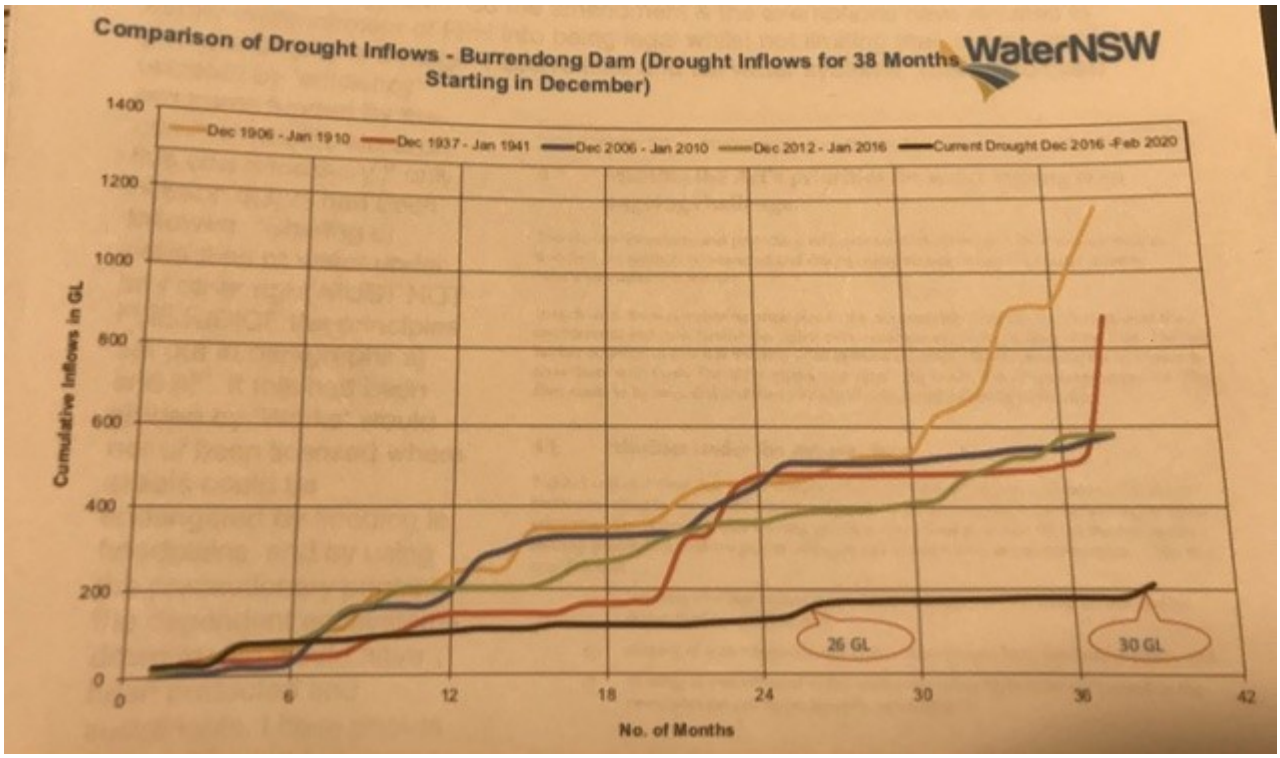
b) sharing of water from a water source must protect basic landholder rights, and

c) **sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b)**."[182]

The administration of the WMA has been incorrectly constructed. In my opinion the finding of the South Australian Royal Commission of Maladministration, unlawfulness and political fixes

can be directed at the NSW Government and bureaucrats.

To give you a REAL, not modelled, example. This last drought in the Macquarie River was 35% of the previous drought of record (DOR).

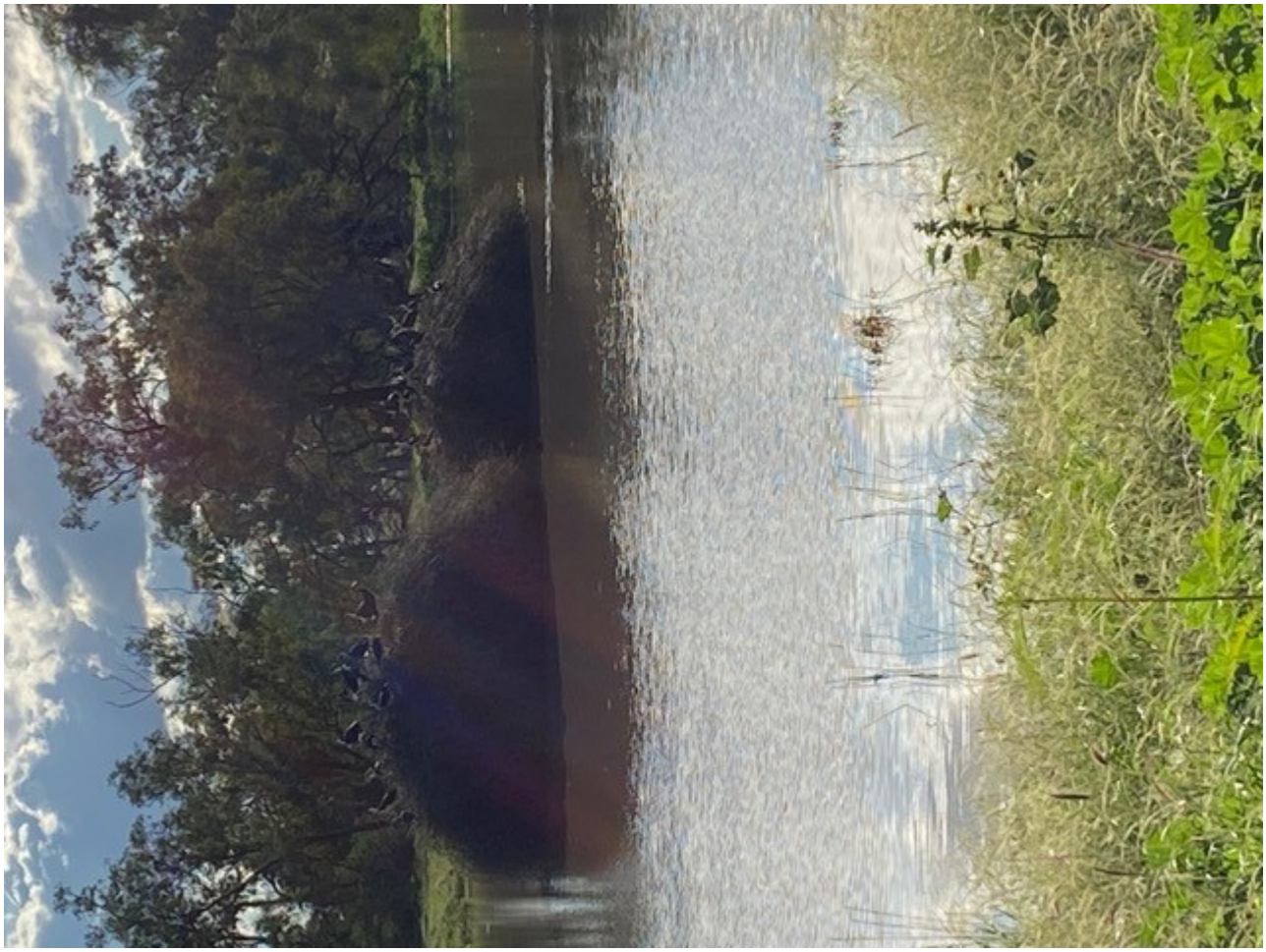


Burrendong Dam was approximately 1% full.
The drought broke Feb/March 2020.
The first water extracted was supplementary water then floodplain harvesting water was taken, next general security carry over water was returned and made available.
Now Burrendong Dam is approx. 85% full (1 million megs).

Macquarie Marshes and floodplain has had about 20,000 hectares out of 200,000 hectares flooded to some degree, enough to grow some reed bed in the core northern marsh but far, far short
of protecting the water source and its dependant ecosystem S5(3)a.

The apex group of animals in the Macquarie Marshes are the colonial nesting birds which can be best represented by the Ibis. Ibis have an average life expectancy of about 8 years.
The Macquarie Marshes are a listed Ramsar Site for wetlands primarily for the colonial nesting waterbirds.

In the 1970s there was an estimated 500k breeding pair, ie 1 million birds. In 2010 and 2011 there was an estimated 50,000 breeding pair. In 2016 there was an estimated breeding pair of 30,000.
In 2020 all the adults and chicks from 2010 and 2011 are dead (old age). The only birds that remain are the chicks from 2016 and are now 5 years old, over half way through their life.
These birds would have attempted to breed if the water had not been prevented or slowed down from getting to their nesting colonies.
They attempted to nest on lignum towards the back of my house which has never happened before.
The birds may or may not have been successful in raising chicks, but for the Gov't, Departments and the irrigation industry to prevent any possibly of breeding event, I consider criminal.



For a small bird breeding event to occur (with high probability of failure) approx 250,000 megalitres of water at the correct time is required.
For a high probability of success above 400,000 megs is required at the correct time, height and duration.
The Department admits “These events are highly episodic and, in some cases, only occur once in every five or more years.”
It is proposed that the annual take for floodplain harvesting (FPH) is one meg per share (this may be changed, more or less) totalling 62,791 megs per year with a five year carry over.
This amounts to 313,955 megs over five years.

As the Macquarie is predominantly a winter catchment and flooding river and the water year starts on the 1st of July, this adds an extra year of take to floodplain harvesting.
Thus, 313,955 + 62,791 = 376, 746 megs can be taken at the Departments “highly episodic flood intervals”.

The result of this floodplain harvesting take upstream of the Macquarie marshes will be to destroy/prevent the first bird breeding event of every flood.
This is clearly not a Environmentally Sustainable Level of Take (ESLT) or a Sustainable Diversion Limit (SDL)

The result is that the 'duty' under the act and the 'principles' of the act are being unlawfully maladministered for the benefit of a few irrigators with no common law, or statutory rights,
which cannot be in the ‘National interest’ which incidentally is the number 1 objective of the commonwealth water act, 2007.

I believe the only way ahead is an open terms of reference royal commission to return the Murray Darling Basin ecosystem to sustainability for future generations.

If I could be of further assistance, don’t hesitate t contact me.

Yours Sincerely

Dugald Bucknell
Quambone Station
Quambone 2831

Legal briefing No. 90
Number 90
21 July 2009

Water was a significant subject of debate in the development of the Australian Constitution in the late 1800s, when we suffered under the 'federation drought'.1 In the context of the current drought, the state of the Murray-Darling Basin, and climate change, it has re-emerged as a major policy issue in which the Commonwealth is now heavily involved.

Recent changes to the landscape of water law in Australia, and particularly to the management of water resources in the Murray-Darling Basin, have been implemented through Commonwealth and State legislation as well as administrative and commercial arrangements.

This briefing is designed to give Commonwealth departments and agencies an understanding of these changes to water law, and in particular how they will impact on policy development and other activities affecting water use in the Murray-Darling Basin.

Outline

In this briefing we discuss the key issues in relation to the law of water rights in Australia; in particular, the new Commonwealth Water Act 2007 as amended by the Water Amendment Act 2008. Amongst other things, the Water Act requires the development of a Basin Plan for the integrated management of water in the Murray-Darling Basin. Though the obligations created by this Plan will mainly impact on States and individuals within the Murray-Darling Basin, they will also be binding on and relevant to the activities of Commonwealth government departments and agencies.

We provide a general outline of the key recent policy developments in relation to water. We then discuss:

- the nature of common law water rights
- the legislative water rights that have developed in Australia
- native title rights in relation to water
- the Murray-Darling Basin Agreement
- the significant reforms introduced by the Water Act and new Murray-Darling Basin Agreement, in particular in relation to:
- the Murray-Darling Basin Authority (the MDBA)
- the Murray-Darling Basin Ministerial Council (the Ministerial Council) and the Basin Officials Committee
- the Basin Plan and water resource plans
- allocation of risks
- water sharing between the Southern Murray-Darling Basin States and the provision of water to meet critical human water needs
- water charge rules and water market rules
- the Commonwealth Environmental Water Holder
- water information
- other Commonwealth laws that have an impact on water rights; in particular, the National Water Commission Act 2004 (Cth)
- the basic constitutional principles involved in these Commonwealth initiatives; in particular, the relevant powers and the limitations on those powers
- some key issues for Commonwealth grants in relation to water projects, and the purchase of water rights.

Introduction

Water resource management has been an issue in Australia since pre-federation times. In particular in the Murray-Darling Basin (which has been called 'Australia's foodbowl'), it has been characterised by tension between governments and competition between different interests and users. The current drought and the onset of climate change have further highlighted the

environmental issues that have been developing for many years in the Basin, and are placing significant strain on the Basin's water resources and ecosystems and the communities that depend on these.

Since 1915, the Commonwealth government and the governments of New South Wales, Victoria and South Australia have carried out aspects of water resource management in the Murray-Darling Basin through an intergovernmental body known first as the River Murray Commission and subsequently as the Murray-Darling Basin Commission (a body that will be discussed in further detail later in this briefing). However, from the 1990s, there have been a number of significant developments in water resource management reform which have culminated in the Commonwealth introducing a legislative program in this area.

2004 National Water Initiative

In 1994, the Council of Australian Governments (COAG) adopted a strategy for the efficient and sustainable reform of national water governance. This strategy was enhanced in 1996. COAG then agreed that the strategy needed further specificity, which resulted in the signing of the Intergovernmental Agreement on a National Water Initiative (the 2004 National Water Initiative) in June 2004 by all governments except those of Tasmania and Western Australia, which subsequently signed in June 2005 and April 2006 respectively. Under the 2004 National Water Initiative, the Commonwealth, States and Territories agreed on the importance of servicing the water needs of rural and urban communities while ensuring the health of river and groundwater systems. They agreed to measures to pursue the policy on increasing the productivity and efficiency of Australia's water use outlined in the 1994 COAG strategy. Under the 2004 National Water Initiative, governments made a number of further commitments, including to:

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

2007 National Plan for Water Security and the Water Act

On 25 January 2007, the Government announced the National Plan for Water Security: a 10-point plan to improve water efficiency and address over-allocation of water in rural Australia. The Plan proposed a number of initiatives, some of which would be addressed by funding programs (such as investment in irrigation infrastructure), and others of which would be addressed through legislative means.

The Water Act, which was assented to in September 2007 and took effect in March 2008, implemented a number of these reforms, the most important being provision for a Basin Plan that would set a sustainable diversion limit on surface and groundwater extraction in the Murray-Darling Basin. We discuss the details of the Water Act further below.

2008 Murray-Darling Basin Memorandum of Understanding

Not long after the commencement of the Water Act, at the COAG meeting of 26 March 2008, First Ministers of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory (the Basin States) and the Commonwealth entered into a Memorandum of Understanding in relation to the Murray-Darling Basin (the March 2008 MOU). First Ministers agreed in principle to implement further cooperative arrangements for the management of water in the Basin that built on the arrangements put in place under the Water Act, particularly in relation to matters on which the Commonwealth did not have constitutional power to legislate.

2008 Intergovernmental Agreement on Murray-Darling Basin Reform

The March 2008 MOU was followed, on 3 July 2008, by the intergovernmental Agreement on Murray-Darling Basin Reform (the 2008 Reform IGA), which set out further details of the

proposed cooperative arrangements, and under which the Basin States agreed to the negotiation of a revised Murray-Darling Basin Agreement and a limited text referral of constitutional powers to the Commonwealth under s 51(xxxvii) of the Constitution. The 2008 Reform IGA led to the enactment of the Water Amendment Act by the Commonwealth Parliament, and the enactment of a Water (Commonwealth Powers) Act 2008 by each of the New South Wales, Victorian, South Australian and Queensland Parliaments. The constitutional powers relied on in the Water Act are discussed in more detail below.

These reforms took place within, and further developed, the law in Australia in relation to water rights.

Common law water rights

The legal concept of 'property' is often difficult and sometimes even unhelpful. In Yanner v Eaton (1999) 201 CLR 351, the High Court considered the concept of property in relation to State assertion of property in wild animals, and Gleeson CJ, Gaudron, Kirby and Hayne JJ said (at [17]–[19], footnotes omitted):

The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that 'the ultimate fact about property is that it does not really exist: it is mere illusion'. …

Nevertheless, as Professor Gray also says, 'An extensive frame of reference is created by the notion that "property" consists primarily in control over access. Much of our false thinking about property stems from the residual perception that "property" is itself a thing or resource rather than a legally endorsed concentration of power over things and resources'. …

'Property' is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not 'a monolithic notion of standard content and invariable intensity'.

These comments are relevant to a consideration of 'property' in water or water rights. The development of the concept of 'property' in water or water rights is essentially the development of a bundle of rights in relation to water access and usage. As the High Court discusses extensively in Yanner v Eaton, the relevant bundle of rights in something will depend to a large extent on the nature of the thing concerned. The concept of State 'ownership' of water indicates State responsibility for the resource, and State power to create and regulate bundles of individual usage rights. The 'bundles of rights' created need to meet economic, environmental and social policy objectives.

Historically, water was not owned in the sense in which real and personal property is owned; rather, water was regarded as a public asset or public property common to all who had a right to access it. Access to water resources was an incident of the ownership of land. At common law, the owner or proprietor of land abutting on water (a riparian owner) was entitled to certain rights in relation to the water. The rights of a riparian owner included a right to:

- extract and use such water for ordinary purposes even to the point of exhaustion of the resource
- extract and use such water for extraordinary purposes–but only to the extent that the use was reasonable, and the rights of other riparian owners were not affected.2

Australian State legislative regimes for water rights

Right of primary access

Common law rights and presumptions in relation to water have been affected by legislation in each of the States and mainland Territories of Australia since the late 19th century and early 20th century. In each case a right to take, use, manage or control water resources–sometimes called a 'right of primary access'–has been vested in the Crown or an instrumentality of the Crown.3

A current example of a State provision on primary access is s 7 of the Victorian Water Act 1989 (the Victorian Act), which provides that '[t]he Crown has the right to the use, flow and control of all water in a waterway and all groundwater', subject to certain rights to take and use water conferred by the Victorian Act. Section 8 provides for some rights to take water for domestic or

stock use without a licence, and under s 8(7) rights under the Act replace any common law riparian rights.

Similarly, s 392 of the New South Wales Water Management Act 2000 (the NSW Act) provides that the rights to all waters in rivers, lakes and aquifers, and occurring naturally on or below the surface of the ground, are vested in the Crown, subject to State legislation. Section 52 provides for some rights to take water for domestic consumption and stock watering without a licence, and s 393 specifically provides that any right the owner of riparian land would otherwise have at common law is abolished.

Licensing regimes

After vesting the right of primary access in the Crown, State legislation then generally provides for the State to grant rights to persons to use the water in its jurisdiction.

For example, in Victoria a range of entitlements to water may be issued by the Minister under the Victorian Act. These include water shares, bulk entitlements, environmental entitlements and water licences (see Part 3A and Part 4, Division 1, Division 1A and Division 2). It is generally an offence under the Victorian Act to take water unless this is authorised by a water entitlement, or a statutory right to take water without an entitlement (see e.g. s 33E in respect of water shares). In most cases, in order to use the water available under an entitlement, a person will also be required to obtain a works licence and a water use licence (see Parts 4B and 5).

A water entitlement sets out the maximum amount of water that a person may lawfully take under specific conditions. However, the amount that a person is entitled to take in any given year is dependent upon overall water availability, and is set out in seasonal water allocations (see e.g. ss 33F, 33G, 33AC and 64GB in respect of water shares). Different water entitlements may have different reliabilities in terms of the average amount of water that will be allocated to that entitlement.

Water entitlements, and allocations made under those entitlements, can be traded. However, the circumstances in which trading is permitted can be limited, to a greater or lesser degree, depending on the type of water entitlement concerned and whether the trade is permanent (i.e. of an entitlement) or temporary (i.e. of an allocation) (see e.g. ss 33S, 33T and 33U).

The NSW Act provides for a similar regime.4 Sections 60A and 60C of the NSW Act create offences where a person takes water from a water source other than in accordance with an access licence and a water allocation credited to that licence, or a statutory right to take water without a licence. Section 56 of the NSW Act provides in part:

1. An access licence entitles its holder:

a. to specified shares in the available water within a specified water management area or from a specified water source (the share component), and

b. to take water:

iii. at specified times, at specified rates or in specified circumstances, or in any combination of these, and

iv. in specified areas or from specified locations,

(the extraction component).

Different categories of access licence exist, including regulated river access licences of differing reliabilities, unregulated river access licences, aquifer access licences, and local water utility access licences (s 57).

Access licences are subject to conditions imposed under the NSW Act, by the relevant management plan or by the Minister (s 66). The Minister makes available water determinations which determine the amount of water available to be taken under each access licence (s 59). Access licences may be traded (s 71M), rights under an access licence may be assigned (s 71Q), and water allocations may be assigned from one access licence to another (s 71T).

As under the Victorian Act, a person holding an access licence will also need to obtain a water use approval and in some cases a water supply work approval before they can access water under the water access entitlement (see Part 3).

Native title rights in relation to water

Another type of right in relation to water, which has only relatively recently been identified, is native title. Native title rights in relation to water are rights:

- possessed under the traditional laws and customs of Australia's Indigenous people
- by which they have a connection with waters
- which are 'recognised' by Australian law.

That is, they are rights which, although derived from neither the common law nor legislation (Wik Peoples v Queensland (1996) 187 CLR 1, 213–214; Commonwealth v Yarmirr (2001) 208 CLR 1, [38]), can be enforced and protected by the Australian legal system; for example, by injunctive or declaratory relief.

The High Court held in Mabo v Queensland (No 2) (1992) 175 CLR 1 (Mabo) that the common law recognised native title rights. Recognition was subsequently enhanced by legislation, particularly the Native Title Act 1993. Interestingly, in Mabo the High Court declared that the native title rights of the Meriam people were, as against the whole world, the possession, occupation, use and enjoyment of the lands of the Murray Islands, and did not expressly refer to 'waters'. However, water is the most basic of human requirements, and rights to water are particularly important in a dry continent such as Australia. Moreover, water and the creatures that live in it have significant spiritual significance for Australia's Indigenous people.

The definition of 'native title' in s 223 of the Native Title Act contemplated the possibility that native title rights exist in relation to water by expressly referring to native title rights in relation to 'land or waters' (a term which is itself defined in s 253). This has proven to be the case for both offshore waters (see e.g. Commonwealth v Yarmirr) and inland waters (see e.g. paras 6(i) and 7(i) of the determination of the native title rights of the Ngarlama and Yindjibandi peoples, which includes a non-exclusive 'right to take water for drinking and domestic use': Daniel v Western Australia [2005] FCA 536).

It is not clear whether the common law recognises native title ownership rights in respect of waters, as opposed to user-type rights similar to those already mentioned above for riparian owners.

Whatever the case, native title is capable of regulation and extinguishment by valid legislative and executive actions. Recent cases have confirmed that the water management laws of the States and Territories, some of which have already been mentioned, have extinguished any exclusive native title rights to inland waters (Western Australia v Ward (2002) 213 CLR 1 at [263]; Daniel v Western Australia [2003] FCA 666 at [819]–[820], [853]–[858], [867]–[870]; King v Northern Territory [2007] FCA 944 at [71]–[78]). Offshore native title rights are also non-exclusive (Commonwealth v Yarmirr).

The non-exclusive native title rights in relation to waters, which have not already been extinguished, enjoy the protection of the Native Title Act. This means that these rights cannot be extinguished, or otherwise affected, unless the legislative or executive act in question complies with the Native Title Act. Various provisions of the Act allow for acts which affect native rights in relation to waters–for example, the provisions in Part 2, Division 3, Subdivisions B, C, D and E (Indigenous Land Use Agreements), Subdivision H (management of water and airspace), Subdivision M (freehold test) and Subdivision N (acts affecting offshore places). Generally speaking, these provisions require that various procedures must be followed before the acts can be done, and confer entitlement to compensation on native title holders.

In some current State water management laws, the existence of non-exclusive native title rights to water is recognised. So, for example, s 55(1) of the NSW Act provides:

1. A native title holder is entitled, without the need for an access licence, water supply work approval or water use approval, to take and use water in the exercise of native title rights.

The Murray-Darling Basin Agreement

In 1914, the River Murray Waters Agreement was signed by the Commonwealth and New South Wales, Victoria and South Australia. It took effect in 1915, after being ratified by the four

parliaments.5 This Agreement established the River Murray Commission and charged it with regulating the main course of the River Murray to ensure that the three States received their agreed shares of its water. It also set out the governments' agreement to construct certain large storages as well as numerous weirs and locks on the River Murray.

Throughout the 20th century, the River Murray Waters Agreement was amended and the functions of the River Murray Commission were gradually expanded. In 1987 it was amended significantly by the first Murray-Darling Basin Agreement, and in 1992 it was replaced by a completely new Murray-Darling Basin Agreement. The Murray-Darling Basin Agreement created the Murray-Darling Basin Commission. The jurisdictions each passed legislation in 1993 to ratify the Agreement.6 Queensland and the Australian Capital Territory formally became signatories to the Murray-Darling Basin Agreement in 1996 and 1998 respectively.7

The Murray-Darling Basin Commission was the executive arm of the Ministerial Council and was responsible for:

- managing the River Murray and the Menindee Lakes system of the lower Darling River
- advising the Ministerial Council on matters related to the use of the water, land and other environmental resources of the Murray-Darling Basin.

The Commission was equally responsible to the governments represented on the Ministerial Council as well as to the Council itself. It was not a government department or a statutory body of any individual government. The legislation of the jurisdictions provided that the Commission had the functions, powers and duties expressed to be conferred on it by the Agreement.8

The main functions of the Commission, which were specified in cl 17 of the former Murray-Darling Basin Agreement, were:

- to advise the Ministerial Council in relation to the planning, development and management of the Basin's natural resources
- to assist the Ministerial Council in developing measures for the equitable, efficient and sustainable use of the Basin's natural resources9
- to coordinate the implementation of, or (where required by the Ministerial Council) to implement, those measures
- to give effect to any policy or decision of the Ministerial Council.

As discussed above, the Basin governments agreed to various reforms in March 2008. One of the main elements of their agreement was that the Commission would cease to exist and that the majority of its functions would be transferred to the MDBA, a Commonwealth statutory body which had been newly established by the Water Act.

In order to carry out this reform, a new Murray-Darling Basin Agreement was entered into by the Basin States and the Commonwealth on 1 December 2008. It took effect on 15 December 2008 at the same time as the Water Amendment Act, which added the new Agreement as Schedule 1 to the Water Act.10 The new Agreement revokes the former Murray-Darling Basin Agreement (thereby abolishing the Commission) and confers most of the Commission's former functions on the MDBA. In addition, the new Murray-Darling Basin Agreement confers most of the roles of the former Ministerial Council, and the Commission's former roles in relation to State water shares, on a new Ministerial Council, and establishes the Basin Officials Committee, which advises the Ministerial Council and has a high-level decision-making role in relation to river operations.

While the former Murray-Darling Basin Agreement required each State to pass legislation approving amendments to the Agreement, the new Murray-Darling Basin Agreement can be amended by resolution of the Ministerial Council, with the amendment taking effect upon registration of a legislative instrument by the Commonwealth government amending Schedule 1 to the Water Act (see cl 5 of the Agreement and s 18C of the Water Act).

Greater attention has been given in the new Murray-Darling Basin Agreement to management arrangements for the River Murray in times of drought and, in particular, management arrangements to ensure that critical human water needs are met. The Agreement now provides

for three tiers of water sharing: Tier 1 applies in conditions of normal water availability, Tier 2 applies in times of water shortages when there is a likelihood that critical human water needs will not be met under Tier 1 arrangements, and Tier 3 applies in extreme or unprecedented circumstances.

Commonwealth Water Act and the new Murray-Darling Basin Agreement

The Commonwealth Water Act received Royal Assent on 3 September 2007, and commenced on 3 March 2008. As outlined in the introduction, significant amendments were made to the Water Act by the Water Amendment Act, which commenced on 15 December 2008.

The most significant aspects of the Water Act are discussed below. Because many of these aspects are intricately linked with the new Murray-Darling Basin Agreement, the discussion below also considers aspects of this Agreement.

The Murray-Darling Basin Authority

The MDBA is an expert body that has a range of functions relating to water management in the Murray-Darling Basin. It is established by s 171 of the Water Act, is a body corporate, and is subject to the Financial Management and Accountability Act 1997 (Cth).11 It has the power to acquire, hold and dispose of property, and to enter into contracts, sue and be sued in its own name. The MDBA consists of a Chief Executive, a Chair and four other members (s 177). The staff of the MDBA are engaged under the Public Service Act 1999 (s 206).

The MDBA has two main sets of functions. The first set of functions are largely those that were originally conferred on the MDBA under the Water Act.12 These functions include:

- preparing a Basin Plan and amendments to the Basin Plan (see below for further information about the Basin Plan)
- advising the Minister on accrediting Basin State water resource plans
- enforcing the Basin Plan
- monitoring the quality and quantity of Basin water resources and associated ecosystems.

The MDBA's second set of functions are those that used to be functions of the Murray-Darling Basin Commission under the former Murray-Darling Basin Agreement. These functions are conferred on the MDBA by s 18E(1) of the Water Act, which provides that the MDBA has, in a referring State or the Australian Capital Territory, the functions, powers and duties conferred on it by or under the Murray-Darling Basin Agreement, insofar as they relate to the water and other natural resources of the Murray-Darling Basin.

The MDBA's second set of functions include:

- managing the River Murray and the Menindee Lakes system of the lower Darling River
- advising the Ministerial Council on matters related to the management of the water and other environmental resources of the Murray-Darling Basin.

As part of its management role, the MDBA may, consistently with the Agreement, give directions to Constructing Authorities13 on the efficient construction, operation and maintenance of works and the implementation of measures which have been authorised under the Murray-Darling Basin Agreement. The MDBA is required to manage the River Murray so as to distribute water in accordance with the complex water sharing provisions in Part XII, XIII and XIV of the Agreement.

Under cl 34 of the Agreement, the MDBA is also required to prepare an annual corporate plan and budget and, under cl 53, an asset management plan for approval by the Ministerial Council. The MDBA is required to carry out its functions in accordance with the Agreement, the corporate plan (including the budget), the asset management plan and the asset agreement (cl 29(2)).

Murray-Darling Basin Ministerial Council and Basin Officials Committee

The Murray-Darling Basin Ministerial Council

The Ministerial Council is established by cl 7 of the Murray-Darling Basin Agreement. The functions of this Ministerial Council are similar to those of the Ministerial Council under the former Murray-Darling Basin Agreement. However, whereas the former Ministerial Council had

up to three representatives from each participating government, the new Council consists of only one Minister per government.
The main functions of the Ministerial Council are to:

- decide whether to approve any proposed construction, improvement, replacement or remedy of works on the River Murray, and implement any proposed measures
- make certain high-level decisions in relation to the sharing of water between New South Wales, Victoria and South Australia
- approve the annual corporate plan, budget and asset management plan prepared by the MDBA
- consider and determine outcomes and objectives on major policy issues of common interest to the Contracting Governments in relation to the management of the water and other natural resources in the Murray-Darling Basin.

The Ministerial Council may also agree on amendments to the Murray-Darling Basin Agreement and its Schedules as it considers desirable from time to time (cl 9(d)).
The Basin Officials Committee
The Basin Officials Committee is a body established by cl 17(1) of the Murray-Darling Basin Agreement, and is granted substantive functions under the Murray-Darling Basin Agreement and the Water Act.
The Basin Officials Committee's functions under the Agreement include:

- advising the Ministerial Council in relation to outcomes and objectives on major policy issues relating to the management of the water and other natural resources in the Murray-Darling Basin
- giving effect to policies and decisions of the Ministerial Council when requested by the Council to do so
- exercising responsibility for high-level decision making in relation to river operations14
- exercising the powers and discharging the duties conferred on it by the Agreement or the Water Act. Under s 201 of the Water Act, the Basin Officials Committee can provide advice to the MDBA about the performance of the MDBA's functions and to facilitate cooperation between the Commonwealth, the MDBA and the Basin States in managing the Basin water resources.

The Basin Plan and water resource plans
The MDBA is required to prepare a Basin Plan, the purpose of which is to provide for the integrated management of the water resources in the Murray-Darling Basin in a way that promotes the objects of the Act (ss 3 and 20). The MDBA is required to provide the draft Basin Plan to the Minister, who ultimately has responsibility for making the Plan (s 44). It is expected that the Basin Plan will first be made in mid-2011.
The Basin Plan is made operational through catchment-level water resource plans (generally prepared by the Basin States). New water resource plans are required to be accredited by the Minister, and they may only be accredited if they are consistent with the Basin Plan (ss 55 and 63). If the Basin Plan is amended prior to the expiry of an accredited water resource plan then the water resource plan is permitted to continue in operation until its expiry (generally a maximum of 10 years). However, the water resource plan replacing the expired plan must be made so that it is consistent with the amended Basin Plan.15 The Water Act contains transitional provisions to allow certain Basin State water resource plans existing as at 25 January 2007 to run until their nominated expiry date (transitional water resource plans), and certain Basin State water resource plans made after 25 January 2007 but before the Basin Plan first takes effect to run until 2014 or for a period of five years, whichever is the later (interim water resource plans) although they may not be consistent with the Basin Plan (Part 11, Division 1).
Section 22(1) sets out mandatory content for the Basin Plan, which, most significantly, includes a specific limit on the quantity of water that may be taken, on a sustainable basis, from the Basin water resources as a whole, and specific limits on the quantities of water that can be taken from

the water resources, or parts of the water resources, of each catchment area. These limits must reflect an 'environmentally sustainable level of take' (s 23(1)). This is the level of take of water from a water resource which, if exceeded, would compromise the resource's key environmental assets, key ecosystem functions, productive base or key environmental outcomes (s 4). These limits can be expressed as a formula or in any other way the MDBA determines to be appropriate (s 23(2)). Other mandatory content includes:

- identification of risks to Basin water resources, such as climate change, and strategies to manage those risks
- an environmental watering plan (s 28)
- a water quality and salinity management plan which must include objectives and targets (s 25)
- requirements that a Basin State water resource plan will need to comply with for it to be accredited
- rules about trading of water rights in relation to Basin water resources (s 26).

Further, under Part 2A, the Basin Plan is required to deal with certain matters relating to critical human water needs. These are discussed in more detail below under the heading 'State water sharing arrangements and critical human water needs'.

Compliance with the Basin Plan and water resource plans

Commonwealth agencies are required to perform their functions and exercise their powers consistently with and in a manner that gives effect to the Basin Plan and water resource plans (ss 34, 58 and 86G).

Basin State agencies, operating authorities, infrastructure operators and holders of water access rights must not do an act if the act is inconsistent with the Basin Plan or water resource plans, or fail to do an act if the failure to do that act is inconsistent with the Basin Plan or water resource plans (ss 35, 59 and 86H).

The MDBA is given relevant enforcement powers in relation to the Basin Plan and water resource plans in Part 8 of the Act.

Consultation on and making of the Basin Plan

The consultation requirements for the making of the Basin Plan are extensive. While preparing the Basin Plan, the MDBA is required to consult with the Basin States, the Basin Officials Committee and the Basin Community Committee16 and, when preparing the water trading rules, must obtain, and have regard to, the advice of the Australian Competition and Consumer Commission (ACCC) (s 42).

The MDBA must also conduct an extensive public consultation process on the proposed Basin Plan, providing an opportunity for both Basin States and members of the public to make submissions to the MDBA (s 43). After this consultation (and any resulting amendments) the MDBA must seek comment from each member of the Ministerial Council (s 43A). If one or more members disagree with an aspect of the Basin Plan, the MDBA is required to consider the relevant comments and may undertake further consultation.

After the MDBA has provided the Minister with a draft Basin Plan, the Minister may adopt it, or give it back to the MDBA for further consideration (s 44). The Minister may direct the MDBA to make modifications to the Basin Plan before ultimately adopting it, but not in relation to aspects of the Plan that are of a factual or scientific nature or relate to risk allocation (risk allocation is discussed further below) (s 44(5)).

A similar process of consultation applies to amendments of the Basin Plan (ss 46, 47 and 47A). The MDBA may propose amendments at any time that it considers it desirable to do so (s 45).

Allocation of risks

Under the 2004 National Water Initiative, the Commonwealth and the States and Territories agreed on a 'risk assignment framework' in relation to future reductions, or less reliable allocations, of water for consumptive use. This framework in essence sets out who would bear the risk of future reductions in, or less reliable, water allocations. It provides that:

- the risk of reductions in or less reliable water allocations caused by 'seasonal or long-term changes in climate' and 'periodic natural events such as bushfires and drought' are to be borne by water access entitlement holders (cl 48)
- the risk of reductions in or less reliable water allocations arising as a result of 'bona fide improvements in the knowledge of water systems' capacity to sustain particular extraction levels' (new knowledge) are to be borne by water access entitlement holders up to 2014, and after 2014 are to be shared in certain proportions between water access entitlement holders, the States and the Commonwealth (cl 49)
- the risk of reductions in or less reliable water allocations arising from 'changes in government policy (for example, new environmental objectives)' are to be borne by governments (cl 50).

Division 4 of Part 2 of the Water Act as originally enacted essentially implemented this arrangement at the Commonwealth level. Subdivision A (ss 74–79) of the original Act set out the Commonwealth's responsibility in relation to the risks flowing from reductions in the long-term sustainable diversion limits in the Basin Plan, and Subdivision B (ss 80–86) similarly dealt with changes to reliability flowing from the implementation of other aspects of the Basin Plan. In 2008, as agreed under the 2008 Reform IGA, these provisions were amended so that, in certain circumstances, the Commonwealth takes on the States' share of risk in relation to new knowledge with respect to reductions in long-term sustainable diversion limits from the date of the expiry of transitional/interim water resource plans (the earliest of which expires in 2012). The circumstances are where the relevant Basin State has legislatively implemented the risk assignment framework in their jurisdiction by 30 June 2009, or a later date if agreed to by the Commonwealth, but in any event before the Basin Plan first takes effect. To date only New South Wales benefits from this additional risk taken on by the Commonwealth. Thus, in New South Wales at this stage, the Commonwealth will bear both its and New South Wales's share of risks specified under the 2004 National Water Initiative from the expiry of transitional/interim water resource plans in so far as the risk arises from new knowledge about sustainable diversions from the Basin's rivers.

The Basin Plan will specify the degree to which the Commonwealth is responsible for bearing the risks of each reduction of the long-term average sustainable diversion limit, and each change in reliability caused by other amendments to the Basin Plan. It will do this by allocating to each of the three categories of risk a proportion of the reduction in the sustainable diversion limit or the change in reliability. The Commonwealth is obliged by ss 76 and 82 to endeavour to manage its share of these reductions and changes, but the Water Act does not specify any particular steps that the Commonwealth must take. Under current Commonwealth programs, the Commonwealth proposes to assist water service providers and water users to improve their efficiency of water use, allowing them to more easily adapt to lower water allocations, and is purchasing water access entitlements in order to reduce the impact on water access entitlement holders of setting sustainable diversion limits lower than the current cap (see 'Implementing policy through commercial arrangements' below).

If the Commonwealth does not entirely mitigate the impacts of reductions that are its responsibility (as specified in the 2004 National Water Initiative, or the 2004 National Water Initiative as modified by the 2008 Reform IGA, and as implemented in the Water Act), and as a result there is a reduction in either allocations to a person's water access entitlement or the reliability of a person's allocations, the Commonwealth can incur a liability to pay an amount to offset the loss in market value of the entitlement. Sections 77 and 83 set out how any Commonwealth payment will be determined. The Minister will determine whether a water access entitlement holder qualifies for a payment and, if the holder does qualify, any amount to be paid. An application can be made to the Administrative Appeals Tribunal for review of such a determination by the Minister (ss 77(7) and 83(8)).

State water sharing arrangements and critical human water needs

As mentioned above, as a result of the 2008 Reform IGA, greater attention has been given to management arrangements for the River Murray System in times of drought and, in particular, to management arrangements to ensure that critical human water needs are met. This is reflected in both Part XII of the new Murray-Darling Basin Agreement and Part 2A of the Water Act.
Under the former Murray-Darling Basin Agreement, water in the River Murray System (a subset of the Murray-Darling Basin that includes the main course of the River Murray, the main River Murray storages and certain tributaries) was shared between New South Wales, Victoria and South Australia under a complex set of arrangements. These can perhaps be best summarised as New South Wales and Victoria each having a right to half the flow that has entered the system above Albury and, generally, retention of ownership of tributary inflows below that point. New South Wales and Victoria also have a shared obligation to supply South Australia with a specified quantity of water (see generally cls 88, 94 and 128 of the current Murray-Darling Basin Agreement). However, over the last few years, it has increasingly been recognised that this sharing arrangement could benefit from additional specification to address water sharing during times of low water availability.
The Murray-Darling Basin Agreement now provides for three tiers of water sharing:

- Tier 1 arrangements are essentially the same water sharing arrangements as existed under the former Murray-Darling Basin Agreement (including provision for special accounting)
- Tier 2 arrangements, which are currently the applicable arrangements, are triggered when Tier 1 arrangements will not be sufficient to ensure that there is enough water to meet conveyance water needs (s 86D and cl 131).

Conveyance water is water in the River Murray System required to deliver water to meet critical human water needs as far downstream as Wellington in South Australia (s 86A(4)). Once the Basin Plan takes effect, the circumstances in which Tier 1 arrangements will not be sufficient to ensure that there is enough water to meet conveyance water needs will be specified in the Basin Plan (s 86D(1)). Until such time, it is the Ministerial Council which has responsibility for determining whether such circumstances exist.
Under Tier 2, Tier 1 arrangements apply, subject to the provisions of a Schedule made by the Ministerial Council under cl 132 of the Agreement. Until this Schedule is made, Tier 1 arrangements apply, subject to any agreement by First Ministers of the Contracting Governments. When the Basin Plan is first made it will contain provisions that, if a cl 132 Schedule has not already been made, will act as a default Schedule under Tier 2 until the Ministerial Council determines otherwise (cl 135(10)).

- Tier 3 arrangements are triggered in circumstances of extreme and unprecedented low water availability or quality (s 86E and cl 133). Similarly to Tier 2, once the Basin Plan takes effect the circumstances that constitute unprecedented low water availability and quality will be specified in the Basin Plan. Until such time, the Ministerial Council has responsibility for determining whether such circumstances exist. Under Tier 3, Tier 2 arrangements apply, subject to any determination of the Ministerial Council. Tier 3 will only be triggered once for any given set of circumstances. It is envisaged that, after such circumstances have been experienced once, the Ministerial Council will modify the Schedule prepared for Tier 2 so that there are clear rules about how water will be shared under such circumstances in the future.

Under Part 2A, the Basin Plan must also specify water quality and salinity trigger points at which water in the River Murray System becomes unsuitable for meeting critical human water needs (s 86B(1)(c)). If these trigger points are reached, the MDBA must develop an emergency response and must implement that emergency response (s 86F). However, if the response affects the State water sharing arrangements discussed above, or the New South Wales – Queensland Border Rivers water sharing arrangements, the MDBA must first obtain the agreement of the Ministerial Council.
A further important change to the new Murray-Darling Basin Agreement relating to State water shares was the conferral of a right on South Australia to store its share in storages in the upper

River Murray for use in future years (cl 91). South Australia previously did not have such a right, which made it difficult for South Australia to plan for dry years. However, the right obtained is subject to a no-disadvantage test vis-a-vis New South Wales and Victoria. This means that, if there are storage capacity issues, South Australia's water will spill from the storages first.17

Water charge rules and water market rules

The Water Act enables the Minister to make water charge and water market rules, having regard to advice from the ACCC (Part 4). The Water Act sets out Basin water charging objectives and principles and water market and trading objectives and principles that the rules must implement (Schedules 2 and 3). These objectives and principles are consistent with those set out in the 2004 National Water Initiative. Under Part 8 of the Water Act, the responsibility for enforcing the water charge and water market rules lies with the ACCC.

Water charge rules

The Minister may make water charge rules that relate to 'regulated water charges', which include:

- charges imposed by irrigation infrastructure operators on irrigators for access to an operator's irrigation network, as well as charges for changing or terminating such access (s 91(1)(a))
- bulk water charges, which are generally charges for on-river storage or delivery of water (s 91(1)(b))
- water planning and water management charges, generally imposed by State governments (s 91(1)(c)).

The water charge rules made by the Minister may, amongst other things, set out rules that must be complied with in determining regulated water charges, permit the ACCC to determine or approve regulated water charges, set out terms and conditions that may or must not be imposed in relation to regulated water charges, and prohibit particular regulated water charges (s 92(3)).

Water Charge (Termination Fees) Rules 2009 were made by the Minister on 10 June 2009. It is expected that the Minister will make further water charge rules relating to access fees imposed by irrigation infrastructure operators, bulk water charges and water planning and management charges in the next six to 12 months, following the receipt of advice from the ACCC.

Water market rules

The Minister may make water market rules that relate to acts of irrigation infrastructure operators that prevent or unreasonably delay the making of 'transformation arrangements'. These rules seek to free up trade of water access rights within the Basin (s 97).

Transformation is relevant to trade because often irrigators do not hold water access entitlements issued under State law directly. Instead, irrigation infrastructure operators often hold water access entitlements collectively on behalf of their members, and each irrigator member holds an irrigation right against the operator (i.e. a contractual right to a certain proportion of the water available under the operator's water access entitlement).

'Transformation' occurs when the share component of the operator's water access entitlement is reduced to allow an irrigator's entitlement to water under an irrigation right to be permanently transformed into a water access entitlement held by that irrigator, or by a third party (if the irrigator wishes to trade it).

Water Market Rules 2009 were made by the Minister on 10 June 2009.

Commonwealth Environmental Water Holder

Part 6 of the Water Act establishes the statutory office of the Commonwealth Environmental Water Holder. The Commonwealth Environmental Water Holder is required to manage the Commonwealth's environmental water holdings so as to give effect to relevant international agreements, in order to protect and restore the environmental assets of the areas (inside and outside the Basin) in which the water is held (s 105(3)). To the extent that the Commonwealth's environmental water holdings relate to water in the Basin, they must be managed in accordance with the environmental watering plan that forms part of the Basin Plan (s 105(4)(a)).

There are stringent limitations on when the Commonwealth Environmental Water Holder may dispose of the Commonwealth's environmental water holdings (s 106).
The holdings are being acquired largely through the purchasing program referred to in the context of risk assignment above and further discussed under the heading 'Implementing policy through commercial arrangements' below.

Water information

Under Part 7, the Water Act confers a number of functions on the Bureau of Meteorology relating to the collection, holding, management, interpretation and dissemination of Australia's water information. The Director of Meteorology is required regularly to publish a National Water Account (s 122), and is also permitted to issue National Water Information Standards that may deal, for example, with the measurement and analysis of water, and the reporting of water information (s 130).
In order to enable the Bureau to carry out its functions, the Water Act provides two mechanisms by which a person can be required to provide water information to the Bureau:

- in compliance with regulations which specify persons or classes of persons that must provide specified water information to the Bureau (s 126; see Part 7 of the Water Regulations 2008)
- pursuant to a requirement to give water information made by the Director of Meteorology (s 127).

Other Commonwealth laws impacting on water rights

National Water Commission Act

Under the 2004 National Water Initiative, the Commonwealth agreed to put forward legislation to establish an independent statutory body to assist with the implementation of the 2004 National Water Initiative (see cl 10 and Schedule C of the 2004 National Water Initiative). The National Water Commission Act 2004 (the NWC Act) was enacted in response to this agreement, and establishes the National Water Commission (the NWC) (s 6).
In addition to assisting with the implementation of the National Water Initiative, the functions of the NWC include:

- promoting the objectives and outcomes of the 2004 National Water Initiative
- advising the Minister, the Commonwealth and COAG on various water-related matters including:
- matters of national significance relating to water
- Commonwealth programs relating to the management and regulation of Australia's water resources
- whether a State or Territory is implementing its commitments under certain agreements between the Commonwealth and a State or Territory relating to the management and regulation of Australia's water resources (s 7).

The NWC consists of a Chair and up to six Commissioners (s 8). The NWC also has a CEO to manage the day-to-day administration of the NWC (currently the Chair and CEO roles are performed by one person) (s 23) and staff to assist the NWC engaged under the Public Service Act 1999 (s 35). Under s 7(2)(i) of the NWC Act, the NWC is required to undertake a comprehensive review of the 2004 National Water Initiative in 2010–2011.
The NWC has also been given the function of auditing the effectiveness of the implementation of the Basin Plan and accredited water resource plans under Part 3 of the Water Act.

Other Commonwealth laws

A range of other general Commonwealth laws may impact upon water access entitlements. To note just some examples, such entitlements can only be granted in accordance with the Commonwealth Racial Discrimination Act 1975 and the Native Title Act (see especially s 24HA). Some of those grants may be subject to the Commonwealth Environment Protection and Biodiversity Conservation Act 1999, as will some actions taken to manage Basin water resources more generally. Water access entitlements will often be granted to trading

corporations, and those corporations will be incorporated under and regulated by the Commonwealth Corporations Act 2001. Trading in water entitlements by those corporations will be subject to the Commonwealth Trade Practices Act 1974.

Commonwealth constitutional power

Relevant powers

There is no express legislative power of the Commonwealth to enact a law providing for regulation of water usage. Consequently, in making the Water Act, the Commonwealth Parliament has had to rely on a range of constitutional powers. In relation to the Water Act as originally enacted in 2007, the most significant of these were:

- the external affairs power (s 51(xxix) of the Constitution), in implementation principally of Australia's obligations under the Convention on Biological Diversity18 and the Ramsar Convention on Wetlands,19 but also obligations under other treaties listed in s 4 of the Water Act under the definition of 'relevant international agreement'
- the corporations power (s 51(xx)), in relation to the regulation of the activities of trading or financial corporations concerning water and water access entitlements
- the interstate trade and commerce power (s 51(i)), in relation to the promotion and regulation of interstate trade in water access entitlements
- the powers relating to meteorological observations (s 51(viii)) and census and statistics (s 51(xi)), which support the Bureau of Meteorology's water information functions.

In addition, to allow the 2008 reforms to be implemented through Commonwealth legislation, the Commonwealth Parliament relied on s 51(xxxvii) of the Constitution. This paragraph provides that the Commonwealth Parliament may make laws on matters referred to it by the Parliament of any State, but such laws can extend only to the States by whose Parliaments the matter is referred or that afterwards adopt the law.

The Parliaments of the Basin States each enacted legislation to refer powers to the Commonwealth Parliament for certain amendments arising out of the 2008 Reform IGA.20 The Commonwealth then relied on these references to support a number of the reforms implemented by the Water Amendment Act.

The mechanics of the referral are set out in the intergovernmental Agreement on Murray-Darling Basin Reform–Referral (the Referral IGA), entered into by the Commonwealth and Basin States, which includes a commitment by the Commonwealth not to amend the referred provisions of the Act without the agreement of the Basin States.

Right to use water

The Constitution also includes some limitations on Commonwealth power. Section 100 of the Constitution deals specifically with Commonwealth power in relation to water, and states:

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

Section 100 of the Constitution is not a source of legislative power. It acts as a restriction on the use of the Commonwealth's legislative power. What s 100 does is provide that, where the Commonwealth enacts a 'law or regulation of trade or commerce' that affects the waters of rivers, that Commonwealth law must not impair the reasonable use of that water by a State or the residents of that State. As Mason J noted in The Commonwealth v Tasmania (1983) 158 CLR 1 at 154–155, the purpose of s 100 lies in the importance of the River Murray to New South Wales, Victoria and South Australia and the residents of those States, and their apprehension as to the impact of the Commonwealth's legislative powers under ss 51(i) (interstate and overseas trade and commerce) and 98 (navigation and shipping) of the Constitution. In particular, it appears that it is an aspect of the compromise reached in the federation debates between South Australia (which successfully argued for the Commonwealth to have power to facilitate trade and commerce, navigation and shipping on the River Murray (ss 51(i) and 98)) and New South Wales and Victoria (which successfully argued for some limitation

on this power to protect their 'reasonable use' of the water in the River Murray system (s 100)).21

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

Commonwealth immunity from State water laws

There is also an issue about whether the Commonwealth and Commonwealth bodies are subject to State regulation of water. This issue raises difficult questions. In summary, in determining whether the Commonwealth is so subject, it is necessary to ask three key questions:

1. Does the State law purport to apply to the Commonwealth?
2. If so, are the relevant provisions of that law inconsistent with the Water Act or other Commonwealth legislation22 (or has a Commonwealth law in fact made the Commonwealth subject to the State law)?
3. If not, does the Commonwealth have implied constitutional immunity from the operation of the relevant provisions of the State law?

These issues were considered by the High Court in Re Residential Tenancies Tribunal of NSW and Henderson; ex parte the Defence Housing Authority (1997) 190 CLR 410, and are discussed in AGS Legal briefing 36, 'The Commonwealth's implied constitutional immunity from State law' (30 August 1997).23

Implementing policy through commercial arrangements

The legislative regime which we have discussed above is an important part of the implementation of the Commonwealth's policy in relation to water, but other aspects are implemented by non-legislative mechanisms.

Water buy-backs

The Commonwealth is currently implementing water policy through programs such as the Restoring the Balance in the Murray-Darling Basin Program, run by the Department of the Environment, Water, Heritage and the Arts (DEWHA). Under this program, $3.1 billion will be invested to purchase water entitlements from willing sellers. As we have noted, water entitlements are generally able to be transferred, subject to regulation by State regimes. This program links into the Water Act, in that:

- purchases of water under the program will go towards managing the impact of any Commonwealth share of reductions in or changes in reliability of water allocations under the risk assignment provisions discussed above
- the purchased water will be managed by the Commonwealth Environmental Water Holder, which is established by Part 6 of the Water Act.

This program also links to other programs such as the Murray-Darling Basin Small Block Irrigators Exit Grant Package, which provides structural adjustment assistance to irrigators owning up to 15 hectares of farm land who choose to leave irrigation and sell their water access entitlements to the Commonwealth.

It should be noted that, prior to the reforms described above, the Commonwealth had already entered into a partnership with the New South Wales, Victorian, South Australian and Australian Capital Territory governments to recover water for the environment. This partnership was known as the Living Murray Initiative and its first step (to be implemented from 2004 to 2009) focused on recovering an annual average of 500 GL of water for the River Murray to be used to improve the environment at six icon sites. The water purchasing program is accompanied by an environmental works and measures program. This program facilitates effective application of recovered water through the design and construction of site-specific infrastructure and other measures.24 This program is ongoing and is now managed by the MDBA.

Grants and funding programs

Another significant program being run by DEWHA is the Sustainable Rural Water Use and Infrastructure Program. Under this program, the Australian Government has committed $5.8 billion to increase water use efficiency in rural Australia, including:

- by providing close to $3.7 billion for significant State-based water infrastructure and reform projects in South Australia, New South Wales, Victoria, Queensland and the Australian Capital Territory. As envisaged by Part 4 of the 2008 Reform IGA, the implementation of these projects is expected to be governed by Water Management Partnership Arrangements
- through the Modernising Irrigation in Australia program which includes pilot on-farm irrigation efficiency projects.

All projects run under the Sustainable Rural Water Use and Infrastructure Program require a proportion of the water savings from the funded projects to be transferred to the Commonwealth. That water will then be managed by the Commonwealth Environmental Water Holder.

The implementation of these programs will also contribute towards managing the impact of any Commonwealth share of reductions in or changes in reliability of water allocations under the risk assignment provisions discussed above.

Other relevant programs include the National Urban Water and Desalination Plan and the National Rainwater and Greywater Initiative.25

The NWC also administers two grants and funding programs: the Raising National Water Standards Program, which offers support for projects that improve Australia's national capacity to measure, monitor and manage Australia's water resources;26 and the National Ground Water Action Plan, which invests in projects to improve knowledge and understanding of groundwater.27

Conclusion

This briefing has outlined the key issues in relation to recent developments in the law of water rights in Australia; in particular, the new Commonwealth Water Act, as amended by the Water Amendment Act. Importantly, the Water Act requires the development of a Basin Plan for the management of water in the Murray-Darling Basin which will be binding on States and individuals in the Murray-Darling Basin, and will also be binding on, and relevant to the activities of, Commonwealth government departments and agencies.

When Commonwealth departments and agencies develop polices or undertake activities which affect water use in the Basin, it will be important for them to consider whether these will be consistent with the Water Act regime. In particular, it will be important for them to consider consistency with the Basin Plan, when this has been made, and water resource plans accredited under the Basin Plan.

Robyn Briese has science and law degrees and has been AGS client counsel to the Department of the Environment, Water, Heritage and the Arts since early 2007 (interrupted by a nine-month assoicateship at the International Court of Justice in The Hague). She was a key legal adviser on the development of the Water Act 2007 and the Water Amendment Act 2008. Previous to her current role, Robyn undertook a range of advice and litigation work for various government departments in the areas of constitutional, administrative, environmental and international law.

Alice Kingsland has science and law degrees and was AGS client counsel to the Department of the Environment, Water Heritage and the Arts between 2007 and 2009, during which time she was closely involved in the development of the Water Amendment Act 2008 and provided legal advice on the implementation and interpretation of the Water Act 2007. She continues to advise on the Water Act 2007 as part of her current work for the Murray-Darling Basin Authority.

Robert Orr QC is AGS's Chief General Counsel and advises the highest levels of government on key public and constitutional law issues. He regularly advises on Australia's constitutional arrangements, the policy development and law-making process, parliamentary matters and procedures, machinery of government, environmental and Indigenous law, and administrative decision making. He has advised the Commonwealth on the nature of water rights and Commonwealth powers in relation to these rights, and on the development of the Water Act 2007 and the Water Amendment Act 2008.

Notes

1. Justice Robert French, 'The Incredible Shrinking Federation–Voyage to a Singular State'(2008) Federal Court of Australia <http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj36.html> at 20 April 2009; Daniel Connell, Water Politics in the Murray-Darling Basin (2007), Ch 2.
2. The Laws of Australia [14.9.1570].
3. The Laws of Australia [14.9.1590].
4. The NSW Act does not currently apply in all of New South Wales. However, its coverage is being expanded as water rights granted under the Water Act 1912 (NSW) are being transitioned into rights under the NSW Act. Currently, approximately 90% of water extractions in New South Wales are covered by the NSW Act and water sharing plans made under that Act. All regulated rivers, major groundwater systems and some unregulated systems are covered.
5. River Murray Waters Act 1915 (Cth), River Murray Waters Act 1915 (NSW), River Murray Waters Act 1915 (Vic), River Murray Waters Act 1915 (SA). See Warren Martin, Water Policy History on the Murray River (2005) at 29.
6. Murray-Darling Basin Act 1992 (NSW); Murray-Darling Basin Act 1993 (Vic); Murray-Darling Basin Act 1993 (SA); Murray-Darling Basin Act 1993 (Cth).
7. See Murray-Darling Basin Act 1996 (Qld); Murray-Darling Basin Agreement Act 2007 (ACT).
8. See s 12 of Murray Darling Basin Act 1993 (Cth).
9. Measures include strategies, plans and programs (see cl 2 of the former Murray-Darling Basin Agreement).
10. The inclusion of the new Murray-Darling Basin Agreement as a Schedule to the Water Act does not of itself give the Agreement the status of a law of the Commonwealth. The Agreement remains an intergovernmental agreement, with legal effect given only to those of its provisions that confer functions, powers and duties on the Murray-Darling Basin Authority and the Basin Community Committee (see ss 18E and 18F of the Water Act).
11. See s 176(1) of the Water Act and item 154 of the table in Schedule 1 to the Financial Management and Accountability Regulations 1997, which sets out the agencies prescribed for the purposes of the definition of 'prescribed agency' in s 5 of the Financial Management and Accountability Act 1997.
12. Note that the Water Act does not affect the vesting of the ownership of water in the State under existing State statutory regimes, but simply provides for the regulation of how such water can be used.
13. 'Constructing Authority' is defined in cl 2 of the Murray-Darling Basin Agreement to mean (a) the Contracting Government by which: (i) any works authorised by the Murray-Darling Basin Agreement or the former Agreement have been, or are being, or are to be constructed; (ii) any measures authorised under the Murray-Darling Basin Agreement or the former Agreement have been, or are being, or are to be executed; or (b) any public authority or any Minister constituted or appointed for the purposes of constructing such works or executing such measures.
14. 'River operations' are defined under cl 2 of the Murray-Darling Basin Agreement to mean activities undertaken under the Murray-Darling Basin Agreement relating to (a) the construction, operation, maintenance and renewal of works on, adjacent to, or connected to the upper River Murray or the River Murray in South Australia; and (b) the execution of the provisions of the Murray-Darling Basin Agreement concerning sharing water between State Contracting Governments; and (c) the provision of other services relating to water, to State Contracting Governments and other persons.
15. Note that, due to the time that it takes to prepare a water resource plan, each new water resource plan need only be consistent with the Basin Plan as it was in force two years prior to the time that accreditation of the water resource plan is sought (s 56(2)).

16. The Basin Community Committee is an advisory body to the MDBA set up under s 202 of the Water Act It is made up of community representatives, including irrigators, environmental water managers and at least one expert on relevant Indigenous matters. It also has the function of providing advice to the Ministerial Council (cl 16 of the Murray-Darling Basin Agreement).
17. Clause 130 of the Agreement makes provision for the Ministerial Council to agree on a schedule setting out the process for accounting for South Australia's storage right.
18. Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) [1993] ATS 32.
19. Convention on Wetlands of International Importance especially as Waterfowl Habitat, (Ramsar, 2 February 1971) (as amended) [1975] ATS 48.
20. Water (Commonwealth Powers) Act 2008 (NSW); Water (Commonwealth Powers) Act 2008 (SA); Water (Commonwealth Powers) Act 2008 (Qld); Water (Commonwealth Powers) Act 2008 (Vic).
21. See Nicholas Kelly, 'A Bridge? The Troubled History of Inter-State Water Resources and Constitutional Limitations on State Water Use', (2007) 30(3) UNSW Law Journal (2007) 639 at 641–645; Sandford Clark, 'Divided power, co-operative solutions?' in Daniel Connell (ed), Uncharted Waters (2002), p 9; Daniel Connell, Water Politics in the Murray-Darling Basin (2007), Ch 2; J A La Nauze, The Making of the Australian Constitution (1972) at 153–4, 208–11.
22. For example, s 123 of the Defence Act 1903 (Cth) provides a limited immunity to members of the Defence Force from any State or Territory law requiring the member to have permission (whether in the form of a licence or otherwise) to do anything in the course of his or her duties as a member of the Defence Force.
23. See also Legal briefing No. 47, 'Application of State laws to the Commonwealth' (29 June 1999), <www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings/index.htm>.
24. See <http://www.environment.gov.au/water/policy-programs/lmi/index.html>.
25. For further information about DEWHA administered water buy-back, grants and funding programs see <http://www.environment.gov.au/water/programs/index.html>.
26. See 'The Raising National Water Standards Program' at <http://www.nwc.gov.au/www/html/347-introduction-to-rnws.asp>.
27. See 'The National Groundwater Action Plan' at <http://www.nwc.gov.au/www/html/350-groundwater-action-plan.asp>.

Australian Government Solicitor

THE ROLE OF SOCIAL AND ECONOMIC FACTORS IN THE BASIN PLAN

Summary

1. In summary, the general purposes of the *Water Act 2007* (Water Act) and the Basin Plan are:

   — to give effect to relevant **international agreements**,

   — to provide for the establishment of **environmentally sustainable limits** on the quantities of water that may be taken from Basin water resources,

   — to provide for the use of the Basin water resources in a way that optimises **economic, social and environmental outcomes**,

   — improved **water security** for all uses, and

   — subject to the environmentally sustainable limits, to maximize the **net economic returns** to the Australian community.

2. The overarching objective of the Act and the Plan is to give effect to relevant international agreements, and this reflects the fact that the provisions of the Act relating to the Basin Plan are, to a large extent, supported by the treaty implementation aspect of the external affairs power in the Commonwealth Constitution. The agreements are international environmental agreements including the Convention on Biological Diversity and the Ramsar Convention relating to wetlands.

3. The international agreements themselves recognise economic and social factors, and their relevance to decision making.

4. The Water Act further makes clear that in giving effect to those agreements the Plan needs to optimise economic, social and environmental outcomes. Therefore, where a discretionary choice must be made between a number of options the decision-maker should, having considered the economic, social and environmental impacts, choose the option which optimises those outcomes.

5. The nature of the decision-making in relation to the Plan involves the application of broad concepts and there is therefore scope for the consideration of how economic, social and environmental outcomes should be optimised.

Discussion

1. This paper examines the ways in which the Murray Darling Basin Authority (MDBA) and the Minister are required to take into account social and economic factors in developing and making the Basin Plan, and the relationship between socio-economic factors and the implementation of international environmental agreements.

The general framework for decision-making: objects, purposes and specific requirements

2. The Water Act frames the requirements relating to the Basin Plan, both at:

- a general level in terms of the objects and purposes of the Act and Plan, and
- at a detailed level setting out the specific requirements that must be included in the Plan.

In making decisions in relation to the Basin Plan the MDBA and the Minister are required to comply with both the detailed statutory provisions relating to the matter under consideration, and to the extent they are relevant, the general objects of the Act and the purpose and the basis of the Plan. The role of socio-economic considerations in decision-making in relation to the Plan must be considered in the context of this framework.

3. At the detailed level, the Act identifies the matters that must be included in the Plan and includes specific statutory requirements for each of these items. [1] The matters that the Plan must deal with include, in particular:

- the long-term average sustainable diversion limits for the Basin water resources,[2]
- temporary diversion provision,[3]
- an environmental watering plan,[4]
- a water quality and salinity management plan,[5]
- water trading rules,[6] and
- the requirements for accreditation of State water resource plans.[7]

---

1 The table in s 22(1) of the Water Act which includes 13 items specifies the mandatory content of the Basin Plan.

2 Water Act, items 6 and 8 of s 22(1), and s 23.

3 Water Act, items 7 and 8 of s 22(1), and s 24.

4 Water Act, item 9 of s 22(1), and ss 28-32.

5 Water Act, item 10 of s 22(1), and s 25.

6 Water Act, item 12 of s 22(1), and s 26.

7 Water Act, item 11 of s 22(1), and s 22(3).

4. At the general level, the Act defines the broad purpose of the Plan: 'to provide for integrated management of the Basin water resources in a way that promotes the objects of the Act'.[8] This general purpose is elaborated by reference to particular ways in which the Plan should provide for the purpose. These 'sub-purposes' include:

    a) giving effect to relevant **international agreements**, including among others, the Convention on Biological Diversity,[9] the Ramsar Convention[10] which deals with wetlands of international importance and the Bonn Convention on migratory species; [11]

    b) the establishment of **environmentally sustainable limits** on the quantities of surface and ground water that may be taken from Basin water resources;[12]

    c) Basin wide **environmental objectives** for water-dependent ecosystems and water quality and salinity objectives;[13]

    d) the use and management of the Basin water resources in a way that optimises **economic, social and environmental outcomes**;[14] and

    e) improved **water security** for all uses of Basin water resources.[15]

5. These 'sub-purposes' of the Plan to a large extent parallel provisions in the objects of the Act relating to:

    a) giving effect to relevant **international agreement**s;[16]

    b) in giving effect to those agreements, promoting the use and management of the Basin water resources in a way that optimises **economic, social and environmental outcomes**;[17]

    c) ensuring a return to **environmentally sustainable levels** of extraction for overallocated or overused water resources; and protecting, restoring, and providing for the ecological values and ecosystem services of the Murray-

---

8 Water Act, s 20.

9 Rio de Janeiro, 5 June 1992, [1993] ATS 32.

10 Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, Iran, 2 February 1971, [1975] ATS 48.

11 Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, [1991] ATS 32. Section 4(1) of the Water Act defines 'relevant international agreement'.

12 Water Act, s 20(b).

13 Water Act, s 20(c).

14 Water Act, s 20(d).

15 Water Act, s 20(g).

16 Water Act, s 3(b).

17 Water Act, s 3(c).

Darling Basin. This object does not limit the previous two objects relating to implementation of international agreements and optimising outcomes;[18]

d) maximizing the **net economic returns** to the Australian community from the use and management of the Basin water resources. This object is subject to the previous provisions relating to environmentally sustainable levels of extraction for overallocated and overused resources and protecting, restoring and providing for ecological values and ecosystem services,[19] and

e) improving **water security** for all uses of Basin water resources.[20]

6. Additional provisions elaborate on the requirement that the Plan give effect to relevant international agreements generally, and in particular to the Convention on Biological Diversity and the Ramsar Convention[21] (developing the concepts in paras 4(a) and 5(a) above, discussed further below).

7. Section 21(4) sets out further matters relevant to the development of the Basin Plan, each of which is subject to the requirements regarding the implementation of the relevant international agreements, in particular the Convention on Biological Diversity and the Ramsar Convention. The MDBA and the Minister must take into account the principles of ecologically sustainable development (linking to the concepts in paras 4(b) and (c) and 5(c) above).[22] These are defined in s 4(2) as including the principle that 'decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations'. The MDBA and the Minister are subject to a requirement to act on the basis of the best available scientific knowledge and socio-economic analysis.[23] In addition there are a large number of other matters that the MDBA and the Minister must have regard to, including the consumptive and economic uses of Basin water resources, and social, cultural, Indigenous and other public benefit issues (linking to the concepts in paras 4(d) and 5(b) above).[24]

Giving effect to international agreements and social and economic considerations

8. The Plan has multiple objects and purposes and must deal with a wide variety of environmental, economic and social considerations. It is clear from this general examination of the provisions relating to the Plan that environmental, economic and social considerations are of relevance to decision-making in relation to Plan. To understand the role of socio-economic considerations in decision-making on the

18 Water Act, s 3(d)(i) and (ii).

19 Water Act, s 3(d)(iii).

20 Water Act, s 3(e).

21 Water Act, s 21(1) to (3).

22 Water Act, s 21(4)(a).

23 Water Act, s 21(4)(b).

24 Water Act, s 21(4)(c)(ii) and (v).

Plan it is necessary to consider the relationship between socio-economic considerations and the obligation to give effect to the relevant international agreements.

9. An overarching objective of the Act and the Plan is to give effect to relevant international agreements.[25] This reflects the fact that the provisions of the Act relating to the Basin Plan are, to a large extent, supported by the treaty implementation aspect of the external affairs power in the Commonwealth Constitution.[26]

10. The two key provisions of the objects relating to implementation of international agreements provide that the Act:

- gives effect to relevant international agreements (to the extent that the agreements are relevant to the use and management of the Basin water resources) and in particular provides for special measures to address the threats to the Basin water resources (para 5(a) above);[27] and
- in giving effect to those agreements, promotes the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes (para 5(b) above).[28]

11. As noted above these objects are incorporated into the purpose of the Plan. Thus the purpose of the Plan is to give effect to relevant international agreements (para 4(a) above). However, in meeting the objects of the Act it is necessary to consider the economic, social and environmental impact of proposed courses of action (para 4(d) above).

12. Therefore, where in applying the particular provisions of the Act that give effect to the agreements a discretionary choice must be made between a number of options the decision-maker must, having considered the economic, social and environmental impacts, choose the option which optimises the economic, social and environmental outcomes. As discussed below the nature of the decision-making in relation to the Plan involves the application of broad concepts and there is therefore substantial scope for the consideration of how economic, social and environmental outcomes should be optimised. This consideration should be informed by the best available scientific knowledge and socio-economic analysis in accordance with s 21(4)(b).

---

25 Water Act, ss 3(b), 20(a), and 21(1) to (3).

26 The external affairs power in s 51(xxix) of the Constitution supports laws that are 'capable of being reasonably considered to be appropriate and adapted' to fulfilling Australia's obligations under international agreements: *Commonwealth v Tasmania* (Franklin Dam case) (1983) 158 CLR 1, 259. Part 2 of the Water Act which deals with most aspects of the making of the Basin Plan is not supported by the referral of powers by the Basin States and relies solely on the Commonwealth's own constitutional powers.

27 Water Act, s 3(b).

28 Water Act, s 3(c).

13. The objects of the Water Act and purpose of the Plan also pivotally involve the establishment of 'environmentally sustainable limits', or levels, on the quantities of surface and ground water that may be taken from Basin water resources (paras 4(b) and 5(c) above).[29] This term is not defined, but the related term of the 'principles of ecologically sustainable development' is,[30] and this sets out the first principle as that decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.

14. The objects of the Act also include to maximise the net economic returns to the Australian community, subject to ensuring returns to environmentally sustainable levels of extraction for water resources that are overallocated or overused, and protecting, restoring and providing for the ecological values and ecosystem services of the Basin (see para 5(d) above).[31] This can be seen as a particular application of the general objects relating to implementation of the international agreements and optimisation of economic, social and environmental outcomes. The effect of the object is that economic objects can only be pursued to the extent that they are consistent with addressing overallocation and overuse. A corollary is that consideration should be given to ways in which economic returns can be maximized consistent with the requirement to address overallocation and overuse and environmental degradation.

15. It is necessary to turn to the key agreements, the Convention on Biological Diversity and the Ramsar Convention and the provisions in the Act specifically relating to the agreements to consider in more detail what scope there is for decision-making in relation to the Plan to take into account social and economic factors.

Convention on Biological Diversity

16. The Convention on Biological Diversity requires, amongst other things, that State Parties, as far as possible and as appropriate:

- integrate the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies;[32]
- identify and monitor the components of biological biodiversity important for its conservation and sustainable use; monitor the components of biological diversity so identified and identify processes and activities which have or are likely to have a significant adverse impact on the conservation and sustainable use of biological diversity;[33]
- establish areas where special measures need to be taken to conserve biological diversity; promote the protection of ecosystems, natural habitats, and the

29 Water Act, ss 3(d)(i) and (ii) and 20(b).

30 Water Act, s 4(2).

31 Water Act, s 3(d).

32 Convention on Biological Diversity (CBD), Art 6(b).

33 CBD, Art 7(a),(b),(c).

maintenance of viable populations of species in natural surroundings; rehabilitate and restore degraded ecosystems and promote the recovery of threatened species through the development of plans or other management strategies.[34]

17. Section 21(2) of the Water Act which reflects these obligations provides that the Plan must:

- be prepared having regard to 'the fact that the use of the Basin water resources has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity' and that as a result special measures are required to manage the use of the Basin water resources to conserve biodiversity; and
- promote the sustainable use of the Basin water resources to protect and restore the ecosystems, natural habitats and species that are reliant on Basin water resources to conserve biodiversity.

18. In addition to these general provisions many of the provisions dealing with the detailed requirements of the Plan give effect to the obligations under the Convention: for example those concerning long-term average sustainable diversion limits, the environmental watering plan, and the water quality and salinity management plan.

19. It is fundamental that the obligations in the Convention concern the preservation of biological diversity. However, the Convention does not exclude social and environmental considerations. Rather, the Convention seeks to balance the requirements to conserve and maintain biodiversity with its sustainable use and other considerations such as the social and economic development of the Parties. The balancing of these requirements is evident in the definition of the concept of 'sustainable use'. 'Sustainable use' is defined by the Convention to mean 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'.[35]

Ramsar Convention

20. The obligations under the Ramsar Convention relate to the conservation of wetlands included in the List of Wetlands of International Importance[36] (Ramsar wetlands) and, as far as possible, to the 'wise use' of wetlands in a State's territory. There are 16 Ramsar wetlands in the Murray-Darling Basin but the relevant obligations under the Ramsar Convention are not confined to the Ramsar wetlands. For the purposes of the Convention 'wetland' is defined to mean 'areas of marsh, fen, peatland or

---

34 CBD, Art 8.

35 CBD, Art 2.

36 Article 2 of the Ramsar Convention establishes the List of Wetlands of International Importance.

water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh or brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.'[37] 'Wetland' has the same meaning in the Act as in the Convention.[38] The definition of 'water resource' in s 4(1) includes, among others, surface water, watercourses, lakes and wetlands. According to these definitions, much, if not all, of the Basin's surface water resources are likely to be wetlands.

21. Section 21(3) which reflects obligations in the Ramsar Convention provides that the Basin Plan must promote the wise use of all the Basin water resources, the conservation of declared Ramsar wetlands, and take account of the ecological character description of all declared Ramsar wetlands and other key environmental sites within the Basin.

22. The key concept of 'wise use' is not defined by the Convention. The most recent definition of 'wise use' by the Parties to the Convention, however, provides guidance as to its meaning: 'the maintenance of … [the] ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development'.[39] For the purposes of the definition 'ecological character' means the 'the combination of ecosystem components, processes, and benefits/services that characterise the wetland at a given point in time.'[40] The phrase 'in the context of sustainable development' is intended to recognise that whilst some wetland development is inevitable and that many developments have important benefits for society, developments can be facilitated in sustainable ways by approaches elaborated in the Convention.[41]

The Conventions permit consideration of economic and social considerations

23. Neither the Convention on Biological Diversity nor the Ramsar Convention require that the Parties disregard economic and social considerations in giving effect to the environmental obligations. Both Conventions establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allows consideration of social and economic factors. In short it would be an over-simplification to regard implementation of the agreements as being concerned with 'purely' environmental objectives as opposed to social and economic considerations.

24. Further, the general and high level nature of the obligations under the Conventions and the provisions in the Act relating to the Conventions allow significant room for

---

37 Article 1(1) of the Ramsar Convention.

38 Water Act, s (4)(1).

39 Ninth Meeting of the Conference of Parties to the Ramsar Convention (2005), Res IX.1 Annex A, *A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character*, para 22.

40 Ibid, para 15 .

41 Ibid, para 22, footnote 3.

judgment as to the application of key provisions concerning sustainable use, wise use and overallocation. These discretionary judgments should, in accordance with the objects of the Act and purpose of the Plan, optimise economic, social and environmental outcomes.

Sustainable Diversion Limits

25. As noted above in making decisions in relation to the Basin Plan the MDBA and the Minister are required to comply with both the specific statutory provisions relating to the matter under consideration and to the extent they are relevant the objects of the Act and to the purpose of the Plan. The interaction of the general provisions and the specific provisions relating to the content of the Plan is necessarily complex and needs to be considered in each case.

26. As an example we consider briefly the interaction of the different provisions in relation to the setting of long-term average sustainable diversion limits where a number of objectives are applicable. In particular, s 23(1) and the definition of 'environmentally sustainable level of take' in s 4(1) operate together to require long-term average sustainable diversion limits to be set so as to not compromise 'key environmental assets'. The Water Act does not specifically provide guidance on which environmental assets are 'key'. In identifying which environmental assets are key for the purposes of the proposed Basin Plan it will be necessary for the MDBA and the Minister to:

- comply with the specific requirements of the Water Act, interpreted in light of the objects; and
- act in accordance with the purpose of the Plan in s 20 (including promoting the objects in s 3).

27. There are a number of specific requirements in the Water Act with which the MDBA and the Minister will need to comply when identifying which environmental assets are key. For example, the Basin Plan is required to promote sustainable use of the Basin water resources to protect and restore the ecosystems, natural habitats and species that are reliant on the Basin water resources and conserve biodiversity (see s 21(2)(b)). They are also required to promote the conservation of declared Ramsar wetlands (s 21(3)(b)). In interpreting the meaning of 'conserve biodiversity' in s 21(2)(b) and 'conservation of declared Ramsar wetlands' in s 21(3)(b), a court would look to the relevant international agreements for guidance, as these requirements are drawn from these agreements.

28. However, the MDBA and the Minister are also required to give effect to the other objects, where possible, within the specific requirements of the Water Act, and where relevant to the provision at hand. Another object relevant to determining which environmental assets are key is the object of optimising economic, social and environmental outcomes while giving effect to the relevant international agreements (s 3(c)). While the specific obligations such as those under s 21 still apply, this objective affects the scope of what the MDBA and the Minister could identify as key

environmental assets. For example, the MDBA and the Minister could not identify an environmental asset as key if this was not necessary to achieve the specific requirements of the Water Act (such as those under s 21) and would have significant negative social and economic effects.

Robert Orr QC
Chief General Counsel

Helen Neville
Senior General Counsel

25 October 2010