
A hundred years of negotiations with no end in sight: Where is the Murray Darling Basin Initiative leading us?

John Scanlon*

There have been many worthwhile developments over the past century in how the shared water resources of the Murray Darling Basin are managed. This stands as testament to the ability of governments and people with a vested interest in the Murray Darling to peacefully negotiate in a pragmatic and cooperative manner, even though, with the benefit of hindsight, some things might have been done differently. Today regulators are confronting many new water resource management challenges, resulting in federal and State governments agreeing to a bold new water reform agenda through the National Water Initiative. Fortunately, there is also a significant knowledge base, which now provides the foresight to better understand the consequences of both current and future actions. The inescapable conclusion from the knowledge available is that changes are required to the Murray Darling Basin Agreement and how it is administered if the system is to be restored to good health and maintain productivity.

<div>PRAGMATIC ECOSYSTEM APPROACH: MURRAY DARLING BASIN INITIATIVE

In the late 1890s, a fierce debate raged over how the proposed Australian Constitution should address the sharing of the waters of the River Murray between the colonies of New South Wales, Victoria and South Australia – a debate that threatened to derail the process of Federation itself.¹

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

The history of the creation of the Commonwealth and the constitutional sharing of powers between the States and the Commonwealth has had a significant influence on the measures that have been taken over the past 100 years to manage the shared resources of the Murray Darling Basin. The past century has seen ongoing negotiation between all parties, which has resulted in a cooperative,

* LLB, LLM (Environmental). Commissioner, Murray Darling Basin Commission and Vice Chair, IUCN Commission on Environmental Law. This article is based upon papers prepared for the Stockholm International Water Institute World Water Week "Beyond the river – sharing benefits and responsibilities" (Stockholm, August 2006); and the Environment Institute of Australia and New Zealand Conference "Environmental Practice" (Adelaide, September 2006). The author gratefully acknowledges the assistance provided by Paul Harvey, Phil Cole, Adam West, Department of Water, Land and Biodiversity Conservation (South Australia); Professor Mike Young, University of Adelaide; and Ilona Millar, Environmental Defender's Office (New South Wales). All the opinions expressed in this article are those of the author.

¹ See generally, Report of the Commissioners, *Report of the Interstate Royal Commission on the River Murray* (Sands and McDougall Ltd, 1902); River Murray Commission, *A Short History of the River Murray Works* (Eaton, 1945); Crabb P, *Murray Darling Basin Resources* (MDBC, 1997); Fullerton T, *Watershed* (ABC Books, 2001); Connell D (Ed), *Unchartered Waters* (MDBC, 2002); Blomquist W, Haisman B, Dinar A, Bhat A, "Institutional and Policy Analysis of River Basin Management" (2005) World Bank Policy Research Working Paper 3527; Connell D, *Water and Politics in the Murray Darling Basin* (Federation Press, forthcoming publication) .

pragmatic, and increasingly ecosystem-based approach² being adopted by governments and the community to managing the shared resources of the Basin.

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

<div>CONFRONTING THE CHALLENGES OF A STRESSED SYSTEM: MAJOR ISSUES IN THE MURRAY DARLING BASIN

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

The Basin spans five State and Territory jurisdictions, is over one million sq km in area (covering 14% of Australia), is home to two million people and is Australia's most productive region for irrigated agriculture (70% of the national total occurs within the Basin). The Basin produces at least 40% of Australia's agricultural output and the city of Adelaide, which lies outside the Basin and has a population of over one million, relies on the River Murray for up to 90% of its water supply in drought years.

Today the Basin enriches Australia by an estimated \$23 billion per year. This does not include the economic value of the City of Adelaide and the Iron Triangle in South Australia,⁵ which rely upon 1% of the Basin's water and have an economic value of over \$16 billion per year.⁶ Agricultural produce now exceeds \$10 billion (recent figures say \$13.6 billion), mining \$3 billion, tourism and leisure around \$6.5 billion, hydro-electricity generation \$0.3 billion and commercial fishing and other industries \$2.5 billion.⁷

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

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

<div>GOVERNANCE OF THE INITIATIVE – STILL EVOLVING TO MEET NEW CHALLENGES

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

² While the Initiative institutionalised a basin management approach in 1987, the water sharing rules are still based on the *River Murray Waters Agreement 1914*.

³ See Crabb, n 1, p 258.

⁴ See *The Living Murray Discussion Paper* (MDBC, 2002) p 13. Full text available online at www.thelivingmurray.mdbc.gov.au/ (viewed 25 September 2006).

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

⁶ See Blackmore D, "Protecting the Future", in Connell D (ed), *Unchartered Waters* (MDBC, 2002) p 7.

⁷ See Crabb, n 1.

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

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

The Commission does not own any infrastructure or any land;⁹ they are owned by the contracting governments, normally through the constructing authorities.¹⁰ The constructing authorities build, own, and operate the joint works and measures that have either been included in, or subsequently agreed upon under the Agreement, for and on behalf of the Commission.¹¹ The Murray Darling Basin Ministerial Council (the Ministerial Council) or the Commission authorise the joint works and measures¹² but are not responsible for their implementation, which is carried out by a nominated contracting government.¹³

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

The Ministerial Council

The Ministerial Council was established in 1985 as the peak policy-making body under the Agreement and it is responsible for considering and determining major policy issues of common interest.

The Ministerial Council consists of up to three ministers from each State and the Commonwealth and one from the Australian Capital Territory (recently admitted as a full member). Members are drawn from ministers who have “prime responsibility for matters relating to water, land and environment”.¹⁴ The Commonwealth chairs the Ministerial Council, traditionally through the minister responsible for agriculture.¹⁵

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

The Commission

The origins of the Commission can be traced back to 1917. Until 1985, the Commission was the peak body under the various agreements. Since then it has answered to the Ministerial Council. The

⁸ See cl 47 of the Agreement.

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

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

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

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

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

¹⁴ See cl 8(3) of the Agreement.

¹⁵ The current chair is the Federal Minister for Agriculture, Fisheries and Forestry.

¹⁶ Blackmore D, “Water, Salinity and the Politics of Mutual Obligation” (2001) Alfred Deakin Lecture. Full speech available at www2b.abc.net.au/rn/deakin/disc/1forum/default.htm (viewed 26 September 2006).

Commission is responsible for administering the Agreement and providing advice to the Ministerial Council.

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

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

The Community Advisory Committee

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

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

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

The Office of the Commission

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

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

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

<div>SOME REAL PROGRESS – THE EVOLUTION OF AGREED WORKS AND MEASURES

¹⁷ See cl 20(2) of the Agreement.

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

¹⁹ Current Commonwealth commissioners are secretary-level appointments reflecting the Commonwealth Government’s increasing interest in the Initiative.

²⁰ For instance, not employed as a public servant by any government.

²¹ See www.mdbc.gov.au/about/murraydarling_basin_commission/the_commissioners (viewed 26 September 2006). Prior to this appointment no non public servant had been appointed to the Commission, other than the heads of corporate bodies such as Goulburn-Murray Water and SA Water. This has been as a result of tradition not because it was a requirement of the Agreement.

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

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

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

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

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

<subdiv>1988-2001 Salinity and Drainage Strategy (the Strategy)

From 1975-1985 salinity levels when measured at Morgan in South Australia exceeded the Australian water quality guideline of 800 EC units 42% of the time. As a result of the implementation of the Strategy, including groundwater management schemes costing over \$50 million, salinity levels were reduced to the point where in 1999 they exceeded 800 EC units 8% of the time, with average salinity being 520 EC units. In 2004-2005 average salinity at Morgan was 395 EC units²⁶ but this figure is generally attributed to drought conditions reducing the level of salt entering the River from the floodplains.²⁷

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

The basic concepts that underpinned the Strategy²⁹ were that:

- there was to be a salinity target of less than 800 EC units, 95% of the time³⁰ at Morgan in South Australia, (a point near offtakes for water for urban use by Adelaide³¹ and Whyalla);
- salt interception schemes would be constructed by the Commission (through constructing authorities), which were to reduce salinity at Morgan by 80 EC units;
- New South Wales and Victoria would each earn salinity credits equivalent to 15/80 of each EC credit from investing in salt interception³² which would be used to cover the salinity impacts of constructing drains to protect irrigation areas; and

²⁵ See Crabb, n 1, p 283, Pt VI of the *Construction Operation and Maintenance of Works* and Sch A of the Agreement. Water is also used to generate hydroelectricity at the Dartmouth Dam, Hume Dam and the Yarrawonga Weir.

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

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

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

²⁹ Personal communication, Phil Cole, Department of Water, Land and Biodiversity Conservation (South Australia), 13 July 2006 with reference to draft “Register Adjustment” paper (July 2006) MDBC.

³⁰ Noting that modelling and simulation against a benchmark period is used to test the target rather than real time management. The target was based upon Australian guidelines for drinking water quality and on the risks to irrigated horticulture. Personal Communication, Phil Cole, n 29.

³¹ The capital city of South Australia with a population of over 1 million. Located outside of the Basin, the city obtains 40% of its water from the River Murray in average years and up to 90% in drought years.

³² South Australia waived its right to such credits. Personal communication, Phil Cole, n 29.

- after all of the States had used their credits, the salinity at Morgan would be reduced by 50 EC units.

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

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

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

<subdiv>1995: Cap on water diversions (the Cap)

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

The Cap limits the amount of surface water that may be diverted from the Basin's rivers. In regulated rivers diversions are limited to what would have been diverted under 1993-1994 levels of development. In unregulated rivers the Cap may be expressed as an end-of-valley flow regime. The Cap has been applied in this way, with small variations, in New South Wales, Victoria and South Australia, which, when combined, account for 94% of the Basin's diverted water. Queensland and the Australian Capital Territory take a total of 6%; their Cap and the way it is determined has not yet been finalised.

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

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

<subdiv>1997: Pilot program for permanent interstate trade

³³ Costs to urban and rural users were calculated, urban costs (1988 estimates) making up 97% of the total salinity costs. A recent review has adjusted the cost functions, with agricultural costs now 24% of the total salinity costs and 96% of the costs calculated to occur within South Australia. Personal communication, Phil Cole, n 29, with reference to "Register Adjustment" paper (MDBC, July 2006).

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

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

³⁶ See Murray Darling Basin Ministerial Council, "The Living Murray Discussion Paper", (MDBC, 2002) p 17.

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

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

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

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

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

At its 40th meeting in May 2006, the Ministerial Council agreed to adopt a new schedule on interstate water trade expanding the ability to permanently trade water within a wider area of the Southern Basin. The same rationale that underpinned the pilot program underpins this expanded trading regime.

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

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

<subdiv>2001 Basin Salinity Management Strategy

This cooperative and jointly funded strategy⁴⁴ was developed to maintain river salinity at an agreed level, to control salt loads in all tributaries, and to control land degradation, while allowing productive

³⁹ See Land & Water Australia, *Property: Rights and Responsibilities – Current Australian Thinking*, (Land and Water Australia, 2002); Dyson M and Scanlon J, “Trading in Water Entitlements in the Murray Darling Basin – Realizing the Potential for Environmental Benefits”, IUCN ELP Newsletter, (Issue 1 2002), p 14 available at www.iucn.org/themes/law (viewed 26 September 2006); “Understanding Water Rights and Water Allocation”, 1st NARBO Thematic Workshop on Water Rights and Water Allocation, (Hanoi, 2005).

⁴⁰ Personal communication, Adam West, Department of Water, Land and Biodiversity Conservation (South Australia), 21 July 2006 with reference to “Evaluation of the Interstate Water Trade Program”, (2005) Tim Cummins and Associates. See also Australia, Draft Report of the Productivity Commission, “Rural Water Use and the Environment: the Role of Market Mechanisms” (June 2006), p 198.

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

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

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

⁴⁴ Replacing the 1988 Salinity and Drainage Strategy.

activity to expand where appropriate. The Strategy builds upon earlier agreements to collectively address irrigation induced salinity and now covers both irrigation induced and dryland salinity.

The Strategy was adopted by the Ministerial Council in 2001 to revise and replace the 1988 Salinity and Drainage Strategy. It is given effect through a schedule to the Agreement⁴⁵ that sets new agreed “baseline dates”, time-based salinity “baseline conditions”⁴⁶ and quantitative Basin-wide and river valley salinity targets. The Strategy retains the Basin-wide target of less than 800 EC units 95% of the time at Morgan and incorporates former salinity and drainage works. The main changes from the 1988 Strategy are the inclusion of salinity impacts and salinity targets in tributaries, including Queensland, and the creation of a new program for salt interception investment.

This new program of joint works and measures sets a salinity reduction target of 61 EC units by 2007⁴⁷ – to be measured at Morgan. It allocates salinity credits to each of the three investing States, New South Wales, Victoria and South Australia, equivalent to 10/61 of each salinity credit achieved through investing in salt interception – thereby allowing an equivalent salinity debit to enable drainage disposal or increasingly, the development of new irrigation areas. The remaining 31 EC units are allocated against the anticipated “delayed salinity impacts”⁴⁸ in tributaries required by 2007.

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

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

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

⁴⁵ Sch C – Basin Salinity Management.

⁴⁶ Defined in Sch C, cl 2 and elaborated in cl 5.

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

⁴⁸ Defined in Sch C, cl 2.

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

⁵⁰ Defined in Sch C, cl 2 and elaborated in cl 8.

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

⁵² See Sch C, cl 34.

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

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

<subdiv>2004: The Living Murray First Step

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

This initiative followed an extensive process of scientific analysis and community consultation.⁵⁴ It was concluded outside of the Agreement through the *Living Murray Intergovernmental Agreement*⁵⁵ and is known as the Living Murray First Step (the First Step), a separate intergovernmental agreement between the Commonwealth, New South Wales, Victorian, South Australian and Australian Capital Territory governments. Its implementation is overseen by the Ministerial Council and is externally audited by the Commission’s Independent Audit Group.⁵⁶

Each State jurisdiction is set investment and water recovery targets based upon its share of consumptive water use, the indicative targets for water recovery being 269 GL from New South Wales, 214 GL from Victoria, 35 GL from South Australia and 2 GL from the Australian Capital Territory. Each State is responsible for developing water recovery plans for icon sites within their jurisdictions, there are six icon sites overall. The Commission is responsible for the Basin-wide environmental watering plan.

The Commonwealth is the major financial contributor to the First Step, committing 40% of the \$500 million, followed by New South Wales and Victoria at 23% each, South Australia at 13% and the Australian Capital Territory at 1%. The total investment is set against annual investment targets spread over the five years of the First Step. The Commonwealth has since invested a further \$500 million in the First Step (and other related works and measures under the Initiative) to ensure there are no financial impediments to its success.

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

It is recognised that the additional flow is a first step towards recovering the health of the River Murray and that more water will be needed over time to achieve this objective. The First Step is, however, a major achievement in its own right, which now has a combined budget of over \$1 billion.

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

<DIV>WALKING THE TALK – SOME EQUALLY REAL CHALLENGES

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

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

⁵⁶ See cl 78 of the *Living Murray Intergovernmental Agreement* and cl 158 of the Business Plan.

<blockquote>

I'm not happy with the progress of the Murray-Darling ... I don't think there is a lot of State co-operation there. I tend to sympathise with those from South Australia who say that ... I think we've got to put a bit of a bomb under the process.⁵⁷ </blockquote>

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

All Australian governments have agreed to a bold new water reform agenda under the *National Water Initiative*.⁵⁸ The Initiative now operates in an environment where:

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

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

In response to these changes the Initiative is going through a period of review. Evolutionary change is required to the way in which the shared resources of the Basin are managed. Some of the more significant changes required are outlined below.

<subdiv>Avoiding cold feet and actually letting emerging water markets work

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

In June 2005 the Productivity Commission⁶² advised that governments should start buying water from willing sellers in order to achieve the First Step water recovery target. This advice is consistent with the independent advice tendered to the 40th meeting of the Ministerial Council in May 2006 in reports from the Independent Audit Group, private consultants⁶³ and the Murray-Darling Basin Commission.

⁵⁷ Australian Prime Minister, Hon John Howard MP, as reported in Tingle L, "PM Backs Nuclear Solution", *Australian Financial Review* (24 February 2006) p 78.

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

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

⁶⁰ There are now 56 regions across Australia through which Natural Heritage Trust and National Action Plan for Salinity and Water Quality funds are invested. See www.nrm.gov.au/index.html (26 September 2006).

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

⁶² Draft Report of the Productivity Commission, n 40.

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

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The Chair of the Ministerial Council and Commonwealth Minister for Agriculture, Peter McGauran, has been reported as responding to the Productivity Commission draft report (referred to above), saying that “it would hurt farmers”.⁶⁴

The Wentworth Group of Concerned Scientists responded to this suggestion in an opinion piece⁶⁵ as follows: “[W]e are being told that, if you buy water from irrigators, you’ll send the rural economy into recession. What nonsense.”

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

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

As the *National Water Initiative* states, the objective of the parties in implementing the agreement is to: “provide greater certainty for investment and the environment, and underpin the capacity of Australia’s water management regimes to deal with change responsively and fairly”.

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

While the practice of paying a premium for appropriate infrastructure improvements to generate water savings should continue to be considered, this needs to occur in a sensible, balanced and economically sound manner. This manner is anticipated by the *National Water Initiative*⁶⁸ and The *Living Murray Intergovernmental Agreement* and Business Plan⁶⁹ which requires measures to be assessed for their cost effectiveness.⁷⁰

The Wentworth Group appears to take a rather extreme view in support of the market. The Productivity Commission’s draft report recognises that in some infrastructure projects source water may have other benefits⁷¹ and The *Living Murray Intergovernmental Agreement* and Business Plan supports a range of possible eligible measures for water recovery.⁷²

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

<blockquote>

⁶⁴ See Breusch J, “McGauran Hoses Down Water Alert”, *Australian Financial Review* (16 June 2006), p 3.

⁶⁵ See Cosier P “Let Market Set the Water Mark”, *Australian Financial Review* (20 June 2006) p 63.

⁶⁶ See cls 58-63 of the *National Water Initiative*.

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

⁶⁸ See cl 79 of the *National Water Initiative*.

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

⁷⁰ See for example cl 32 of the *Intergovernmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray Darling Basin 2004*.

⁷¹ See Draft Report of the Productivity Commission, n 40, p 121.

⁷² See cl 23 of the *Intergovernmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray Darling Basin 2004*.

Commonwealth funds should not be used to subsidise uneconomic projects ... Instead of running grants schemes that aren't delivering water, buy it from willing sellers and let them use the money to invest in water efficiency.</blockquote>

<subdiv>**Entering the market under The Living Murray First Step**

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

It is apparent that the target of 500 GL of "new water" will not be achieved through infrastructure improvement projects alone and it will be necessary to purchase water from willing sellers if the target is to be achieved. The Commonwealth Parliamentary Secretary with responsibility for water, Malcolm Turnbull MP, emphasised that, "[w]e are committed to ensuring that we meet the target of restoring 500 GL to the river by 2009 ... the rate of progress ... is simply not good enough."⁷⁴

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

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

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

⁷⁴ Commonwealth Parliamentary Secretary with responsibility for water. See Anderson L, "Grants Plan to Raise River Murray Flows", *The Advertiser* (Adelaide, 28 April 2006)

⁷⁵ See cl 23 (ii) of the *Intergovernmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray Darling Basin 2004*.

⁷⁶ The purchase of water through the *Living Murray Intergovernmental Agreement* in a particular jurisdiction requires the approval of that jurisdiction under cl 43 of the *Living Murray Intergovernmental Agreement* and cl 63 of the Business Plan.

Assessing market-based options under the *Living Murray Intergovernmental Agreement*

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

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

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

<div>PUTTING INTO PLACE AN ENVIRONMENTAL FLOW REGIME THAT WILL ENSURE A HEALTHY SYSTEM WHILE MAINTAINING PRODUCTIVITY.

The Ministerial Council has received consistent advice from the world’s best river ecologists that additional flow in the River Murray is the key to restoring it to good health. The Scientific Reference Panel advised that at the whole-of-river scale, an additional 1,500 GL per year option alone would deliver, at best, a moderate improvement in the health of the River – assuming it was combined with improved structural and operational management.⁸⁰ These conclusions were based on the conditions that prevailed in 2003, including any surplus or unregulated flows.

The Hon John Hill MP, then Minister for the River Murray in South Australia, in a paper delivered to the Ministerial Council in 2002 described the advice as follows:

⁷⁷ See BDA Group, “Issues and Options in Applying Market Based Measures in The Living Murray First Step” (March 2006). The Ministerial Council has agreed to publicly release this report.

⁷⁸ See Debus B, “\$105 million Fund to Rejuvenate Inland Rivers and Wetlands”, (Media Release, 30 November 2005). This funding package is not part of The Living Murray.

⁷⁹ The tender has since been released. For initial announcement see Turnbull M, “Malcolm Turnbull announces new measures to recover water for the River Murray” 28 April 2006 available at www.malcolmtturnbull.com.au/news/article.aspx?ID=423 (viewed 26 September 2006).

⁸⁰ See Cooperative Research Centre for Freshwater Ecology, “Scientific Reference Panel, Ecological Assessment of Environmental Flow Reference Points for the River Murray System” (October 2003).

<blockquote>

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

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

The First Step is just that, an essential and significant first step along the path of returning the River Murray to good health. It is intertwined with the finalisation of the Living Murray Environmental Works and Measures Program⁸² to achieve the best possible environmental outcomes from the use of recovered water and existing flows,⁸³ including the management of surplus or unregulated flows.

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

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

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

<subdiv>**The Ramsar Convention and the Montreux Record**

Wetlands on the List of Wetlands of International Importance (the List) under *The Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971*, commonly known as the Ramsar Convention,⁸⁵ are selected on the basis of their "international significance in terms of ecology, botany, zoology, limnology or hydrology".⁸⁶ Once a wetland is included on the List by a contracting party, the State is obliged under the terms of the Convention to, among other matters,

⁸¹ Per the Hon John Hill, "Environmental Flows in the River Murray", Ministerial Council Meeting 32 (Adelaide November 2002).

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

⁸³ Through cl1 108-110 of the Business Plan.

⁸⁴ The various market based options are addressed in BDA Group, "Issues and Options in Applying Market Based Measures in The Living Murray First Step" (March 2006); Draft Report of the Productivity Commission, n 40; and the submission presented to the Productivity Commission by the Australian Conservation Foundation (July 2006) available at www.pc.gov.au/study/waterstudy/subs/sublist.html (viewed 26 September 2006).

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

⁸⁶ Today there are 1,590 wetlands included on the List by the Conventions 150 contracting parties, 64 of which are included in Australia with 11 being in the Murray Darling Basin. See www.ramsar.org/ and <http://www.deh.gov.au/> (viewed 26 September 2006).

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“Formulate and implement their planning so as to promote the conservation of wetlands included in the List”.

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

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

<subdiv>**The Environment Protection and Biodiversity Conservation Act 1999 (Cth)**

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

Under the EPBC Act no “action” can be undertaken that will have “a significant impact on the ecological character” of a Ramsar wetland⁹¹ without the prior approval of the Commonwealth Environment Minister.⁹² The Commonwealth and its agencies are also obliged to take all reasonable steps to “ensure it exercises its powers and performs its functions in relation to a wetland in a way that is not inconsistent with ... the Ramsar Convention”.⁹³

<subdiv>**The Coorong and Lower Lakes: The Ramsar Convention and the EPBC Act**

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

⁸⁸ Full text of resolution available at www.ramsar.org/key_montreux_record.htm (viewed 26 September 2006).

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

⁹⁰ The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) lists seven matters of national environmental significance, national heritage places having been added since the passage of the Act in 1999. The Act seeks to give effect to Australia’s international environmental obligations under a range of international conventions and to deal with the management of Commonwealth places, including heritage places. More information on the Act is available from its home page at www.deh.gov.au/epbc/index.html (viewed 26 September 2006).

⁹¹ See *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), s 16.

⁹² Any action that reduces the surface flow of the River Murray or its tributaries, for example when a prescribed volume is exceeded, could be investigated as a new matter of national significance under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), thereby requiring the consideration of the Commonwealth Environment Minister before the action proceeds. The precise description of such a trigger would require further thought and analysis. The Environmental Defender’s Office of New South Wales has considered a possible water extraction trigger. For information see www.edo.org.au/edonsw/site/default.php (viewed 26 September 2006). Section 100 of the *Constitution* provides that the Commonwealth shall not “by any law or regulation of trade or commerce, abridge the right of a State or the residents therein to the reasonable use of the waters of rivers for conservation or irrigation”, a provision that has never been fully tested. The Commonwealth has used many heads of power to legislate on environmental issues, including legislating for the domestic implementation of international treaties under its ‘external affairs’ power. Powers can also be referred to the Commonwealth by the States under Section 51(xxxvii) of the Australian Constitution.

⁹³ See *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), s 334.

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

Colin Thiele, in his book *Storm Boy*, vividly describes the wild beauty of the Coorong:

<blockquote>

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

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

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

The state of health of the mouth of the River Murray and the Coorong and Lower Lakes is the most obvious and emotionally evocative indication of the success or failure in managing the shared resources of the Basin.⁹⁸ Minister Maywald from South Australia has long advocated that: “*if we can get it right at the end of the system the rest will follow*”.⁹⁹

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

<div>SERIOUSLY ADDRESSING THE SIX RISKS TO SHARED WATER RESOURCES AND MANAGING UNREGULATED FLOWS FOR THE BENEFIT OF THE WHOLE BASIN

⁹⁴ Thiele C, *Storm Boy* (Rigby, Adelaide 1963) in Muirhead P, “The Changing face of the River Murray” *ABC News Online* (undated) available at www.abc.net.au/news/features/ocean/adelaide.htm (viewed 26 September 2006).

⁹⁵ Murray Darling Basin Commission, “The Lower Lakes, Coorong and Murray Mouth Asset Environmental Management Plan for 2005/2006” (2005) p 39.

⁹⁶ See Walker D, “The Behaviour and Future of the River Murray Mouth” (Centre for Applied Modeling in Water Engineering, University of Adelaide, 2002) p 3, available online at www.thelivingmurray.mdbc.gov.au/reports/archived_reports (viewed 26 September 2006).

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

⁹⁸ Dredging has been underway at the Mouth of the River since October 2002, at a total cost of \$15 million to June 2005. See Murray Darling Basin Commission, “Murray Darling Basin Commission Annual Report 2004-2005”, (2005) p 32. The total cost of dredging operations from October 2002 to June 2006 is \$22.006 million. The cost of dredging has been shared equally by the Commonwealth, New South Wales, Victoria and South Australia. Personal communication, Geoff Haberfield Office of the Commission 26 July 2006.

⁹⁹ Per the Hon Karlene Maywald MP, Personal Communication (July 2006, emphasis added).

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

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

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

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

There are three risks that are within the direct regulatory control of the parties yet there remains ongoing reluctance to promptly deal with them. They are afforestation, groundwater extraction and farm dams, the potential impact of which has been known for a decade or more. The estimates included in the CSIRO reports predict that these three risks could reduce surface water supply by 1,075 GL to 4,100 GL in the next 20 years – afforestation between 550 to 700 GL, farm dams between 250 to 3,000 GL and groundwater between 275 to 550 GL.

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

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

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

Although the Murray Darling Basin Commission is spending \$1 billion to secure and manage an additional 500 GL of water for environmental flows, the parties to the Agreement are allowing the continuance of a situation where the three risks that are within the control of the jurisdictions are projected to decrease flows over the next 20 years by between two and eight times this volume. This is occurring in the context of the best science indicating that an additional 1,500 GL per year is required to deliver a moderate improvement in the health of the River.

¹⁰¹ See Murray Darling Basin Commission, “CSIRO, The Shared Water Resources of the Murray-Darling Basin”, (February 2006); and Murray Darling Basin Commission, “CSIRO, Risks to the Shared Water Resources of the Murray Darling Basin”, (February 2006), both available online at www.mdbc.gov.au/news/MC_communique/mc40-reports (viewed June 2006).

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

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

¹⁰⁴ An impact that is not accounted for is the reduction in flows caused by salt interception schemes. Young, n 102.

¹⁰⁵ See Draft Report of the Productivity Commission, n 40, p 25; and for a detailed discussion see Young M and McColl J, “Robust Reform: Implementing Robust Institutional Arrangements to Achieve Efficient Water Use in Australia”, (CSIRO Land and Water, 2003).

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

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

The response from some respected colleagues is that if they cannot access groundwater they will have nowhere to go for additional water. First, they do have somewhere to go, they can access water from within the Cap. Secondly, it is well established that there is a limit to the available resource, something South Australia recognised in 1969 when it put into place a self-imposed cap on diversions from the River.

This is a critical matter for the parties to address. The Ministerial Council and the Commission are responding to the six risks by undertaking further studies and analysis and at its 40th meeting in May 2006, the Ministerial Council agreed that the issue should become a standing item for all future meetings of the Council until strategies are in place to deal with the risks.¹⁰⁸ All of this is good, but in light of the available knowledge and the regime that has been put into place through the CoAG water related reforms and the *National Water Initiative*, decision-makers must act now to stop creating new water rights that could impact the surface water resources of the Basin unless sourced within the Cap. All of this can be achieved in the context of the States' existing legislative regimes, with the possible exception of some farm dams which may require legislative (as opposed to regulatory) change.¹⁰⁹

<subdiv>**Unregulated or surplus flows**

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

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

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

The volume of water recovered through the First Step is small compared to the volume of water available through unregulated flows and it does not match the amount of available water that can be

¹⁰⁶ The Murray Darling Basin Commission cannot assume continuing budget surpluses to spend on recovering water.

¹⁰⁷ See Draft Report of the Productivity Commission, n 40, p 11.

¹⁰⁸ See Ministerial Council Communique available online at www.mdbc.gov.au/news/MC_communique/mc40-reports (viewed July 2006).

¹⁰⁹ See Dyson M, "Risks to Shared Water Resources, Overview of Statutory Frameworks", (Murray Darling Basin Commission, 2005). Also see n 92, above, regarding a possible role for the Commonwealth under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

¹¹⁰ See "Review of The Living Murray Implementation" presented to the Ministerial Council at Meeting 40 (May 2006) p 26.

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lost to the system through the six risks to shared water resources, estimated at being between 2,500 GL and 5,500 GL per year by 2023.

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

- requiring the Commission to propose options for achieving improved environmental outcomes for the River Murray through the management of unregulated flows by June 2005 and to provide a report to the Ministerial Council in October 2005;¹¹¹
- requiring the Living Murray Environmental Watering Plan to include rules for the management of unregulated and/or surplus flows;¹¹²
- requiring a Basin-wide account to be developed to enable monitoring and reporting on the volume and spatial distribution of unregulated flows in the Murray Darling Basin over time; and¹¹³
- requiring jurisdictions, while retaining responsibility for unregulated flows, to comply with cl 46 of the Agreement at any time when the assignment of water resources to tributary ecological assets is being considered in order to assess the relative merits of the various options.¹¹⁴

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

<blockquote>

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

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

<subdiv>**Minimising the need to recover additional new water**

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

The Commission, and each jurisdiction, wishes to minimise the amount of additional “new water” that is recovered from consumptive users, including irrigators, following the success of the First Step in restoring the River to good health. The only future option available to the Ministerial Council to achieve this objective through better flows – other than recovering additional “new water” from consumptive users – is to better manage unregulated flows.¹¹⁷ This needs to be done correctly.

The optimal management of unregulated flows to achieve specific environmental outcomes for the six significant ecological assets and other local assets may reduce the additional volume of “new

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

¹¹² Rules have not yet been prepared.

¹¹³ A Basin-wide account has not yet been prepared.

¹¹⁴ No proposals have been submitted to the Commission under cl 46 of the *Murray Darling Basin Agreement*.

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

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

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

water” that will need to be recovered to restore the River to good health after the implementation of the First Step.

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

<div>CREATING MODERN AND EFFECTIVE GOVERNANCE AND COMPLIANCE ARRANGEMENTS.

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

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

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

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

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

Heads of government agencies work very closely with Ministers, and while not political in a party political sense, are appropriately close to the politics of government. They are contracted to

¹¹⁸ The World Summit on Sustainable Development, (Johannesburg, South Africa, 26 August-4 September 2002), *Johannesburg Plan of Implementation* stated that “good governance within each country and at the international level is essential for sustainable development”.

¹¹⁹ And numerous initiatives have been launched to promote water governance such as the joint initiative of the United Nations Development Programme and Stockholm International Water Institute through the Water Governance Facility available at www.watergovernance.org/ (viewed 26 September 2006), and the Global Water Partnership available at www.gwpforum.org/servlet/PSP (viewed 26 September 2006).

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

¹²¹ South Australia, House of Assembly Select Committee on the River Murray (3 May 2000 and 13 March 2001), available online at www.parliament.sa.gov.au/committees/committee.asp?doCmd=show&intID=11 (viewed 26 September 2006). Committee Chair, the Hon David Wotton, is now the Chair of the South Australian Murray Darling Basin Natural Resources Management Board and Committee Member, the Hon Karlene Maywald MP, is now South Australia’s Minister for the River Murray.

¹²² See Agenda Item 5A Ministerial Council Meeting 40 – May 2006. See also Turnbull M, “Commonwealth Injects \$500 Million, New Urgency Into Water Recovery For Murray Darling Basin”, (Media Release, 19 May 2006), available online at www.malcolmturnbull.com.au/news/default.asp?action=article&ID=441 (viewed 26 September 2006).

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

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carry out the government's policy agenda,¹²⁴ yet the expectations of the government of the day and obligations to the Basin under the Agreement may not always coincide. This stands in contrast to the intended role of commissioners under the Agreement which is to act in the best interests of the Basin without regard to political borders; this obligation is not expressly stated.¹²⁵

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

Since the author returned to the Commission in 2006, it has become equally apparent that a level of independence is also required in the implementation of measures under the Agreement. Under current arrangements the heads of State agencies responsible for the implementation of many measures, and related federally funded programmes sit on the Commission, which is also often responsible for overseeing, reviewing or advising the Ministerial Council on the implementation of the very same initiatives.

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

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

A selection process for independent members of the Commission that closely followed the process used at Commonwealth level for appointments to research and development cooperation boards was recommended in evidence before the Select Committee.¹²⁸ This process should be adapted and applied to the appointment of a skills-based Commission. It would involve the chair of the Ministerial Council appointing a selection panel following consultation with all members of the Ministerial Council, an open process of inviting expressions of interest in being appointed to the Commission, and the Panel making nominations to the Chair based upon established selection criteria. The Minister's discretion to reject nominations would be constrained, but if exercised would require the process to be repeated. The evidence presented to the Select Committee included the following:

<blockquote>

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

¹²⁵ This role would be clearer if the Commission was treated as body corporate. For a discussion of this issue see Clark SD, "Divided Power, Co-operative Solutions", in Connell D (ed), *Unchartered Waters*, (MDBC 2002) p 15.

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

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

¹²⁸ See transcript of Scanlon J, n 123.

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

The Select Committee's recommendations closely followed this evidence, with the Committee's findings including Recommendation 4, which states that:¹²⁹

<blockquote>

The Murray-Darling Basin Ministerial Council give consideration to the composition of the Murray-Darling Basin Commission with the aim of changing it to an independent, expert (skills-based) Commission. The Commission must contain skills in ecology and natural resource management, irrigation technology, engineering, finance and business administration, resource economics, law, regional development and public administration.

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

In addition to this recommendation¹³⁰ it needs to be clearly set out in the Agreement and implementing legislation that commissioners are to act in the best interests of the Commission. This could be achieved by establishing the Commission as a statutory board to direct, govern, guide, monitor, oversee, and supervise the work of the Office. The role and function of the Office would also need to be recognised in the Agreement, along with requirements for the more open and transparent transaction of the Commission's business.

<subdiv>**Moving ahead with Independent Commissioners**

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

Of particular note are the opinions expressed by Professor Sandford D Clark¹³¹ in an article written in 2002.¹³² Professor Clark expressed the view that:

<blockquote>

¹²⁹ South Australia, Select Committee on the Murray River, *Final Report – 2001* (South Australia, 2001) p 6, available at: www.parliament.sa.gov.au/committees/documents/MurrayRiver_49_4/public_documents/Reports/SCRiverMurayFinal.pdf (viewed 26 September 2006).

¹³⁰ The author suggests government members are appointed as ex officio, non-voting members.

¹³¹ A long time legal adviser to the Commission.

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

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

The notion of appointing commissioners on the basis of their skills was also supported by Professor Peter Cullen through a recommendation made to the Government of South Australia as an Adelaide Thinker in Residence in 2004.¹³⁴ Professor Cullen recommended that:

<blockquote>

Recommendation 7

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

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

<blockquote>

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

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

<subdiv>Utilising majority voting – a first for the Commission

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

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

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

<subdiv>Majority Voting – removing the veto from the Ministerial Council

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

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

¹³⁵ Murray Darling Basin Commission.

¹³⁶ See cl 32 of the *Murray Darling Basin Agreement*.

¹³⁷ See cl 17 of the *Murray Darling Basin Agreement*.

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

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

The Ministerial Council takes all of its decisions by the unanimous vote of all Ministers present and constituting a quorum.¹⁴⁰ This has, on occasion, led to a situation where one jurisdiction has refused to yield and effectively vetoed progress on reform.¹⁴¹ There are many examples, the European Council of Ministers is one, of political bodies adopting voting requiring a qualified majority, or super majority, rather than a unanimous decision or simple majority vote.

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

<div>FULLY IMPLEMENTING MAJOR INITIATIVES OF THE MINISTERIAL COUNCIL, IN PARTICULAR THE CAP ON WATER DIVERSIONS, BASIN SALINITY MANAGEMENT STRATEGY, LIVING MURRAY FIRST STEP AND INTERSTATE TRADE

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

It is not the purpose of this article to run through the implementation challenges in detail, rather it is to highlight the importance of ensuring that focus is maintained on implementation and not being unduly distracted by the next emerging policy initiative.

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

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

<div>ACHIEVING COMPLIANCE WITH THE NATIONAL WATER INITIATIVE.

<blockquote>For the first time, all Australian governments have committed to a national blueprint for water reform ... The National Water Initiative is the agreed blueprint for the reform of water management throughout Australia.¹⁴⁵</blockquote>

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

¹⁴⁰ See cl 12(3) of the *Murray Darling Basin Agreement*.

¹⁴¹ See generally Clark, n 133.

¹⁴² See Murray Darling Basin Commission, *Review of Cap Implementation 2004/5, Report of the Independent Audit Group* (MDBC, 2006).

¹⁴³ See Murray Darling Basin Commission, *Report of the Independent Audit Group for Salinity 2004-2005* (MDBC, 2006) p 6.

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

¹⁴⁵ Transcript of the Prime Minister, the Hon John Howard MP, “Address to the Committee for Economic Development of Australia” and “Securing Australia’s Water Future July 2006 Update”, (CEDA Conference, Sydney, 17 July 2006).

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Unlike the 1994 CoAG Water Related Reforms,¹⁴⁶ compliance with the *National Water Initiative* is not tied to competition payments, nor does it include any legislative compliance options.

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

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

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

The requirement of reviews gives parties the opportunity to address each of the challenges referred to above. It also provides the opportunity for the Commonwealth to consider whether to start tying funding to the *National Water Initiative* and its ongoing investment in the Initiative to achieving necessary reform. Whether the parties seize the opportunity presented by these reviews remains to be seen.

<div>A NEVER ENDING STORY: CREATING THE FRAMEWORK FOR ONGOING NEGOTIATIONS

The negotiation process is a little over a century old and will continue in perpetuity as governments and the community adapt to changing economic, social and environmental conditions by utilising innovative tools to enhance productivity and to improve the ecological health of the Basin.

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

Many royal commissions and government and community-based conferences have been held both prior to and since the creation of the Commonwealth of Australia in 1901 and strongly-held negotiating positions have been defended with great vigour. However, a sense of shared ownership

¹⁴⁶ The National Competition Policy was an agreement between the Commonwealth and State and Territory governments to progress a nationally coordinated approach to microeconomic reform in return for a series of national competition tranche payments, based upon the effective implementation of the reform agenda. The reform agenda included so called "related" reforms, including the strategic framework for the reform of the Australian water industry, adopted by all Australian governments in 1994. Through including the "related reforms", the National Competition Policy entrenched the following issues on the national agenda: identifying and managing assets; efficient pricing; trade in water rights; environment flows; and community involvement. More specifically, this strategic framework included provisions relating to urban and rural pricing, separating water allocations or entitlements from land title, institutional reform, water trading, third party access to infrastructure, environment flows and community consultation.

¹⁴⁷ See cl 14 of the *National Water Initiative*.

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

¹⁴⁹ See eg cll 78-79 of the *National Water Initiative*.

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

and responsibility has prevailed as the parties have strived to work with the Basin community to find pragmatic and cooperative solutions to the economic, social, and increasingly environmental challenges that confront the Basin, its governments and its community.

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

Over the past century the governments and communities of the Murray Darling Basin have done some truly great things within the Basin along with some things that, with hindsight, might have been done differently. The parties now have a significant knowledge base which allows a better understanding of the consequences of both current and future actions.

The latest version of the Agreement has been in place since 1992 and was revised in 1996. As has been described above, the Commission and Ministerial Council have now entered an era where they are confronting new and significant challenges. The inescapable conclusion from all the knowledge available is that changes are required to the Agreement and the way it is administered if the parties are going to successfully implement the measures deemed necessary by all governments to restore the system to good health and to maintain productivity.

If the necessary changes are made, society will be heading in the right direction to pass on a healthy and productive Basin to the next generation of Australians. If not, a steady decline in the health and productivity of the system is assured. Responsibility for the direction taken is shared by all of us.