

## **Introduction**

The Water Act is an integral part of the Government's longstanding water reform agenda - a reform process that has enjoyed bipartisan support across the 20 years since the COAG Water Reform Framework was first agreed in 1994.

The current water reform journey began with the COAG Water Reform Framework agreed by the Commonwealth and Basin States in 1994. COAG took this important first step in response to systemic environmental and economic concerns over water management that had been developing over previous decades. Central to the reform was acknowledgement that long term overuse of water had led to environmental degradation, with poor water quality and salinity jeopardising the long term health of the river systems, particularly the Murray-Darling. Governments agreed that a new approach was needed to deliver long term sustainability and better economic returns.

The resulting reform package had a strong focus on economic reforms, including the introduction of water trading and market reforms designed to encourage more efficient water use. The 2004 COAG National Water Initiative sought to strengthen and extend the Reform Framework, introducing further pricing and market reforms designed to clarify property rights, strengthen water markets, increase efficiencies and encourage water to move to its highest value use. The National Water Initiative also sought to deal once and for all with the issue of overuse of the resource and all governments committed to this.

The *Water Act 2007* and the Basin Plan are cornerstones in continuing this reform, with an emphasis on managing the Basin's water resources in the national interest and achieving a balance of environmental, social and economic outcomes. When the Water Act was enacted by the Howard Government in 2007, it was in recognition that while States were making some progress with implementing the National Water Initiative, some of the harder issues on addressing overuse of the resource and liberalising trade were stalling. In essence, the Water Act and the Basin Plan deliver on the outstanding business of the National Water Initiative (at least within the Basin).

The Water Act 2007 fundamentally changes the way the Basin water resources are managed, introducing a Basin-wide approach to managing water sustainably across borders and beyond state interests. Key element the Water Act include the introduction, for the first time, of sustainable and legally enforceable limits on surface and groundwater extraction across the Basin (the sustainable diversion limits, or SDLs), along with reforms designed to achieve a more effective water market that can deliver more efficient and effective water use, and improved outcomes for communities.

The legislative reforms are complemented by a significant investment of Commonwealth funds (over \$12bn) to address overuse, and improve water use efficiency. The Basin water reforms have enjoyed bipartisan support since their inception in 2007. The Water Act and the Basin Plan can be viewed as an insurance policy to underpin the large government investment in the reforms to date.

### **Timing of the Review**

*Whilst regular review is a critical part of delivering reform, in this case it is important to recognise that this review is taking place very early on in the life of the Basin Plan. As such, MDBA considers there are limitations to the conclusions that can be drawn about the extent to which the Water Act and Basin Plan objectives are being met. MDBA believes that community interests will be best served by providing certainty and avoiding further change at this time: we just need to get on with the job.*

At the time the 2014 review was written into the Water Act, it was envisaged as a 5 yearly review of a Plan that came into effect in 2009. As events have unfolded, the Basin Plan, which is the primary mechanism for implementing the reforms of the Water Act, has been in place for less than two years and there are key elements that will not be operational until 2019. Most notably:

- the introduction of new SDLs is delayed until 2019, in recognition of the need for a reasonable transitional period for communities, and to align with the Government's investment in water recovery
- state water resource plans, which deliver on SDLs and other key elements of the Plan are not operational until 2019
- the water trade rules have only just commenced this month (July 2014)
- the SDL adjustment mechanism will not operate until 2016
- the Basin-wide environmental watering strategy will not be finalised until the end of 2014.

Given this timing issue, the MDBA considers there will be practical limitations on the ability of the review to reach conclusions about the implementation of the Plan, and we urge caution in considering any proposals for wholesale change to the current arrangements this early in the implementation phase. On the contrary, we consider that the best interests of the community, and the water industry in particular, will be best served by providing certainty and avoiding further change. We believe the Authority, in partnership with States and the Basin community, should get on with the task of rolling out the Plan in the transparent and collaborative way that we have demonstrated since the Plan was drafted and passed into law.

Within this context, the MDBA offers the following observations.

### **Role of the MDBA**

*MDBA has two very clear and distinct functions that are each funded and accounted for separately. The Commonwealth funds the Authority for its role in implementing the Basin Plan, whilst Basin governments jointly fund the Authority to manage river operations on their behalf. MDBA believes that reporting on both these streams of work should be separate and transparent.*

MDBA plays a dual role in the Basin, overseeing implementation of the Basin Plan in accordance with the Water Act; and carrying out river operation functions and NRM programs on behalf on the Basin governments in accordance with the Murray Darling Basin Agreement. River Murray Operations and joint NRM programs are funded jointly by the Commonwealth and the governments of NSW, Victoria and South Australia. Separately, the Commonwealth funds MDBA to carry out its Basin Plan implementation functions.



Within the MDBA, separate accounting and operational arrangements are maintained for Joint activities and Basin Plan activities respectively. Under these arrangements, MDBA reports publicly on its Basin Plan functions and to the joint governments on jointly funded river operations and NRM programs, as set out below. Public reporting on these joint government activities is in the hands of the States.

The MDBA manages River Murray Operations on behalf of the partner governments - providing head office functions such as coordinating asset management, directing river operations, technical and modelling support. Each state partner government appoints a State Constructing Authority to undertake the day to day management, maintenance, and renewal of the physical assets and on-ground operations, under the direction of the MDBA.

The annual budget and associated activities for River Murray Operations is authorised by Basin Ministers, through the Ministerial Council. The MDBA then authorises activities to be undertaken by the State Constructing Authorities, and funds them through the Joint Activities budget. Almost 90 per cent of the funds received by the MDBA for River Murray Operations are expended in regional areas through the State Constructing Authorities.

River Murray Operations is a significant enterprise responsible for the management and operation of an asset base with a replacement value of around \$3.6 billion. These assets underpin the delivery of state water shares and the operation of water markets that are critical to the Basin's irrigated agriculture sector.

The last formal review of River Murray Operations efficiency, undertaken in 2007, concluded that efficiency was comparable with similar businesses in the water infrastructure sector. However, there have been many changes both in the operating environment and the nature of the business since 2007. Accordingly, an independent review into the efficiency of River Murray Operations is currently underway, encompassing the MDBA head office and the State Constructing Authorities. This review will report to Ministerial Council in early 2015.

The MDBA directs river operations in the River Murray System in accordance with objectives and outcomes set by the Basin governments through the Basin Officials Committee. Every year the Authority provides comprehensive reports on its river operations function to the Basin Officials Committee. The annual report of River Operations is then reviewed by an independent review group with recommendations being provided back to the Committee for consideration. MDBA supports any moves towards further transparency in its river operations and joint NRM functions, but notes that any such decisions are in the hands of the states, to whom the Authority reports on these matters.

Further information on the joint programs is on the MDBA website.

## **The Regulatory Regime**

*MDBA believes that broadly, the current regulatory settings of the Water Act and the Basin plan are right. The current arrangements provide an appropriate balance of continued collaboration underpinned by the strength of Commonwealth governance to confront difficult issues.*

MDBA anticipates that the review panel will be asked to consider a range of proposals which, in some shape or other, are about dismantling the achievements of the Basin reforms or the ability to sustain them into the future. On this, our message to the review Panel is a simple one – resist! The basic model of a national government, advised by a small independent expert agency, determining the key settings for Basin water resources is - in our view - very sound. It meets the basic regulatory principle of subsidiarity, and represents an appropriate response to previous failures of both governments and the market to address significant externalities and deliver sustainable and efficient water use.

Some examples of the type of proposals for change likely to be put to the review are:

- to change the governance arrangements back to a consensus between six governments
- to wind back the Authority's regulatory role to that of an occasional, toothless, auditor
- to have trade in the water portfolio held by the Commonwealth Environmental Water Holder dictated by production concerns alone.

Each of these examples would undermine the basic settings of the reform. The Water Act and the Basin Plan provide a low level regulatory response to what has been an intractable public policy issue. The regulatory burden, particularly for private individuals, is low.

The settings in the Act and the Plan are aimed at achieving a more efficient water market that operates more effectively across state borders and removes the regulatory restrictions on trade. It is appropriate for the Commonwealth to use its powers to help deliver cross-jurisdictional outcomes. MDBA believes compliance activity in the Plan is the minimum necessary to provide confidence that implementation will occur and the regulatory objectives will be achieved.

## **Compliance Approach**

*MDBA believes the need remains for an independent arbiter to ensure the reforms introduced by the Water Act and the Basin Plan are bedded down. The inclusion in the Act of a regulatory scheme with associated enforcement powers gives the community confidence that in an area of public policy as vexed as water management in the Basin, there is an independent agency that can ensure the aims of the Plan can be achieved. MDBA's Compliance Strategy focuses heavily on the use of negotiation to resolve issues. The application of enforcement powers against Basin States or individuals would only occur as a last resort*

The MDBA is implementing the Basin Plan with Basin States within a cooperative framework: this is set out in the Implementation Agreement already agreed with Basin States. Given the early stage of implementation, we believe it would be far too early to review governance arrangements and consider self-regulation by the States. There is a history in the Murray Darling Basin of States operating with competing interests and the potential remains for conflict between a Basin State's



desire to enhance its economic position and new requirements to operate cooperatively with other States and the Commonwealth to limit consumptive water use.

By creating enforceable obligations in Commonwealth law and providing an appropriate enforcement toolkit, the Commonwealth is able to more readily influence State behaviour. In essence, the very nature of the existence of a compliance regime acts to influence State decisions.

MDBA takes a risk-based approach to compliance. Our Compliance Strategy focuses heavily on the use of negotiation to resolve issues. The application of enforcement powers against Basin States or individuals would only occur where we are unable to negotiate and/or mediate acceptable compliance outcomes. Paragraph 6.4 of the Basin Plan Implementation Agreement expressly states that '*The MDBA would only seek to exercise its powers under the Water Act 2007 (the Act) as a last resort*'.

The Act also provides constitutional protections to States by expressly excluding an agency of a State from liability to be prosecuted for an offence or to be subject to civil proceedings for a civil penalty for a contravention of a civil penalty provision (refer section 12).

### **Water Resource Planning**

*MDBA considers that the Basin Plan framework providing for Commonwealth accreditation of state based water resource plans is the best to ensure that the Basin Plan reforms are delivered consistently by all governments, but with the ability to reflect state or regional differences.*

The Water Act establishes state water resource plans (WRPs) as a primary vehicle for delivering key elements of the Basin plan including, importantly, the SDLs. Under the Act, states prepare WRPs which are accredited by the Commonwealth Minister for 10 years, based on expert advice from the MDBA. MDBA considers that Commonwealth accreditation of state WRPs is important in securing the long term implementation of the reforms and promoting better regulatory performance across the Basin States. It is appropriate surety for the nation's \$12 billion investment in the Murray-Darling Basin.

Water resource planning is a complex matter that address multiple bio-physical, economic and social needs through the application of scientific and regulatory approaches. The accreditation framework established by the Water Act incorporates a risk-based approach to ensure compliance burdens are the minimum necessary to ensure that of key aspects of the Basin Plan (such as SDLs) are delivered, while maintaining sufficient flexibility to fit with a variety of State planning frameworks and accommodate regional differences.

The Water Act requirements are designed to incorporate and, where necessary, build on the water planning already undertaken by the Basin States in a way that encourages improved and more consistent regulatory approaches and delivers sustainable outcomes at a basin wide scale. In most cases, the Basin States' primary water planning instruments, prepared under State legislation, are expected to form the main component of the water resource plans under the Basin Plan.

The framework set out in the Water Act enables the MDBA to work collaboratively with States as they develop their water resource plans, providing assistance and advice on Basin-wide issues throughout the process and without duplicating the effort of Basin States. Provisions such as the step-in powers that enable the MDBA to prepare water resource plans would only be used in exceptional circumstances where the Commonwealth and a Basin State were unable to reach agreement.

All water resource plans are to be finalised no later than 30 June 2019 and work has already commenced on some plans in Qld and the ACT. In accordance with the Basin Plan Implementation Agreement, the MDBA is currently working with the Basin States on a work program for developing, assessing and accrediting plans progressively to ensure all plans are in place when the SDL's come into effect.

MDBA considers that there are some minor improvements that could be made in the Water Act to ensure this overall framework operates as efficiently and effectively as possible. Some examples of these suggested minor amendments include:

- allowing Basin States some flexibility in choosing a more recent version of the Basin Plan to accredit their plans against, rather than applying the hard 2 year rule (see s56 of the Act); and
- providing a 'middle road' for non-critical amendments to be made to WRPs rather than requiring full reviews for modest but non-trivial amendments (see s63 and s66 of the Act).

These suggested amendments are largely about making the task of altering already accredited plans more efficient and flexible to assist Basin states in managing water resources under the Basin Plan.

### **Water Trade**

*The water trading rules are designed to reduce barriers to trade in the water market. In doing so, they impose some new obligations and standardise a number of rules that are already in place. The MDBA has taken care to ensure this is done in a way that minimises the regulatory burden.*

The Basin Plan water trading rules are an important part of the reform package, designed to free up water markets and enable industry to adapt. In doing so, they impose some new obligations and standardise a number of rules that are already in place. The MDBA has taken care to ensure this is done in a way that minimises the regulatory burden.

The water trading rules have been designed in accordance with the objectives and principles set out in Schedule 3 of the Water Act. These include:

- minimising transaction costs
- enabling the appropriate mix of water products to develop
- recognising and protecting the needs of the environment
- providing appropriate protection of third party impacts



The Australian Competition and Consumer Commission (ACCC) and the MDBA undertook extensive stakeholder consultation when developing the rules. This consultation provided an opportunity to identify areas for improvement and ensure the rules operated in a manner that did not duly increase the regulatory burden. The MDBA amended a number of rules based on advice received during the consultation process.

The water trading rules are intended to reduce barriers to trade for water market participants. As such, they standardise certain rights and conditions to ensure participants have fair and equal access to trade. The rules have three main areas of focus:

- preventing unnecessary restrictions on trade
- increasing transparency in the market
- supporting market confidence.

In order to ensure a consistent framework across the Basin, the rules apply to Basin States, irrigation infrastructure operators and individuals who are involved in the water market.

The rules complement existing regulatory frameworks in order to minimise the regulatory burden for entities (includes the MDBA). For example:

- the MDBA worked with the ACCC on the rules to ensure that the water trading rules complemented existing regulation for irrigation infrastructure operators under the Water Market Rules and Water Charge (termination fees) rules.
- the MDBA worked with Basin States to ensure all reporting to the MDBA utilises existing information wherever possible.

To prepare for the commencement of the water trading rules on 1 July 2014, the MDBA worked extensively with stakeholders on how to comply with the new obligations.

In April 2014, the MDBA released technical guidelines which explain the rules in more detail. We conducted a number of multilateral and bilateral meetings with Basin States to ensure the guidelines set out the new requirements. Broader input on the guidelines was also sought from irrigation infrastructure operators, the MDBA's Basin Community Committee, water brokers and a small group of water market participants.

The MDBA is now working with relevant entities on a small number of areas where full compliance was not possible by 1 July 2014. In the first instance the MDBA intends to ensure entities fully understand their obligations. New material on the MDBA's website sets out the MDBA's Compliance Strategy and how an individual can contact the MDBA. MDBA has adopted a risk-based approach to all of its compliance activities.

### **Water Charging**

*The water charging regime introduced by the Water Act is designed to give effect to the principles of user-pays, achieve pricing transparency and facilitate the efficient functioning of the water market. MDBA has concerns that the water charging provisions of the Water Act have not yet led to the 'level playing field' intended by the regime, and recommend that this issue be examined in more detail.*

MDBA is concerned that the water charging provisions of the Water Act have not yet led to a 'level playing field' across the states, resulting in different charges for similar products, and implications for competitive neutrality. Despite the intention under the Water Charge Rules for bulk water operators to move toward upper bound pricing and full cost recovery, it appears that this is not occurring. Transparency of pricing decisions is low, and approaches to cost recovery and consumption based pricing appear to be inconsistent across jurisdictions, below those intended by the water charge and water market rules, and not consistent with commitments made by COAG under the National Water Initiative.

The consequent distortions in the water market undermine the objective of achieving efficient use of water. There is also a risk that over time inconsistent approaches to price recovery could result in problems with infrastructure operation and maintenance (including safety).

Given the role the Water Charge Rules were meant to play in driving efficient and sustainable outcomes in water markets, MDBA considers more detailed assessment may be warranted to consider:

- the extent to which the Water Charge Rules have been implemented
- any impediments to implementation
- the implications of failure to implement Water Charge Rules
- whether the Water Charge Rules should be amended in any way to make them more effective.

### **Environmental Watering**

*The environmental watering provisions of the Basin Plan establish a long-term planning framework complemented by annual priorities. MDBA is working with state agencies, and the Commonwealth Environmental Water Holder, to build on existing collaboration and develop more streamlined processes. Environmental watering is a complex area that will continue to evolve, but there have been some early successes.*

The Environmental Watering Plan (Chapter 8 of the Basin Plan) sets out overall environmental objectives and establishes an integrated planning framework for delivering environmental water. This framework involves long term environmental watering plans which are complemented by annual environmental watering plans that identify specific priorities for each coming year. These plans are developed cooperatively between the MDBA, the Commonwealth Environmental Water Office (CEWO), States and Basin communities.

### **Long term planning**

At the Basin scale, MDBA will publish the first Basin-wide long-term environmental watering strategy at the end of November 2014. This timeframe reflects the work required to develop a robust and scientifically credible long-term strategy for the whole of the Basin. Once this strategy is in place,



individual state long-term watering plans must be prepared to complement the Basin-wide Strategy, within 12 months.

#### Annual planning

Annual environmental watering plans (or priorities) are also prepared at the both the Basin-wide scale by the MDBA and state scale by each Basin states. MDBA and the states have kicked off environmental watering planning, through the 2013-14 and for 2014-15 priorities while the long-term plans are being developed. This has allowed stakeholders involved in priority setting and water delivery to learn from the process and make necessary refinements (as part of a 'soft institutional build'). Future annual priorities will be prepared having regard to the long-term strategy, once it is in place at the end of this year.

#### Coordinating and Delivering Environmental Water

Planning and coordinating environmental water requires the Commonwealth and State governments, basin communities and river operators to work together. In unregulated rivers for example in the Paroo river system in Qld, environmental watering is effectively achieved through implementing the relevant water resource plan. In simpler regulated river systems such as the Macquarie in NSW, there are existing, mature arrangements for identifying environmental watering priorities and making decisions.

However in the southern Basin in particular, where the Murray and its larger tributaries such as the Goulburn and Murrumbidgee are regulated, and several jurisdictions are involved, the MDBA (as river operator) has an important role in working with water holders to identify opportunities for environmental watering throughout a given water year, to maximise the ability to take advantage of conditions as they occur. In the southern Basin, procedures and processes are still being developed – for example governments have established a new forum to coordinate delivery of environmental water, and this will be subject of further refinement in future.

There has been some criticism of the number of government bodies involved in environmental water delivery and the potential risk of duplication of roles. MDBA is working to build on existing collaborative arrangements and develop more streamlined processes for different environmental water holders to work together and achieve the best outcomes with their environmental water. MDBA does not believe further regulation is necessary to achieve this.

#### Reviewing the Basin Plan

*MDBA considers that regular review and reporting are important features of the Basin Plan. There would be merit in reviewing the timing of the various reviews now that the timeframes for implementation are known.*

It is appropriate that significant long-term reforms such as those set up by the Water Act and the Basin plan should be monitored and reviewed regularly to confirm if they are delivering on their objectives. Monitoring, evaluation and reporting are also important to inform improvements where necessary. For this reason the Act embedded a monitoring and evaluation program as part of the

Basin Plan, including annual reporting on Basin Plan effectiveness and various evaluation and reviews on 5-yearly cycles from when the Basin Plan commenced.

The periodicity of reviews is in essence a trade-off between the objective of certainty over the conditions of resource access, and the objective of setting resource access in line with the best available information (ie. adaptive management). MDBA considers that a 10 year cycle is a good compromise between these two objectives, and notes that this is the planning cycle most commonly in operation for state plans. MDBA does not support a longer planning cycle, as we believe this would not allow us to keep pace with the development of best-practice information and knowledge about river management.

Now that the Basin Plan is established and the timing of its implementation is known, MDBA considers there may be benefits in putting back the first '10 yearly' review of the Plan to around 2026 (this means that the Plan in effect at the time states commence reviews of those water resource plans expiring in 2029 would be up to date).

### **Information and Reporting**

*The Water Act gives the Authority the power to collect certain information essential to performing its functions. Whilst MDBA supports moving towards managing data through a single information portal, information delivery will need to meet standards and timeframes that allow MDBA to carry out those functions.*

MDBA is working with basin governments and agencies to collect and report a wide variety of information as efficiently as possible, including:

- quality, quantity and availability of water across the Basin;
- qualitative information to evaluate the outcomes of the Basin Plan including ecosystem health and socio-economic impacts; and
- information on water access and delivery rights and information about water use and trade.

MDBA agrees that a single water information portal is the ideal, but also recognises the complexities involved in achieving this. This will require reaching consensus among governments and agencies on a range of issues such as information standards, quality, definitions and timing. It will also require extensive collaboration between those who use and provide information. Until these issues are resolved, it is essential that parties continue to provide quality assured information in a timely way to support our work.

It is important also to recognise that a single water information portal will not cater for all information needed to implement and report on the effectiveness of the Basin Plan.