

THE PROPOSED GOVERNANCE FRAMEWORK FOR THE MURRAY-DARLING BASIN

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I INTRODUCTION

The Murray-Darling Basin (MDB) takes its name from two dominant rivers, the Murray and the Darling. Located in the south-east of Australia, it is defined as the largest river catchment in Australia, covering an area of more than one million square kilometres or the equivalent to 14 per cent of the country's land area.¹ The shared water resources in the MDB are managed by an inter-jurisdictional framework spanning five states and one territory. Good governance for sustainable development and effective use of water is paramount for the Basin which has been termed the Australia's agricultural heartland.

The value of the Basin's agricultural production makes a major contribution to the national economy and supports a large number of jobs.²

Under the current *Murray Darling Basin Agreement 1992* the Basin is run under a catchment management program. The structure of the MDB initiative has been quite successful due to the development of policies to promote integrated catchment management plans for the Basin, although the implementation of its water resources remains challenging. Ultimately, the management program has been put in place to ensure that the riverine system is restored to good health and retains an optimum level of productivity.

Yet, the depletion of water resources in the MDB remains a serious issue. The continuing decline of water resources has also been compounded by the worst drought since European settlement.³ A perceived lack of co-operation between state

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¹ See the Murray Darling Basin Commission, *Basin Statistics* (2006) <http://www.mdbc.gov.au/about/basin_statistics> at 29 September 2007.

² The basin accounts for over 40% of Australia's gross value of agricultural production. For more information see Murray-Darling Basin Commission, *Basin Encyclopedia* (2006) <<http://www.mdbc.gov.au/encyclopedia>> at 1 October 2007.

³ Daniel Connell, *Water Politics in the Murray- Darling Basin* (2007), 5.

governments led the Commonwealth to announce a ten point plan to reform rural water management in January 2007 and to take over control of the MDB from the states. Opinions between jurisdictions were divided on this issue, with Victoria stalling the process by refusing to sign the Commonwealth draft legislation. Despite ongoing negotiations between the Commonwealth government and the Victorian government no consensus was reached. Nonetheless, the Commonwealth *Water Act 2007* (due to commence in early 2008) was passed by the Commonwealth Parliament as part of the National Plan for Water Security. To become fully operative the states are required to refer their legislative powers to give the Commonwealth control over the waters in the MDB.

This paper will address two issues. First, the current MDB governance framework will be outlined and critically evaluated in terms of its performance in the context of recent initiatives. Second, the paper will critically evaluate the proposed ten point plan and the implications of a Commonwealth takeover of the MDB governance structure.

II THE CURRENT GOVERNANCE FRAMEWORK

The Governance framework of the MDB has evolved over time since 1915.⁴ More recently, a commitment to the principles of integrated catchment management⁵ has been the precursor to a number of initiatives such as the National Strategy for Ecologically Sustainable Development (ESD) in 1992, the Council for Australian Governments (CoAG) in 1994 and the National Water Initiative (NWI) in 2004.⁶

The current governance framework for the MDB was established by the *Murray Darling Basin Agreement 1992* and the purpose of this agreement is "... to promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of water, land and other environmental resources of the Murray-

⁴ 1915 marks the date when the River Murray Waters Agreement was signed between the governments of the Commonwealth, New South Wales, Victoria and South Australia. The River Murray Waters Agreement is regarded as a pioneering document ahead of its time. It took another two years before the River Murray Commission was established which had the task of administering the Agreement. See Murray-Darling Basin Commission, *A Brief History of the Murray-Darling Basin Agreement* (2006) <http://www.mdbc.gov.au/about/history_mdbc> at 20 November 2007.

⁵ Nowadays Integrated Catchment Management (ICM) places a great emphasis on the partnership between the community and the government. See S. Ewing, "Catchment Management Arrangements" in Stephen Dovers & Su Wild River (eds), *Managing Australia's Environment* (2003), 395. For the MDB the ICM Policy states that it is "a commitment by the community and governments to do all that needs to be done to manage and use the resources of the Basin in a way that is ecologically sustainable". See Murray-Darling basin Commission, *Integrated Catchment Management (ICM) Policy Statement*, (2004) <http://www.mdbc.gov.au/salinity/integrated_catchment_management> at 3 June 2007. Still ICM across jurisdictions has evolved differently depending on the local environmental pressures.

⁶ Connell, above n 3, 4.

Darling Basin...”.⁷ Queensland became a signatory to the Agreement in 1996 and the Australian Capital Territory formalised its participation in the Agreement through a Memorandum of Understanding in 1998.

The Agreement is given full legal status by the *Murray-Darling Basin Act 1993* (Cth) passed by all the contracting governments. The collective efforts of the Commonwealth and the governments of New South Wales, Victoria, South Australia, Queensland and the Australian Capital Territory are referred to as the “Initiative”. This broadly involves the development and implementation of policies to promote integrated catchment management plans for the Basin. It also involves the sharing and distribution of ‘states’ entitlements to water’ of the Murray River, between New South Wales, Victoria and South Australian water in accordance with the *Murray Darling Basin Agreement 1992*.⁸ In addition, the Agreement set out the institutional arrangement for the Initiative at the political, bureaucratic and community levels, as described below.

A The MDB Ministerial Council

The MDB Ministerial Council was first established in 1985 as the main policy body for the Basin. The *Murray Darling Basin Agreement* provides the council with a broad scope to determine issues facing the region. The Council is comprised of ministers responsible for land, water and environmental resources from each contracting government (i.e. the government of New South Wales, Victoria, South Australia, Queensland and the Commonwealth) and up to three ministers from each government can sit on the council.⁹ Its main functions are:

- (a) generally to consider and determine major policy issues of common interest to the contracting governments concerning effective planning and management for the equitable efficient and sustainable use of water, land and other environmental resources of the Murray-Darling Basin;

⁷ Government of South Australia: Department of Water, Land and Biodiversity Conservation, *Murray-Darling Basin Initiative*, (2006) <<http://www.dwlbc.sa.gov.au/murray/initiative/agreement.html>> at 24 April 2007.

⁸ John Scanlon, “A hundred years of negotiations with no end in sight: Where is the Murray Darling Basin Initiative leading us?” (2006) 23 *Environmental & Planning Law Journal* 386, 388.

⁹ The Australian Capital Territory participates via a memorandum of understanding which allows the ACT to take part in the planning and the management of the Basin’s environmental resources. It does not allow the ACT to be involved in water management of the River Murray system. The memorandum also provides for an ACT government minister to be a non-voting member of the Ministerial Council.

- (b) to develop, consider and, where appropriate, authorise measures for the equitable, efficient and sustainable use of such water, land and other environmental resources.¹⁰

Since it is a political forum, the Ministerial Council has the power to make decisions on behalf of the Basin. Under the *Murray Darling Basin Agreement* all decisions are reached by consensus and must be unanimous. Although this process has enabled the Ministerial Council to make difficult decisions, reaching a consensus can be a slow undertaking. Considerable time often needs to be spent for consultation and education before the Council can come to a viable agreement.¹¹

Scanlon¹² questions the effectiveness of the Agreement and admits that changes are required to the MDB Agreement and the way it is administered if the health of the riverine system and its level of productivity is to be improved. Connell¹³ argues on the other hand that the purpose of the Agreement and the activities that are incorporated in it, have been at best, “advisory or discretionary in nature”. Consequently, the Agreement required at the outset the involvement and also the genuine cooperation of all the governments and the different agencies before any real implementation could occur. Bates¹⁴ notes that the law invariably confers broad discretionary powers; “it does not confer duties”. Decisions need to be made therefore at the institutional framework set out in the Agreement, namely the Ministerial Council, the Commission and the Community Advisory Committee.

The early years of the MDB initiative paved the way for some significant new measures. The widespread desire for a new approach provided the momentum required to initiate strategies. For example, the Ministerial Council successfully implemented a salinity and drainage strategy¹⁵ to reduce the levels of river borne salinity to acceptable levels, particularly in the lower Murray. The strategy provided the framework for a coordinated effort on the part of New South Wales, Victoria, South Australia and the Commonwealth governments to deal with water logging

¹⁰ Murray-Darling Basin Commission, *Murray-Darling Basin Agreement*, (June 2006) [14] <http://www.mdbc.gov.au/data/page/44/Murray-Darling_Basin_Agreement.pdf> at 1 June 2007.

¹¹ D. Blackmore, “Protecting the Future” in Daniel Connell (ed), *Uncharted Waters* (2002), 6.

¹² Scanlon, above n 8, 386.

¹³ Connell, above n 3, 116.

¹⁴ G. Bates, “Legal Perspectives” in Stephen Dovers and Su Wild River (eds), *Managing Australia’s Environment* (2003), 255.

¹⁵ The Basin salinity management strategy was first implemented from 1988-2001 with a renewed program for 2001-2015. This new joint program costing an estimated \$60 million is due to commence in 2001 to deliver at least 46 EC at Morgan, and potentially up to 61 EC, over the first seven years. The Government partners to the Agreement acknowledge that joined mitigation works must both be economically and technically feasible. A number of schemes are currently under investigation. See Murray-Darling Basin Commission, *Basin Salinity Management Strategy 2001-2015* (2007) <http://www.mdbc.gov.au/salinity/basin_salinity_management_strategy_20012015/salt_interception_schem> at 5 June 2007.

and land salinisation along the Murray River.¹⁶ The strategy also created incentives whereby a state could earn ‘salinity credits’. Under this strategy, no state was and is currently allowed to undertake any actions that would impact on the salinity of the river unless it can be offset by salinity mitigation works.¹⁷ Furthermore, the implementation of the cap is subject to annual independent audit by the MDB Commission, where salinity debits and credits are recorded.¹⁸

The early years of the MDB initiative also introduced in 1995 an interim cap on water diversions from the Basin which became permanent in 1997. This was a “bold supra-jurisdictional initiative”¹⁹ in that the Ministerial Council knew that the cap would inevitably become a source of contention and criticism. The cap became necessary however, in order to address the continuing increase in the quantity of water diverted from the rivers in the Basin and the subsequent deterioration of flow regimes, the rise of salinity levels and the frequency of algal blooms along the river. It became clear that the riverine conditions were continuing to deteriorate in the MDB when, in the summer of 1991, spectacular algal blooms spanning 1000km along the Darling River gave rise to international prominence.²⁰

Thus, the cap was seen as the first step towards achieving the appropriate balance between the health of the river system and a sustainable approach to its consumptive uses.²¹ The cap is set up so that it limits the amount of surface water that is diverted from the Basin’s rivers and it is defined as the volume of water that would have been diverted under 1993/94 levels of development.²² The cap has been applied in this way with small variations where for instance, New South Wales, Victorian and South Australian levels have been adjusted for additional developments that occurred after 1993/94. However, the cap for Queensland and the Australian Capital Territory are yet to be determined.

The cap does not attempt to reduce water diversions from the Basin; it simply tries to prevent them from increasing. In addition, it is not set to reflect a sustainable

¹⁶ Murray-Darling Basin Commission, *The Salinity and Drainage Strategy* (2003) <[http://www.mdbc.gov.au/salinity/salinity and drainage strategy](http://www.mdbc.gov.au/salinity/salinity_and_drainage_strategy)> at 20 November 2007. The Salinity and Drainage Strategy program is based on four elements: the interception of salt to reduce river salinity; a renewed approach to storage at both Menindee and Lake Victoria to reduce the loss of water through evaporation and reduce river salinities; the development of new irrigation technology and saline crop resistant; and new management schemes to control land salinity and water logging on the riverine plain upstream from Echuca.

¹⁷ Ibid.

¹⁸ Murray-Darling Basin Commission, *Murray Darling Basin Commission Annual Report 2005-2006* (2006) <http://www.mdbc.gov.au/subs/annual_reports/AR_2005-06/part1_1-3.htm> at 5 June 2007.

¹⁹ S. Clark, “Divided Power, Co-operative Solutions?” in Daniel Connell (ed), *Uncharted Waters* (2002), 14.

²⁰ Connell, above n 3, 123.

²¹ Murray Darling Basin Commission, *The Cap* (2007) <http://www.mdbc.gov.au/nrm/the_cap> at 20 November 2007.

²² Ibid.

level of extraction.²³ Nonetheless this decision is still regarded as one of the most significant ever made.²⁴ Dole²⁵ suggests that its application is complex and difficult for the states to comply with; consequently the states' commitment is essential to maintain its principles. These relate to the process of implementation and the benefits of the cap as a means to protect the security of water supply along the MDB system. A five year review was completed in August 2000 to assess how the cap could be better refined to address the changing needs of the Basin.

It soon became clear that a lot more work was required and refinements to the cap were highly desirable.²⁶ Five recommendations were put forward by the Independent Audit Group (IAG) in 2000 including: management of groundwater on an integrated basis with surface water within the spirit of the Cap; completion of the compliance tools (computer simulation models used to determine cap target diversions) throughout the Basin; introduction in each jurisdiction of a suitable quality management system for monitoring, metering and reporting data; development of less restrictive trading rules within and between state's jurisdictions; and the development of a register of agreed Cap definitions. This was followed by annual IAGs reports to evaluate the progress of each state in dealing with the issues raised.²⁷ So far the overall progress has been very slow.²⁸

There is no denying that without the cap, the degradation of the river system and the impact on the environment would be much worse.²⁹ And whilst it was a joint decision, Queensland agreed in principle but it has yet to become part of the process.³⁰ This raises questions about the process of implementation and the effectiveness of the MDB water management plan in terms of what is actually practiced on the ground.³¹ It also begs the question as to why Queensland has been 'reluctant' to commit to its cap arrangements when other states are expected to comply with theirs.

Connell³² points out that, for instance, out of the five recommendations suggested by the IAG in 2000, one stipulated the development of a register of agreed Cap definitions. To date, no central register is available for public scrutiny on what process is used to calculate what the cap should be in the 22 water management regions of the MDB. Once again, this raises questions about the effectiveness of the Agreement in dealing with these issues. Nonetheless, the establishment of the Ministerial Council in 1985 represented an unprecedented step forward in the

²³ Scanlon, above n 8, 391.

²⁴ Ibid.

²⁵ D. Dole, "Managers for All Seasons" in Daniel Connell (ed), *Uncharted Waters* (2002), 28.

²⁶ Connell, above n 3, 128.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Scanlon, above n 8, 391.

³⁰ Connell, above n 3, 125.

³¹ Ibid, 130.

³² Ibid.

management of the Basin, in that it provided a regular forum for high-level political engagement³³.

B The MDB Commission

The MDB Commission is the executive arm of the Ministerial Council. Although it was the main body under the various agreements prior to 1985, it now answers to the Ministerial Council.³⁴ The commission consists of two commissioners and two deputy commissioners that are appointed by each government.³⁵ There is also an independent president that is appointed by a unanimous vote from the members of the Ministerial Council. The Commission's responsibilities are to administer the Agreement and to advise the Ministerial Council on matters relating to the use of water, land and environmental resources in the MDB. Many of these tasks are undertaken with the assistance of the technical, scientific and administrative staff of the commission's office.³⁶ Still, most of the work that is done by the Initiative remains the responsibility of various working groups and committees that contribute to the panel of specialist experts from the various governments and the Community Advisory Committee – detailed below.

C The MDB Community Advisory Committee

The Community Advisory Committee (CAC) was established by the Ministerial Council in 1986 and recognised by the Agreement.³⁷ It consists of a formally appointed group of 23 people who are chosen from a wide range of expert fields and have networks throughout the Basin. Representatives of non-government groups, such as the Australian Conservation Foundation, The National Farmers Federation and others are represented, with an additional appointee to provide an Aboriginal perspective. The CAC is responsible for providing advice to the Ministerial Council from a community viewpoint on critical natural resource management issues including indigenous issues. In addition to keeping the Council informed, the CAC also actively participates in Commission working groups and committees.

Although the CAC has been an active independent community voice providing an alternative view to the Ministerial Council, the effectiveness of its role as the interface between community and government has been questionable. For instance, the CAC's position as a facilitator of communication between the Ministerial Council and the Basin's residents has shown that true community participation has

³³ Scanlon, above n 8, 388.

³⁴ Ibid.

³⁵ Murray-Darling Basin Commission, above n 10, 18.

³⁶ Although the Office of the Commission is not recognised in the Agreement, Scanlon (above n 8, 389) suggests that the role of the office is no less important. It has the power to employ staff and its panel of highly skilled staff provides the driving force that the Initiative requires particularly amidst difficult challenges.

³⁷ Murray-Darling Basin Commission, above n 10, clause 14(1)(a).

not necessarily been achieved.³⁸ What this implies is that if public involvement is paramount to ‘bottom up’ participation in resource decisions, and collaboration is desirable in matters relating to integrated catchment management then perhaps the structure of the CAC does not facilitate this outcome.

Chenoweth *et al*³⁹ points out that the structure of the CAC has been significantly modified since it was first established in 1986 so that it could improve its ability to facilitate communication between the community and the Basin authority. The more recent changes in 1992 established a number of representatives from regional catchment management committees which are all state government appointees. Chenoweth *et al*⁴⁰ argue that although it indicates the importance assigned to an integrated catchment management approach in the Basin, this recent restructure and the domination of state government representatives could lead to an overemphasis of the government viewpoint at the expense of community views.

However, one of the most important achievements of the MDB initiative was that it established the co-operative framework to manage the environmental resources in the Basin.⁴¹ This co-operative framework was fundamental and important because it would require governments to agree on an overall plan with each jurisdiction responsible for its implementation.⁴² In addition, it also reflected the changing ideas about how a public institution should be structured and operated in order to improve biodiversity, sustainability and production.⁴³ Decision-making could no longer be left to engineers who dealt primarily with water resource infrastructure. Thus under this new institutional arrangement, government representatives responsible for production and the environment were brought together with agricultural representatives to develop “a whole of government position” and to discuss various issues that would be subsequently incorporated into the revised Agreement.⁴⁴

D *Inter-jurisdictional Agreements*

Amendments to inter-jurisdictional Agreements is a particularly slow process whereby the agreement must be submitted to each contracting government for approval and then to each parliament for legislative ratification. Needless to say this process becomes grossly ineffective when dynamic environmental systems need to

³⁸ Jonathon L. Chenoweth, Sarah A. Edwing and Juliet F. Bird, “Procedures for Ensuring Community Involvement in Multijurisdictional River Basins: A Comparison of the Murray-Darling and Mekong River Basins” (2002) 29(4) *Environmental Management* 497, 500.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ P. Crabb, “Straddling Boundaries: Inter-governmental arrangements for managing natural resources” in Stephen Dovers and Su Wild River (eds), *Managing Australia’s Environment* (2003), 244.

⁴² Connell, above n 3, 115.

⁴³ Ibid.

⁴⁴ Ibid.

be managed in an adaptive fashion.⁴⁵ For the MDB Commission however, its role in implementing the decisions of the Ministerial Council becomes questionable. Scanlon⁴⁶ highlights this when he states

Hheads 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 carry out the government's policy agenda, yet the expectations of the government of the day and obligations to the Basin under the Agreement does not always coincide. This stands in contrast to the intended role of the 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.

Clark⁴⁷ suggests that the Commission has been inclined to act cautiously with respect to the nature of the advice it provides to the Ministerial Council. However, if the legal personality of the Commission⁴⁸ was made at all clear, the Commission could achieve the level of independence that is required to act in the best interests of the Basin.⁴⁹

Short of negotiating a solution in the face of conflicting state interests, it has been suggested that the governance of the MDB be reviewed and perhaps the task of retrieving and managing environmental flows should be managed by one body; the Commonwealth.⁵⁰ The opinions on this issue have remained largely divided, particularly when traditionally each state jurisdiction has looked after their own water. Constitutionally, primary responsibility for water and environmental management rests with the state governments.⁵¹ 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 of the residents therein to the reasonable use of the waters or rivers for conservation or irrigation.⁵²

⁴⁵ Stanford Clark, "Divided Power, Co-operative Solutions?" in Daniel Connell (ed), *Uncharted Waters* (2002), 16.

⁴⁶ Scanlon, above n 8, 405.

⁴⁷ Clark, above n 45, 16.

⁴⁸ What Clark refers to here is that if the Commission became a body corporate, commissioners would be required to observe the common law duties of directors and that is to act in the best interest of the corporation, rather than observe the different points of view dictated by their respective appointing governments. In addition, a director of a corporation has an obligation to act independently when making decisions. *Ibid.*

⁴⁹ *Ibid* 15.

⁵⁰ *Ibid* 16.

⁵¹ The Hon Justice Peter McClellan, "Environmental Issues – How Should We Resolve Disputes?" *National Environmental Law Association Canberra* (13-15 July 2006) [3] <[http://www.lawlink.nsw.gov.au/lawlink/lec/ll lec.nsf/vwFiles/Speech_13Jul05_McClellan.pdf/\\$file/Speech_13Jul05_McClellan.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll lec.nsf/vwFiles/Speech_13Jul05_McClellan.pdf/$file/Speech_13Jul05_McClellan.pdf)> at 29 September 2007.

⁵² Australian Politics, *The Australian Constitution* (1901) [s100] <<http://australianpolitics.com/constitution/text/>> at 29 September 2007.

This legacy, according to Justice McClellan⁵³ has led to a number of problems. For example, South Australia has struggled to achieve better water quality and Queensland has taken time to accept that the balanced ecosystem of the Darling River is dependent upon the quality and quantity of water that is necessary for the downstream demands by the southern States.⁵⁴ The Contemporary response to this legacy however has been that for the state to manage its water, it has been necessary to legislate and provide mechanisms towards both the control and fair distribution of water throughout the Basin.⁵⁵

By contrast, Connell⁵⁶ argues that a new institutional system is essential, although a Commonwealth takeover is not necessarily the best option. He suggests that the Commonwealth should use its constitutional and financial powers to force the states to abide by the national policies regardless of the local political climate.

The notion that the current governance structure is in need of reform has been a recurrent theme for many years. In 2000, South Australia expressed its concerns about the way the governance of the MDB and the role of the Commission was unable to address the problem of water over-allocation in the Basin. Again in 2006, the Commonwealth committed \$500 million as part of the Living Murray Initiative⁵⁷ to improve the health of the River Murray, under the precondition that the parties to the agreement would undertake a review of the current governance structure.⁵⁸ Despite these genuine concerns, little has been done to date. Hundreds of millions of dollars are being spent, but the money does not in any way address the need for institutional change that is required in the current MDB structure. The recent announcement by then Prime Minister John Howard has reignited this debate.⁵⁹

⁵³ McClellan, above n 51.

⁵⁴ This relates to what is called 'Running the River'. Each day, water storage is released along the River Murray and the lower Darling to meet the needs of irrigators and the flows for South Australia. For more information see, Murray Darling Basin Commission, *Running the River* (2006) <http://www.mdbc.gov.au/rmw/running_the_river> at 29 July 2007.

⁵⁵ Hon Justice McClellan, above n 51, 4.

⁵⁶ Connell, above n 3, 6.

⁵⁷ The implementation of the Living Murray First Step is provided through an intergovernmental agreement that was signed by NSW, Victoria, South Australia, the Australian Territory and the Commonwealth on 25 June 2004. For the intergovernmental agreement on addressing water over-allocation and achieving environmental objectives in the MDB, see *The Living Murray, Implementing*, (2007) <<http://xlivingmurray.mdbc.gov.au/implementing>> at 2 June 2007.

⁵⁸ Scanlon, above n 8, 405.

⁵⁹ Then Prime Minister John Howard, *Address the to National Press Club* (25 January 2007) <<http://pandora.nla.gov.au/pan/10052/20070321-0000/www.pm.gov.au/media/Speech/2007/speech2341.html>> at 31 March 2007.

III THE PROPOSED GOVERNANCE FRAMEWORK

Then Prime Minister Howard⁶⁰ recently proposed that, as a precondition to investing \$10 billion to reform rural water management, the states would hand over their power of water management to the Commonwealth. The reaction from each government has been mostly favourable although the Victorian government stalled the process, refusing to comply with the Commonwealth proposal. Despite ongoing negotiations no consensus was reached and the Commonwealth *Water Act 2007* was assented to in September 2007 for commencement in early 2008. This unilateral *Water Act 2007* has been described as “a key mechanism through which elements of the National Plan for Water Security will be implemented”⁶¹.

The ‘10 Point Plan’ or *the National Plan for Water Security* was announced by John Howard on 25 January 2007.⁶² It refers to a \$10 billion investment that the Commonwealth is proposing to spend to improve water efficiency and address the over-allocation of water in rural Australia. Whilst the funding under this plan will be provided in different areas,⁶³ most of the efforts focus on the Murray Darling Basin. Under this plan, John Howard proposed to address over-allocation in the MDB once and for all, set up a new set of governance arrangements for the Basin, set up a sustainable cap on surface and groundwater use in the Basin and set up major engineering projects at both the Barmah Choke and the Menindee Lakes.⁶⁴

According to Howard, the proposed plan is a response to the scale of the water crisis that is currently facing the MDB, an acknowledgement that the MDB governance is clearly ineffective and that the current management has “reached its use-by date”.⁶⁵ The Commonwealth, he suggests, is in effect offering to assume the responsibility for the problems created by the states. Howard argues that the core of the problem is states’ competing interests which have made even the best national agreements difficult to implement. Thus the Federal government views a streamline management structure as being more appropriate. However, as a condition of the proposal going ahead, all states and the ACT must refer their water management powers to the Commonwealth.⁶⁶

⁶⁰ The Coalition Government led by the Prime Minister, the Hon John Howard was defeated on 24 November 2007. A new Government led by the leader of the Australian Labor Party, Mr Kevin Rudd, has been sworn in.

⁶¹ Australian Government – Department of the Environment and Water Resources, *National Plan for Water Security* (2007) [3] <<http://www.environment.gov.au/water/action/npws.html>> at 29 September 2007.

⁶² Howard, above n 59.

⁶³ The funding under this plan is not to be used exclusively for the Murray Darling Basin. It is part of an overall package that also includes funding for northern Australia and the Great Artesian Basin and new investments in water information. See Australian Government – Department of the Environment and Water Resources, above n 59, at 30 September 2007.

⁶⁴ Howard, above n 59, 2.

⁶⁵ Ibid.

⁶⁶ Ibid.

On 30 January 2007,⁶⁷ Howard reiterated his proposal suggesting that a new governance arrangement for water management in the MDB was essential to ensure that the benefits of the plan would be carried out successfully in the future. Howard further criticised the current MDB structure suggesting that the “existing arrangements centring on the MDB Agreement and the MDB Ministerial Council are unwieldy and not capable of yielding the best possible Basin-wide outcomes”⁶⁸. He suggested that under the new proposal, the terms of arrangement would be as follows: The MDB Commission would be reconstituted as a Commonwealth government agency reporting to a single minister; and the Commission would be charged with setting a sustainable cap on water extraction and ensuring that the cap is complied with. These new arrangements are expected to cost in excess of \$600 million over the next 10 years.

The plan, as it currently stands, provides no clear guidelines about what would happen during the transitional period between arrangements. Also, it does not indicate how a Commonwealth MDB Commission, which effectively will be undertaking the same responsibilities as the original MDB Commission, will yield better outcomes for the Basin. It suggests that the Agreement under this proposal would need to be amended to accommodate for the proposed restructure. Admittedly, a streamlined structure could work more efficiently but the details of the restructure have been kept to a bare minimum suggesting that the plan has been at best, “cobbled together with unprecedented speed in Canberra over Christmas”.⁶⁹

At the June 2004 meeting of the Council of Australian Governments (CoAG), the Commonwealth and State governments adopted the National Water Initiative (NWI) with a commitment to “... the adoption of the best practice approaches to water management nationally ...”⁷⁰ The NWI is a comprehensive strategy regarded as Australia’s primary water policy.⁷¹ In addition, the intergovernmental agreement set out The Living Murray project to provide new funding of \$500 million over five years, to address water over-allocation in the MDB⁷².

⁶⁷ Then Prime Minister John Howard, *Interview with Keith Conlon and Tony Pilkinton – Radio 5AA, Adelaide* (30 January 2007) Prime Minister of Australia – Media Centre <<http://pandora.nla.gov.au/pan/10052/20070321-0000/www.pm.gov.au/media/Interview/2007/Interview2349.html>> at 6 June 2007.

⁶⁸ Ibid 3.

⁶⁹ Brian Toohey “Why the Government went to Water” in *The Australian Financial Review* (Sydney), 9-10 June 2007, 29.

⁷⁰ Council of Australian Governments, *Council of Australian Governments’ Meeting* (25 June 2004) [1] <<http://www.coag.gov.au/meetings/250604/index.htm>> at 6 June 2007.

⁷¹ Connell, above n 3, 4.

⁷² The Living Murray, above n 57.

Lastly, the Victorian National Water reform⁷³ proposed by Steve Bracks⁷⁴ was put forward in February 2007 as an alternative to the Commonwealth's proposal. The Victorian National Water reform states that the current commonwealth plan appears to be under-developed and carries significant risks for long term water management. It suggests instead that the objectives of the Commonwealth would be better served if all the Basin governments were involved in the overhaul of the current "outdated"⁷⁵ governance and investment structures.

The position of the Victorian government remained very clear. The former Victorian Water Minister John Thwaites⁷⁶ stated in May 2007:

We have said from day one. We are prepared to have a sensible system. We are prepared to give to the Commonwealth, but we are not prepared to have a full constitutional handover.

A lot of measures have been put in place with a view to address the highly variable water conditions that characterise the MDB. These measures need to demonstrate their worth. It seems therefore that the recent Commonwealth plan for the MDB is perhaps premature particularly when so little consultation time has been put into its execution. Toohey⁷⁷ supports this notion and points out that the plan had been compiled with almost no consultation; it did not go to cabinet and no advice was sought from the Treasury. In addition, neither the states nor the MDBC were consulted, which demonstrates a complete disregard to normal policy development processes.

Ongoing negotiations over the next few months kept raising legitimate issues from the Victorian Premier particularly over the Commonwealth draft legislation⁷⁸. By early September 2007 however, the *Water Act 2007 (Cth)* was assented to and is due for commencement in early 2008. This Act, gives effect to a number of key elements as devised by the Commonwealth government *National Plan for Water Security* announced earlier this year by then Prime Minister Howard.

Specifically, it establishes the Murray Darling Basin Authority which will be an independent and basin wide institution. Decisions will be made by a full-time chair

⁷³ Victorian Department of Premier and Cabinet, *National Water Reform, A comprehensive and balanced national water reform plan: a proposal of the State government of Victoria* (2007) <[http://www.dse.vic.gov.au/CA256F310024B628/0/8417D6C246EB6D9DCA2572C1001FEC44/\\$File/National+water+reform+plan.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/8417D6C246EB6D9DCA2572C1001FEC44/$File/National+water+reform+plan.pdf)> at 8 June 2007.

⁷⁴ Steve Bracks has since stepped down as the Premier of Victoria. He formally resigned from his position in July 2007. See <http://www.theage.com.au/news/national/bracks-resigns-as-premier/2007/07/27/1185339209648.html> (accessed 30/09/2007).

⁷⁵ Ibid 3.

⁷⁶ ABC News, "Murray-Darling plan still unacceptable, says Vic" *ABC News Online* (22 May 2007) <<http://www.abc.net.au/news/newsitems/200705/s1930002.htm>> at 25 May 2007.

⁷⁷ Toohey, above n 69, 29.

⁷⁸ Subsequent to a meeting in late May 2007, John Howard conceded that Steve Bracks had raised some legitimate issues. He admitted that the draft gave too much power to the Federal Minister and agreed to change the Commonwealth's draft legislation: Toohey, above n 69, 29.

and four part-time members reporting to the Commonwealth Minister for the Environment and Water Resources⁷⁹.

In the meantime, there are constraints on the proposed Basin plan and these relate to the constitutional limits within which the Commonwealth can implement these changes. Put simply, in order to extend the scope of the Commonwealth *Water Act*, States need to refer their legislative powers. It remains too early to tell therefore whether this Act will make a difference until at least the Constitutional ‘gaps’ can be addressed.

IV CONCLUSION

The Murray-Darling is the most significant river system in Australia and, whilst the structure of the MDB initiative has had some success, the situation has changed more recently to a state of little progress resulting in the continuing decline of water resources in the MDB. The current governance framework and commitment to the principles of integrated catchment management have undoubtedly been a very real driving force. However, an inter-jurisdictional arrangement requires that each government maintain a shared responsibility in how the waters are managed and dispersed. In addition, there has been some recent joint initiatives between the States and the Commonwealth, namely the National Water Initiative and the Living Murray, which have been implemented for the express purpose to better preserve the environment and prevent the decreasing supply of water in the MDB. The recent Commonwealth proposal to invest \$10 billion under the *National Plan for Water Security* to reform rural management seems to act contrary to these initiatives, for it proposes to act *unilaterally* to address the water crisis in the MDB. Further, the Commonwealth has introduced the *Water Act 2007* marking the next stage in the water plan for a federal takeover of the Murray-Darling system. Although this Act will enable water resources in the MDB to be managed at the National level, the constitutional ramifications of this decision could prove interesting for the future of the MDB. These ramifications arise due to the constitutional limits within which the Commonwealth’s plan can operate.

⁷⁹ Australian Government – Department of the Environment and Water Resources, “The *Water Act 2007*” (2007) <www.environment.gov.au/water/action/npws-act07.html#mdba> at 29 November 2007.