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Senate Select Committee on the Multi-jurisdictional Management and Execution of the Murray-Darling Basin Plan

Submission by the Department of Agriculture

Introduction

The Department of Agriculture (the Department) welcomes the opportunity to make a submission to the Select Committee on the Multi-jurisdictional Management and Execution of the Murray-Darling Basin Plan.

The Department is committed to enhanced sustainability, efficiency and productivity in the management and use of water resources. Australia faces major challenges in ensuring sustainable water supply in the face of increased climate variability and rising demand for water. In response, the Australian Government provides national leadership in water reform, including in the Murray-Darling Basin.

The management of the Murray-Darling Basin's water resources is inherently complex. Basin water resources are a natural resource with very high levels of seasonal and year-on-year variability, requiring both adaptive management as well as institutional and regulatory arrangements that provide certainty to water users and communities.

The Murray-Darling Basin has a large number of diverse stakeholders and, as with many natural resources, management of water requires balancing competing interests in the resource and an expectation that multiple layers of accountability will provide transparency and oversight for this.

Basin water management is characterised by legacy arrangements codified in historic agreements as well as contemporary practices and more recent reform agendas such as the Murray-Darling Basin Plan which are designed to address over-allocation of water resources. Since the first ratification of the River Murray Waters Agreement in 1915, the management of Basin water resources has been a joint endeavour of the Commonwealth and state and territory governments, recognising the key stakes of these governments in the shared resource.

Roles and responsibilities of the Commonwealth

Department of Agriculture

The Department provides national coordination, leadership and support to improve the efficiency and sustainability of water use in Australia, including support for the adoption of reform measures and management of major transboundary resources in partnership with relevant jurisdictions. The Department supports the Commonwealth Minister by providing key advice on policies and programs that underpin national water resource management.

The Department's role, specifically in regard to the *Basin Plan 2012* (Murray-Darling Basin Plan), is to assist the Minister for Water Resources in delivering their statutory responsibilities under the *Water Act 2007* (Water Act), which include adopting the Murray-Darling Basin Plan (and any amendments) and accrediting water resource plans (WRPs).

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The Department has responsibility for the implementation and funding of programs that support the Basin Plan. This includes implementing the Commonwealth's water recovery programs (including the Water Efficiency Program to deliver 450 gigalitres of efficiency measures in a socio-economically neutral or positive manner), as well as supporting the southern states in delivering supply and constraint measures under the Sustainable Diversion Limit Adjustment Mechanism.

The Department also chairs the Basin Officials Committee and supports the Commonwealth Minister in their role as the Chair of the Murray-Darling Basin Ministerial Council.

The work of the Department requires close collaboration with officials from state and territory water agencies, the Murray-Darling Basin Authority (MDBA), the Commonwealth Environmental Water Holder (CEWH) and other Commonwealth agencies with responsibilities under the Water Act.

Under the Administrative Arrangements Order, the Department of the Environment and Energy assists the Environment Minister in their role administering Part 6 of the Water Act (which relates to the CEWH).

Murray-Darling Basin Authority

The Water Act established the MDBA as the independent agency responsible for coordinating how the Murray–Darling Basin's water resources are managed. The two key functions of the MDBA are:

- operating the River Murray system, on behalf of the Basin governments in accordance with the Murray–Darling Basin Agreement; and
- overseeing implementation of the Murray–Darling Basin Plan.

The first function, to operate the River Murray and joint programs, is guided by collective Basin governments and is jointly funded by the Commonwealth and Basin states. The second function, to oversee the rollout of the Basin Plan, including working with jurisdictions to finalise water resource plans and compliance activities in relation to Basin water resources, requires the MDBA to make decisions and recommendations and is funded by the Commonwealth.

Further information on the Murray-Darling Basin Authority is provided in the MDBA's submission to the Select Committee.

Commonwealth Environmental Water Holder

The CEWH, a statutory appointment established under the Water Act, is responsible for managing the Commonwealth environmental water holdings and the Commonwealth Environmental Water Holdings Special Account. The CEWH manages a large portfolio of water entitlements acquired through the Australian Government's investment in water-saving infrastructure and strategic water purchasing in the Murray-Darling Basin, to achieve environmental objectives set out in the Murray-Darling Basin Plan.

The Commonwealth's environmental water holdings must be managed to protect and restore the environmental assets of the Murray-Darling Basin in the national interest. The Water Act also gives effect to relevant international agreements, such as the Ramsar Convention on Wetlands of International Importance.

State government water agencies and the MDBA are responsible for managing water resources in storages and in rivers, including water infrastructure and for river operations. The CEWH has no independent capacity to manage or deliver water, and must work within state regulatory, licensing and operational frameworks, and in partnership with water delivery entities and environmental agencies, to ensure water is provided from the Commonwealth's accounts to support the CEWH's environmental objectives. All Commonwealth environmental water delivered in the Murray-Darling Basin occurs in partnership with state governments, local groups and non-government organisations, including the irrigation industry, environment groups and Indigenous communities.

Further information on the CEWH is provided in its submission to the Select Committee.

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Other agencies with responsibilities under the Water Act

Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) is Australia's competition regulator and national consumer law champion. Under the Water Act and the *Competition and Consumer Act 2010* (the CCA), the ACCC has the following water-related functions to:

- enforce water market rules and water charge rules under the Water Act;
- enforce the CCA with water brokers, exchanges and irrigation infrastructure operators;
- monitor and report on regulated charges and compliance with water market and water charge rules;
- determine regulated water charges;
- provide advice to the Commonwealth minister responsible for water on development of water market rules and water charge rules; and
- advise the MDBA on the development of water trading rules, which form part of the Murray-Darling Basin Plan.

Bureau of Meteorology

The Water Act gives the Bureau of Meteorology water information functions that are in addition to its existing functions under the *Meteorology Act 1955*. Under the Water Act, the Bureau took on responsibility for compiling and delivering comprehensive information about water resources across Australia. A broad range of products and services has been developed to deliver water information to the public and to specialist users in policy, planning, engineering design and water management (<http://www.bom.gov.au/water/about/waterRole/index.shtml>).

Productivity Commission

The Water Act gives the Productivity Commission a role in reporting on the effectiveness of the implementation of the Murray-Darling Basin Plan and associated water resource plans, and the progress towards achieving the objectives and outcomes of the National Water Initiative (NWI). The Productivity Commission undertakes inquiries into the effectiveness of the implementation of the Murray–Darling Basin Plan every five years, and inquiries to assess progress in achieving the objectives and outcomes of the NWI every three years.

Roles of Basin States and Murray-Darling Basin Ministerial Council

Basin states

While the Commonwealth's role in water management focuses on national leadership, Basin states (New South Wales, Victoria, South Australia, Queensland and the Australian Capital Territory) remain responsible for managing and regulating water in the Murray-Darling Basin through their own policies and legislation, in a manner consistent with the Water Act and Murray-Darling Basin Plan. Basin states continue to exercise responsibility for decisions around water harvesting and water allocations.

Murray-Darling Basin Ministerial Council

The key joint decision-making body in the Murray-Darling Basin is the Murray Darling Basin Ministerial Council (Ministerial Council). The Ministerial Council is established by the Murray-Darling Basin Agreement (the MDB Agreement) and comprises water ministers from the Murray-Darling Basin states and the Commonwealth. The Commonwealth Minister is the Chair of the Ministerial Council.

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The Ministerial Council has policy and decision-making roles for matters such as state water shares, and the funding and delivery of natural resource management programs, as set out in the MDB Agreement.

The Ministerial Council also has a role under the Water Act to review and comment on the proposed Murray-Darling Basin Plan and any amendments.

The key functions and powers of the Ministerial Council are:

- to consider and determine outcomes and objectives on major policy issues of common interest on the management of water and other natural resources of the Murray–Darling Basin;
- to determine matters specified in the MDB Agreement;
- to approve the annual corporate plan, the annual work plan, and the asset management plan prepared by the MDBA for the purposes of the MDB Agreement; and
- agree to amendments to the MDB Agreement.

Basin Officials Committee

The Basin Officials Committee (BOC) is responsible for providing advice to the Ministerial Council and for implementing policy and decisions of the Ministerial Council. It is also established under the MDB Agreement.

BOC facilitates cooperation and coordination between the Commonwealth, the Basin states and the MDBA in funding works and managing the water and other natural resources of the Murray-Darling Basin.

Membership of BOC comprises one official from each of the Basin states and a Chair appointed by the Commonwealth Minister in accordance with clause 19 of the MDB Agreement. The Chair and Chief Executive of the MDBA are permitted to attend and participate in BOC committee meetings, but are not entitled to vote on meeting decisions.

The key functions and powers of BOC are to:

- advise the Ministerial Council in relation to outcomes and objectives on major policy issues on the management of water and other natural resources of the Murray-Darling Basin;
- exercise responsibility for high level decision making regarding river operations, including setting objectives and outcomes to be achieved by the MDBA in River Murray operations; and
- be consulted by the MDBA in the preparation of amendments to the Basin Plan.

Intergovernmental Agreements

Each jurisdiction and agency plays an important role in implementing the Murray-Darling Basin Plan. Steady progress is being made through the cooperative efforts of Commonwealth, state and territory governments, water users and Murray-Darling Basin communities.

2004 National Water initiative

The *Intergovernmental Agreement on a National Water Initiative 2004* (NWI) is the national blueprint for water reform (agriculture.gov.au/water/policy/nwi). The NWI is a shared commitment by governments to increase the efficiency of Australia's water use, leading to greater certainty for investment and productivity, for rural and urban communities and for the environment. The NWI built upon the 1994 COAG Water Reform Framework.

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Under the NWI, governments committed to:

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

Murray-Darling Basin Agreement

The MDB Agreement appears at Schedule 1 to the Water Act (legislation.gov.au/Details/C2014C00194/Html/Text#_Toc390870752). Its purpose is to promote and coordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Murray-Darling Basin. It does this by implementing arrangements agreed between the Contracting Governments to give effect to the Murray-Darling Basin Plan, the Water Act and state water entitlements (which are the entitlements of states to water as determined under the Agreement). Many elements of the MDB Agreement pre-date the Murray-Darling Basin Plan, including the arrangements for water sharing between the states.

2008 Intergovernmental Agreements

The *Intergovernmental Agreement on Murray-Darling Basin Reform 2008* (Reform IGA) sets out the cooperative arrangements under which the Basin states agreed to the negotiation of a revised MDB Agreement (coag.gov.au/sites/default/files/agreements/Murray_Darling_IGA.pdf).

The Reform IGA also set out Basin states' agreement to a limited referral of constitutional powers to the Commonwealth under section 51(xxxvii) of the Constitution. The mechanics of the referral are set out in the *Intergovernmental Agreement on Murray-Darling Basin Reform—Referral 2008* (the Referral IGA).

As a result of the Referral IGA, the parliaments of New South Wales, Victoria, South Australia and Queensland each passed a *Water (Commonwealth Powers) Act 2008* and the *Water Amendment Act 2008* was enacted by the Commonwealth Parliament.

A significant portion of funding for programs is delivered through the Basin states as part of the Reform IGA. Funding to State governments is generally provided under the Federal Financial Relations Framework which aims to support the delivery of specified outputs or projects. This is achieved through the requirement for Basin states to meet pre-determined project milestones or performance benchmarks before a payment associated with the deliverable is provided by the Australian Government.

2013 Implementing Water Reform in the Murray Darling Basin (revised 2017 and 2019)

The *Intergovernmental Agreement on Implementing Reform in the Murray-Darling Basin 2013* (Implementation IGA) builds on the 2008 Reform IGA and the 2008 Referral IGA. Its objective is to ensure that the Basin water reforms, including the Murray-Darling Basin Plan, are implemented in a cost effective manner to support the national interest of improving river and wetland health, putting water use on a sustainable footing, enhancing irrigation productivity, providing water for critical human needs and providing farmers and communities with more confidence to plan for a future with less water (coag.gov.au/about-coag/agreements/intergovernmental-agreement-implementing-water-reform-murray-darling-basin).

As part of the Implementation IGA the Australian Government also provides financial support to the Basin states through the *National Partnership Agreement on Implementing Water Reform in the*

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Murray-Darling Basin (federalfinancialrelations.gov.au/content/npa/environment/national-partnership/MDB_NP.pdf).

Commonwealth legislation

The Constitution

Under the Constitution, the Commonwealth Parliament does not have an express power to legislate in respect of water management and use in Australia.

However, the Commonwealth has been able to legislate in respect of water resources in reliance on a range of constitutional powers. In relation to the Water Act as originally enacted in 2007, the most significant of these were:

- The external affairs power (s 51(xxix)) of the Constitution, in implementation of Australia's obligations under international law, including the Convention on Biological Diversity and the Ramsar Convention on Wetlands of International Importance, and other treaties;
- The corporations power (s 51(xx)), in relation to the regulation of the activities of trading or financial corporations concerning water and water access entitlements;
- The interstate trade and commerce power (s 51(i)), in relation to the promotion and regulation of interstate trade in water access entitlements; and
- The powers relating to meteorological observations (s 51(viii)), and census and statistics (s 51(xi)), which support the Bureau of Meteorology's water information functions.

Following the 2008 referrals of power by the States, provisions were introduced by the *Water Amendment Act 2008* that also rely on s 51(xxxvii) of the Constitution. This paragraph provides that the Commonwealth Parliament may make laws on matters referred to it by the Parliament of any State, but such laws can extend only to the States by whose Parliaments the matter is referred or that afterwards adopt the law.

The constitutional basis for the Water Act is generally set out in sections 9 and 9A of the Water Act. Provisions addressing the interaction between the Commonwealth's water legislation and the laws of a State are outlined in Part 11A of the Water Act.

The Department also draws the Committee's attention to the following public documents that discuss the constitutional bases of the Water Act, both as originally enacted in 2007 and as amended following the referral of powers by Basin states under section 51(xxxvii) of the Constitution in 2008:

- Explanatory Memorandum for the Water Bill 2007 (legislation.gov.au/Details/C2007B00164/Revised%20Explanatory%20Memorandum/Text)
- Explanatory Memorandum for the Water Amendment Bill 2008 (legislation.gov.au/Details/C2008B00243/Explanatory%20Memorandum/Text)
- Australian Government Solicitor Legal briefing Number 90 (21 July 2009) (ags.gov.au/publications/legal-briefing/br90.htm.)

Water Act 2007

The Water Act enables the Commonwealth, in conjunction with Basin states, to manage water resources within the Murray-Darling Basin in the national interest (legislation.gov.au/Series/C2007A00137). Basin states continue to manage and regulate water in the Basin through their own policies and legislation in a manner consistent with the Water Act and the Murray-Darling Basin Plan.

In particular, the Water Act:

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- establishes the MDBA with the functions and powers, including enforcement powers, needed to ensure that Basin water resources are managed in an integrated and sustainable way;
- requires the MDBA to prepare the Murray-Darling Basin Plan—a strategic plan for the integrated and sustainable management of water resources in the Murray-Darling Basin—for adoption by the Commonwealth Minister;
- establishes a Commonwealth Environmental Water Holder to manage the Commonwealth's environmental water to protect and restore the environmental assets of the Murray-Darling Basin, and outside the Murray-Darling Basin where the Commonwealth owns water;
- provides the ACCC with a key role in developing and enforcing water charge and water market rules along the lines agreed in the National Water Initiative;
- gives the Bureau of Meteorology water information functions that are in addition to its existing functions under the *Meteorology Act 1955*; and
- gives the Productivity Commission a role in reporting on the effectiveness of the implementation of the Murray-Darling Basin Plan and water resource plans and the progress towards achieving the objectives and outcomes of the National Water Initiative.

In addition to the Water Act, the legislative framework for managing the Murray-Darling Basin includes the Murray-Darling Basin Plan, the *Water Regulations 2008*, and water charge and water market rules.

Basin Plan 2012

The Murray-Darling Basin Plan provides an integrated and strategic framework for water reform, consistent with the requirements of the Water Act. The Murray-Darling Basin Plan sets a limit on the amount of water that can be taken from the Basin's water resources as a whole, and from particular water resource plan areas, each year, while leaving enough for the environment (legislation.gov.au/Details/F2018C00451). Further information on the development and implementation of the Murray-Darling Basin Plan is provided in the MDBA's submission to the Committee.

Current and future Bills relevant to the Murray-Darling Basin

Water Amendment (Indigenous Authority Member) Bill 2019

On 4 July 2019, the Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management introduced the Water Amendment (Indigenous Authority Member) Bill 2019 to the House of Representatives (parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F6353%22).

The Bill passed both Houses on 19 September 2019 and amends the Water Act to establish a permanent position on the MDBA for an Indigenous person with skills and expertise regarding Indigenous matters relevant to the Murray-Darling Basin's water resources.

The establishment of this position was agreed by all water ministers from the Commonwealth and Basin states at the Ministerial Council meeting in December 2018, and will provide for better representation of Indigenous peoples' interests in the Basin's water resources.

Legislation to address compliance matters in the Murray-Darling Basin

The government has committed to draft amendments to the Water Act to strengthen the MDBA's compliance and enforcement powers. The amendments will include new civil penalties and criminal offences.

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The government's commitment to draft the amendments is a key action item contained in the Murray-Darling Basin Compliance Compact, which was approved by the Ministerial Council in June 2018, and endorsed by the Council of Australian Governments in December 2018.

Legislation to establish an Inspector-General of Murray-Darling Basin Water Resources

On 4 August 2019 the Ministerial Council met and its ministers supported the Commonwealth's decision to establish an Inspector-General of Murray-Darling Basin Water Resources to build community confidence in water management, Basin Plan implementation and compliance across the whole Basin (agriculture.gov.au/water/mdb/inspector-general).

It is expected that legislation to establish the Inspector-General position will be introduced into Parliament in 2020 and may potentially be combined with the compliance amendments outlined above. The Northern Basin Commissioner, Mr Mick Keelty AO APM, has been appointed to the position of Interim Inspector-General, with oversight of both the northern and southern Basins.

Water recovery

Sustainable Diversion Limit Adjustment Mechanism

During the development of the Murray-Darling Basin Plan, Basin water ministers requested the inclusion of an adjustment mechanism which would allow for better social, economic and environmental outcomes than would otherwise be achieved by the Murray-Darling Basin Plan. The Murray-Darling Basin Plan (at Chapter 7) provides for a mechanism to adjust the sustainable diversion limits (SDLs) to achieve equivalent social, economic and environmental outcomes with less water recovery. The mechanism enables adjustment of the Basin-wide SDL (up or down) by no more than 5%.

The Basin Plan Amendment (SDL Adjustments) Instrument 2017 amended the Basin Plan to give effect to adjustments to the SDLs, which were proposed by the MDBA in accordance with the SDL adjustment mechanism in Chapter 7.

Supply and constraint measures

In 2017, under the Murray-Darling Basin Plan, the Basin Officials Committee notified a package of 36 supply and constraints measure projects. Taking into account these 36 projects, the MDBA determined a supply contribution to the adjustment to the SDLs of 605 gigalitres/year.

To enable the full 605 gigalitres of supply offset to take effect, 62 gigalitres of efficiency measures are required. That is, the Basin Plan requires that SDLs can only be adjusted by up to five per cent (equivalent to 543 gigalitres) of the Basin-wide SDL unless offset by the delivery of efficiency measures.

The development and implementation of these projects is the responsibility of New South Wales, Victoria and South Australia. The Australian Government is providing funding to the states for implementation through a two stage process involving detailed design, approvals and community consultation in stage 1 and implementation and construction in stage 2. Under the Murray-Darling Basin Plan notified supply and constraints measures projects need to enter into operation by 30 June 2024.

Implementing efficiency measures

Under Part 2AA of the Water Act, the Commonwealth can make payments from the Water for the Environment Special Account to fund efficiency measures to recover the 450 gigalitres of environmental water. These are projects that make savings in the amount of water required for consumptive purposes, for instance, by improving the efficiency of water infrastructure.

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In December 2018 the Ministerial Council agreed an efficiency measures work plan to guide actions by Basin states to recover 450 gigalitres of water for the environment in a socio-economically neutral or positive manner.

The Water Efficiency Program is the Commonwealth-led program to deliver the 450 gigalitres of efficiency measures by 2024, with neutral or improved socio-economic impacts. The Ministerial Council also agreed in December 2018 to apply additional socio-economic criteria for efficiency measure projects to provide a greater level of assurance that delivery of these projects does not create adverse socio-economic impacts for Basin communities. They also agreed that each state will establish a process to assess each project against the criteria.

Sixty-two gigalitres of water is required to be recovered to achieve the maximum 605 gigalitres supply contribution to the adjustment under the SDL Adjustment Mechanism, ensuring that net SDL adjustment is within the 5 per cent limit. The Commonwealth has agreed to fund certain State-led efficiency measures projects to deliver the initial 62 gigalitres of efficiency measures, subject to the provision of business cases by Basin states that meet the requirements of the Commonwealth's assessment.