

Chapter 6

Committee views and recommendations

6.1 This chapter presents the committee's views and recommendations regarding water metering and compliance across the Basin. In particular, it highlights the role of the MDBA and Basin state governments in improving their approaches to water management, to ensure the ongoing, effective implementation of the Basin Plan and appropriate responses to alleged instances of water theft.

Role of the committee

6.2 The committee appreciates that there are many strong views held on many issues pertinent to the management of the Basin, and the allocation of its resources between extractive users and the environment. This was apparent in the evidence the committee received, which covered a wide variety of topics.

6.3 However, given the terms of reference for this inquiry, there were various matters regarding the MDB and the Basin Plan which the committee was not in a position to address in this instance—for example the adjustments to SDLs, the specific content of WRPs, the water trading market, the basis and adequacy of hydrological modelling, and the particulars of water access licences. The committee also reiterates that it cannot investigate any alleged individual instances of water theft.

6.4 It is now a matter for Basin states to acknowledge the findings of the various reviews and investigations and implement their recommendations wherever possible. The Federal Government will play a vital role—through the MDBA—in progressing improvements to oversight, compliance and monitoring in the Basin. While the committee cannot make recommendations for individual Basin states, it hopes its recommendations will help to progress these aims.

6.5 In addition, the committee is cognisant that some of the matters canvassed in this report and elsewhere were considered (or may be considered) by the South Australian royal commission as part of its investigations. It is expected that the royal commission's findings, due in early 2019, will address a number of these matters in greater detail, as well as the numerous concerns about the implementation of the Basin Plan that are outside the scope of this inquiry.

Progress since referral

6.6 Since the Four Corners episode 'Pumped' first aired in July 2017, there have been significant and positive developments concerning regulatory and enforcement frameworks for compliance with water usage rules across the MDB, and within the Basin states, following a number of detailed investigations and reviews into the issue.

6.7 All the reviews and investigations into adherence with water rules highlighted serious flaws in the compliance and enforcement mechanisms in place across some of the Basin states, accompanied by a lack of transparency into government water policies and strategies. The committee acknowledges that it has greatly benefitted from considering the outcomes of many of these reviews, prior to presenting its own assessment.

6.8 Indeed, in August 2018 the committee heard evidence suggesting that, since completion of the various inquiries and reviews, matters had improved with regard to water extraction and compliance activities in the northern Basin. Councillor O'Connor expressed his pleasure with the outcome of the Matthews review, and advised that he had received 'plenty' of calls from the new NRAR in NSW. The Councillor concluded that, at this stage, 'everything is heading in a more positive direction'.¹

6.9 The committee is also cognisant that a significant period of time has passed since the original allegations were brought to light, and notes that several matters are now before the courts. The committee will therefore not be making any comments or findings on these matters.

Management of the Murray-Darling Basin

6.10 All parties involved in MDB water management appreciate the complexities of the issues before them. The considerable and significant variables in the implementation and management of the Basin Plan, particularly between states, and the states and the Commonwealth, were well highlighted by Mr Bill Johnson, who summarised the matter as follows:

The delivery of the reforms has a lot of moving parts. A part of the complication is that the whole reforms depend on many different parts. Each part is complicated in itself, let alone in the way they interact. There are interdependencies for a lot of them, and they include water resource plans; water recovery through purchase; water recovery through efficiency programs; the protection of the purchased and recovered water; the sustainable diversion limit adjustment mechanism...constraints management strategy; measuring, monitoring, metering, enforcement and compliance; accounting of water use and water recovery; hydrology models; and, underpinning all of that, inclusive consultation. That's just an example of the complexity of the reform. The debate is wrongly and often deliberately categorised as one between community, as represented by the irrigators, and greenies. It's not; it has gone far beyond that.²

6.11 Despite these difficulties, stakeholders from a variety of backgrounds expressed to the committee their strong support for the Basin Plan. The economic, environmental and cultural significance of the Basin is well understood and should not be underestimated. To this end, all Basin states, the MDBA and the Commonwealth must work together to restore public trust in the administration of the Basin, and confidence that water use is being properly managed.

6.12 There are significant challenges in implementing a cohesive and effective monitoring and compliance regime across an area as large and geographically diverse as the MDB. These challenges are amplified for NSW, given the differences between the northern and southern Basins. Despite the differences, the focus for compliance should remain on where there is more water use and extraction.

1 Councillor Phillip O'Connor, Brewarrina Shire Council, *Proof Committee Hansard*, 28 August 2018, pp. 5-6.

2 Mr Bill Johnson, Private capacity, *Committee Hansard*, 1 November 2017, p. 39.

6.13 It became apparent throughout the inquiry that in numerous instances, there were water use rules in place across the various Basin jurisdictions that, while adequate to achieve the desired compliance and Basin Plan outcomes, were not being complied with or enforced. In some instances, enforcement of existing rules was problematic, while in others a lack of adequate rules had brought about poor compliance outcomes.

6.14 This is not to say that some water use rules are not without need for improvement. However, if existing, satisfactory rules had been appropriately enforced, particularly in NSW, the many and varied instances of water over-extraction may have occurred with far less frequency.

6.15 The allegations of water theft, government malfeasance and over-extraction in the MDB, and particularly in NSW, were met with outrage from many sectors of the community. There was further dismay over the perceived lack of compliance and enforcement activity from certain Basin states. Basin water users and communities hold an expectation that the precious water resources of the MDB will be appropriately managed and actions taken to enforce the legislative and regulatory framework wherever necessary.

6.16 The committee understands that the allegations of theft certainly do not apply to all irrigators and other water licence holders. The committee agrees that it is indeed regrettable that the actions of a few may have implications for the many.

6.17 However, the allegations and the investigations into them by the MDBA and Basin states resulted in a thorough examination of compliance across the Basin. The implementation of the recommendations by the various investigations will greatly improve oversight, metering and monitoring throughout the MDB, and this should be seen as a positive outcome.

Water compliance in NSW

6.18 The investigations of the NSWOW made clear that water compliance has been problematic in NSW for many years. The committee was alarmed that the previous investigations of the NSWOW had not been made public when first completed, and that the concerns raised by NSWOW as early as 2009 were not addressed. Had they been, it is possible that the alleged large-scale water theft in NSW, and particularly in the northern Basin, may not have occurred.

6.19 The committee is of the view that the recommendations presented by the Matthews reports, and by the NSWOW, are vital to improving the management of water in the MDB, particularly in NSW. The committee was encouraged by the significant support given by stakeholders to the Matthews recommendations, and by the prompt actions taken by NSW to implement the recommendations.

6.20 The committee was pleased to see that NSW moved quickly to establish the NRAR, and is further encouraged by the work it has already completed. It is hoped that as the NRAR progresses with its important work, compliance and enforcement in NSW will continue to improve. As indicated in evidence to the committee, the NSW Government should ensure that the NRAR remains properly funded and resourced in order to exercise its functions.

6.21 However, the committee agrees with many witnesses and observers of the need to keep the new regulator in place for the long term. As noted by the NSW O, the constant NSW departmental reshuffles and restructures have had a serious, detrimental impact on water rule compliance and enforcement in NSW. The new structures recently put in place through the NRAR and as recommended by the Matthews review, must be given time to realise their potential. Teams like the SIU are vital in ensuring the ongoing viability of water sharing across the Basin.

6.22 The committee was also pleased to see that a number of pathways have been established that allow for confidential tip-offs to be made to relevant authorities in NSW, with clear escalation pathways and set timeframes for response. In addition, in December 2017 and following the Matthews review, the NSW Government released its water reform action plan. The plan provides that the NSW water goals are to:

- introduce best practice for water management;
- build a compliance and enforcement regime that ensures strong regulation;
- ensure transparency in the sharing, allocation and management of NSW water; and
- build capability to support implementation of water reforms.³

Metering regulations

6.23 The NSW Government released a draft policy and regulation for the metering of non-urban water, containing mandatory conditions to be imposed on water access licences and water supply work approvals. The draft policy noted that metering of 95 per cent of water take would meet the objective of the 'no meter, no pump' rule, given that monitoring of all water use was unlikely to be possible or practical. Accordingly, the policy took a risk-based approach and stipulated that:

- all users already required to have a meter will continue to be metered, and
- meters would be required if a threshold had been reached based on:
 - infrastructure size;
 - multiple works on the same licence, approval or landholding, and
 - at-risk groundwater sources.⁴

6.24 Following stakeholder input, it is anticipated that the policy and regulations will soon be finalised, with the regulations commencing on 1 December 2018.⁵

3 NSW Department of Industry, *Securing our water: NSW Government water reform action plan*, December 2017, p. 1, https://www.industry.nsw.gov.au/_data/assets/pdf_file/0016/136204/nsw-government-water-reform-action-plan.pdf (accessed 9 January 2018).

4 NSW Government, *Consultation Paper: NSW water metering framework – Policy, regulations and mandatory conditions*, August 2018, p. 9, https://www.industry.nsw.gov.au/_data/assets/pdf_file/0008/171656/NSW-water-metering-framework-consultation-paper.pdf (accessed 2 November 2018).

South Australian approach

6.25 It was highlighted by a number of reports that South Australia is leading the way when it comes to water use metering and monitoring, compliance and enforcement action, and transparency. The committee was likewise impressed by the evidence it received at its hearing in Adelaide, where a variety of stakeholders from across South Australia and within the South Australian Government expressed their confidence in the water management systems in place in that state.

6.26 The facts speak for themselves, with the WCR noting that in South Australia, there was a substantial volume of enforcement and compliance activity, with a codified compliance regime, adequate resources and personnel, good transparency and detailed reporting, and 96 per cent of water take efficiently metered and monitored.

6.27 The committee encourages other Basin states to adopt similar approaches to South Australia wherever possible and in accordance with regulatory frameworks, particularly with regard to its codified compliance regime, transparent reporting and publicly accessible registers.

Murray-Darling Basin Authority

6.28 The WCR provided a comprehensive and critical examination of the MDBA's compliance and enforcement functions, and an acknowledgement that the MDBA was not effectively performing these functions. The WCR made clear that the MDBA needed to better clarify and communicate its roles, and how these interact with both the Basin Plan and Basin state legislation. Questions remain regarding the delineation of compliance responsibilities between the MDBA and Basin states.

6.29 The PC considered the MDBA to be 'an inherently conflicted entity'. This view was often expressed during the inquiry, along with the view the MDBA was not properly exercising its oversight and compliance functions. It appears to the committee that the PC recommendation to separate the MDBA into two authorities, responsible for regulation and compliance respectively, would address the concerns raised in evidence about the independence and regulatory strength of the Authority.

6.30 The findings of the PC and the MDBA WCR were congruous, in that both sought a clear distinction between the administrative and regulatory roles of the MDBA, and its compliance and enforcement responsibilities. The WCR called for the establishment of a dedicated compliance and enforcement branch within the MDBA. To this end, the PC recommendation to separate the MDBA into two bodies seems to the committee to be a very sensible suggestion, and one which should be progressed as soon as is practicable.

6.31 The compliance role would then shift to the Basin Plan Regulator, and it is imperative that this body be properly financed and resourced in order to undertake its functions through the entirety of the Basin. To this end, the committee further suggests that should the Regulator be empowered to enforce pecuniary penalties for

5 NSW Department of Industry, *NSW water metering framework*, <https://www.industry.nsw.gov.au/water-reform/metering-framework> (accessed 2 November 2018).

water breaches and offences, the financial proceeds from these penalties be returned to the Regulator. This would enable the Regulator to efficiently continue its compliance and enforcement activities.

Recommendation 1

6.32 The committee recommends that the Australian Government support the recommendation of the Productivity Commission to separate the Murray-Darling Basin Authority into two entities: the Murray-Darling Basin Corporation, and the Basin Plan Regulator, with the Regulator established as a new statutory independent authority.

Recommendation 2

6.33 The committee recommends that the Australian Government ensure sufficient funding and resources are allocated to the Basin Plan Regulator, once established, to ensure that it is adequately resourced to undertake effective compliance, evaluation and review functions.

Recommendation 3

6.34 The committee recommends that the Australian Government consider hypothecating any pecuniary penalties paid to the Basin Plan Regulator, back to the Regulator. This would assist with the ongoing viability of the Regulator's compliance and enforcement roles.

Basin Compliance Compact

6.35 The final report of the Matthews review made the point that the MDBA and NSW needed to align their metering objectives and other technical frameworks, as it would be of no benefit if different metering outcomes were recommended and pursued.

6.36 The committee suggests that this risk applies equally across the Basin, and that the MDBA's compliance and enforcement framework should not go against that of the Basin states. Likewise, the Basin states should adopt a uniform approach to metering, monitoring and compliance wherever it is feasible to do so. A uniform approach across all jurisdictions—as far as is practicable—is of clear benefit to all.

6.37 This important issue appears to have been addressed by the Basin Compliance Compact, where Basin states have agreed to implementation of meters that accord with the relevant Australian standard, and have agreed to do so within set timeframes. The Compact further requires prompt metering of more high-risk areas, such as the Barwon-Darling.

6.38 The Compact requires Basin states and the MDBA to complete a number of tasks by 31 December 2018, including:

- a review of internal governance arrangements for water management—in both Basin states and the MDBA—to ensure a strong culture of compliance;
- publication of revised compliance frameworks, in accordance with the requirements stipulated by recommendations in the WCR;

- development of compliance protocols, including how allegations of non-compliance by individual entitlement holders will be coordinated in each jurisdiction (both before and after accreditation of WRPs); and
- publication of a metering policy and implementation plan, addressing meter accuracy, meter coverage and transmission data (among other things) with annual reporting on implementation commencing 30 September 2019.

6.39 Further, by 30 June 2019 all Basin states are required to publish a work program to improve transparency about water take under entitlements, including real-time information on flows and extractions, the location of take, and changes to water registers to ensure that information about water entitlements and trades can be easily accessed by the public. By this date both Queensland and NSW are also required to publish programs for improved measurement of floodplain harvesting and overland flow harvesting.⁶

6.40 Taken as a whole, and when combined with the actions arising from the various other reviews into alleged water theft and water management, the committee sees the Compact as a significant step forward in improving the integrity of the water market. The commitments made by Basin states as part of the Compact directly address many of the concerns raised during both this inquiry, and other investigations.

6.41 The committee encourages COAG to endorse the Compact.

Water resource plans

6.42 The committee notes the commentary from numerous stakeholders of the importance of WRPs in finalising a number of elements of the Basin Plan, and ensuring the best approach to management of the Basin's resources. Implementation of the WRPs will also allow the MDBA to more formally enact its role as regulator.

6.43 The issue was well-summarised by SAMI, which submitted that:

The water market cannot function with integrity until water allocation policy and the triggers that inform water allocation announcements have been bedded down and are not subject to political whims. This will not occur until after 2019/2024 when the Water Resource Plans come into effect, transitional documents have stopped being redrafted and works and measures are complete.⁷

6.44 The EDOA summarised concerns that the WRPs would not adequately protect environmental water, and that the MDBA was inadequately resourced to properly assess the 36 WRPs (particularly given their technicality), with insufficient resources to undertake adequate community consultation.⁸

6 Murray-Darling Basin Compliance Compact, 8 June 2018, pp. 3, 7; https://www.mdba.gov.au/sites/default/files/pubs/Basin-Compliance-Compact_0.pdf (accessed 1 November 2018).

7 South Australian Murray Irrigators, *Submission 35*, [p. 2].

8 EDOs of Australia, *Submission 18*, p. 14.

6.45 The committee observes with considerable concern that the WRPs are to be accredited and in place prior to 1 July 2019. Only one WRP has been accredited, despite 36 WRP areas existing across the Basin. NSW alone is required to develop 22 WRPs, detailing the water sharing arrangements for consumptive use and considering potential and emerging risks to water resources in that state.⁹

6.46 The committee is particularly concerned about the NSW WRPs, given the perceived difficulties in water management and oversight which have resulted from the 2012 Barwon-Darling WSP. It appears that the development of the Barwon-Darling WSP lacked a proper consultation process with communities and other key stakeholders, as well as proper protections for environmental water and may have led to over-extraction of water in the region.

6.47 With the deadline for accreditation fast approaching, the committee draws attention to the PC draft report, which also raised significant concerns about the accreditation of the WRPs, particularly in NSW. The PC observed that:

In some WRP areas, significant rules changes are needed to meet Basin Plan requirements and these changes could impact on the reliability and use of entitlements. In these areas, meaningful consultation is required to resolve these issues and there is a concern that not enough time is left to do this well. There is a risk that old rules will be rolled into the new arrangements, or new rules will be rushed and ill specified, resulting in WRPs being ineffective in addressing the issues. This risk is highest for New South Wales, given the number of outstanding WRPs and the magnitude of proposed rule changes in some plans.¹⁰

6.48 The PC called for the Basin states and the MDBA to 'negotiate a pathway for granting extensions to the 30 June 2019 deadline' for WRP accreditation, in limited instances where there are 'outstanding issues with material impacts'. Additionally, the PC called for longer-term clarification on the purpose and effective format of the WRPs and their associated compliance processes.¹¹

Committee view

6.49 The committee shares the concerns of stakeholders, and the PC, regarding the pending deadline for WRP accreditation. The WRPs will be important instruments in the management of water take across the Basin, including placing limits on annual water take, and therefore will help to guide enforcement and compliance action.

6.50 In addition, any compliance action undertaken by the MDBA needs to better consider overland flows and floodplain harvesting, and how these matters interact with WRPs, before the WRPs are accredited.

9 NSW Department of Industry, *Securing our water: NSW Government water reform action plan*, December 2017, p. 5.

10 Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment; Draft Report, Overview and Recommendations*, August 2018, p. 9.

11 Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment; Draft Report, Overview and Recommendations*, August 2018, p. 20.

6.51 Given the significant importance of WRPs to the overall success of the Basin Plan, the committee shares the concerns of the PC. If WRPs are properly developed and implemented, with adequate oversight, they will play a vital role in maintaining the health of the MDB. Conversely, if the WRPs are incorrect or poorly developed, and based on incorrect assumptions and modelling, they could have a detrimental effect on the success of the Basin Plan.

6.52 The committee therefore encourages the MDBA to work with Basin states, wherever possible, in their development of the WRPs, and echoes the sentiments of the PC in encouraging more flexible timeframes, where warranted. In the event that any WRP accreditation falls beyond the due date, there should not be indefinite extensions, and the process should be finalised as soon as possible.

6.53 The committee is also concerned about the considerable time and resources required by the MDBA to assess and evaluate whether the WRPs are consistent with the Basin Plan. This will need to occur in concurrence with the MDBA's existing regulatory, oversight and compliance functions. The committee therefore recommends that the MDBA ensure adequate resources are allocated to the WRP accreditation process.

Recommendation 4

6.54 The committee recommends that the Murray-Darling Basin Authority allocate sufficient resources to complete its assessment and evaluation of Water Resource Plans.

Water for the Environment Special Account

6.55 The committee holds a number of concerns regarding the operation and oversight of the WESA.

6.56 The committee notes that over the financial years 2015-16 to 2017-18, \$580 million had been allocated to the WESA account (\$900 million with the inclusion of 2018-19), with expenditure across those years only totalling approximately \$12.74 million.

6.57 The committee acknowledges that the WESA is currently in its fifth year of operation, of a ten year funding period, and also recognises that a number of projects may be in development, with payments to be released at a later date. However, the committee notes that of the \$1.775 billion allocated for that ten years, very little of the appropriations to date appear to have been spent. It is unclear to the committee if the funding is flexible enough to adjust to necessary changes that may occur in any number of efficiency projects, as the projects develop over the ten-year funding period.

6.58 It is also unclear to the committee who has direct oversight of the WESA, and the process involved in approving the allocation of funds to various projects.

6.59 The committee hopes that if the recovery of a further 450GL for the environment occurs through efficiency measures, the WESA appropriations are drawn on appropriately to best implement and support these efficiency programs. Given the issues with compliance and enforcement across the Basin, particularly with metering

and over-extraction, the committee would be loath to see such significant funding underutilised or allocated inappropriately to other projects.

Committee views

6.60 The committee is of the view that the details on WESA expenditure, as included in the DAWR annual report, should be more comprehensive. Under section 86AI of the Water Act, a number of particulars must be included in the annual report upon the expenditure of WESA funds.

6.61 To highlight this issue, the NSW Government submission to this inquiry provided detail on the funding it received, in 2015-16, from the WESA. However, this information is not contained in DAWR's annual report for that year. The annual report merely states that payments of nearly \$4 million were made to NSW, South Australia and Victoria to assist in development of business cases.

6.62 The committee acknowledges concerns that the expenditure of the WESA funds may not accord with the provisions of the Water Act. The lack of transparency in the annual reports does not help in this regard—a lack of detail makes it difficult to ascertain exactly what the funded projects entail, and whether these accord with legislated requirements. The Water Act does provide that the WESA can be debited for the purposes of 'improving the rules, policies, practices and procedures in relation to the use and management of the Basin water resources', and the committee observes that this gives a very broad scope to which projects may be funded by the WESA.¹²

6.63 The committee draws the relevant sections of the Water Act about reporting on the WESA to the attention of DAWR, particularly as efficiency projects will—presumably—progress further in coming years, resulting in an increase to the frequency and magnitude of the payments from the WESA. It is important that appropriate levels of transparency are applied to this significant expenditure, to allow proper oversight of its allocation and confidence in the use of taxpayer funds.

6.64 To this end, the committee recommends that DAWR develop more detailed annual reporting on the allocation of payments from the WESA during each financial year, and as required by the Water Act.

Recommendation 5

6.65 The committee recommends that the Department of Agriculture and Water Resources present detailed annual reporting on the allocation of funds from the Water for the Environment Special Account, in accordance with the requirements of the *Water Act 2007*.

Metering, monitoring and enforcement

Metering

6.66 It is possible that a variety of existing, new and emerging technologies could be implemented to better meter and monitor water use. Many of these technologies have been discussed and put forward for implementation by the various reviews and

12 *Water Act 2007*, s. 86AD(2)(vi).

investigations that have been completed over the previous 18 months. While the committee has not examined these technologies in detail, it hopes that all Basin states adopt the metering standards as put forward by the Basin Compliance Compact and other reviews, and takes on the recommendations of other reports where appropriate.

6.67 It is apparent that a lack of water metering and monitoring, particularly in the northern Basin, has direct implications for enacting effective compliance and enforcement regimes.

6.68 The committee is concerned that metering has been on the national agenda for a considerable period, yet the goalposts appear to keep moving. The first national standards for metering, under the National Framework for Non-Urban Water Metering, determined that all non-urban meters should comply with national standards by 2020. Now, under the Basin Compliance Compact, Basin states have committed to an undertaking that all water meters comply with the national standard by 2025.

6.69 While the committee was encouraged to see that water metering has become a focus of many Basin states, as highlighted by the commitments of the Compact, it notes that it may still be some time until meters are installed and operating as intended. This may hamper any efforts to enact better compliance frameworks.

Enforcement

6.70 A number of the investigations examined as part of the inquiry, including the WCR, noted that there were difficulties across the Basin states in proving that a water breach had occurred. They highlighted that the burden of evidence required was considerable, and inconsistent between jurisdictions. Further, the point was repeatedly made that these remedies lacked consistency between jurisdictions as to the maximum penalties applicable for offences against water legislation.

6.71 It is the committee's view that a more nationally consistent penalty regime and clear guidance on the burden of proof of a water breach would greatly assist in compliance efforts. A codified approach to these issues across jurisdictions would support a more cohesive Basin Plan, and demonstrate the commitment of all jurisdictions to address water breaches comprehensively. As noted by the WCR, more clarity in these areas would allow compliance resources to be better allocated, and would see 'the punishment match the crime'.

6.72 Accordingly, the committee recommends that the Ministerial Council, or another appropriate body, develop a codified or uniform schedule of evidentiary requirements, penalties and sanctions in relation to water breaches. The schedule should consider the views put forward by the various investigations about the burden of proof, the use of technology and the simplification of offences.

Recommendation 6

6.73 The committee recommends the development of a uniform schedule of evidentiary requirements, penalties and sanctions be developed to apply to breaches of water legislation in Murray-Darling Basin jurisdictions. The schedule should be presented to the Council for Australian Governments for endorsement. The schedule should consider:

- **the appropriate burden of evidence for water breaches;**
- **the use of technology in determining breaches;**
- **the suitability of strict liability offences; and**
- **the simplification of offences.**

Senator Glenn Sterle

Chair