

## Chapter 2

### **Governance arrangements under the Intergovernmental Agreement on Murray-Darling Basin Reform**

#### **Introduction**

2.1 This chapter discusses the adequacy of the current whole of basin governance arrangements under the Intergovernmental Agreement on Murray-Darling Basin Reform.

2.2 The independence of the Murray-Darling Basin Authority, and the continuing role that the Basin States play in the management of the Murray-Darling Basin, were the focus of the committee's consideration in relation to the governance arrangements. Other issues addressed were: the extent to which the Intergovernmental Agreement on Murray-Darling Basin Reform covered the 'whole-of-basin'; and the role of Indigenous Australians in the management of the Murray-Darling Basin.

#### **Adequacy of current whole-of-Basin governance arrangements under the Intergovernmental Agreement**

2.3 On 3 July 2008 the Intergovernmental Agreement on Murray-Darling Basin Reform (IGA) was signed by the Commonwealth and Basin States – Queensland, New South Wales, Victoria, South Australia and the Australian Capital Territory.<sup>1</sup>

2.4 The IGA implements the Memorandum of Understanding on Murray Darling Basin Reform (MoU), which was signed at the Council of Australian Governments meeting on 26 March 2008. Under the MoU the Commonwealth and Basin States agreed to merge the Murray-Darling Basin Commission (MDBC) and the Murray-Darling Basin Authority to create a single institution, to be known as the Murray-Darling Basin Authority (the Authority) which is responsible for developing, implementing and monitoring the Basin Plan. The Basin Plan will include a sustainable cap on surface and groundwater diversions and provide for the critical human needs of communities that use water from the Murray.<sup>2</sup>

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1 Intergovernmental Agreement on Murray-Darling Basin Reform (IGA), 3 July 2008. Available at [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/docs/Murray\\_Darling\\_IGA.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/Murray_Darling_IGA.pdf).

2 Murray-Darling Basin Reform, Memorandum of Understanding, 26 March 2008, p. 1. Available at [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-03-26/docs/attachment\\_a.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/docs/attachment_a.pdf). The Basin Plan is discussed in detail in Chapter 3.

### *Governance arrangements*

2.5 The IGA seeks to establish 'a new culture and practice of Basin wide management and planning, through new structures and partnerships'.<sup>3</sup> The governance arrangements for the Basin are set out in Schedules B and C of the IGA. Those arrangements are:<sup>4</sup>

- The Commonwealth Water Minister is responsible for the Authority and is responsible for approving the Basin Plan. The Minister can choose not to adopt the Basin Plan and refer it back to the Authority with suggestions for consideration by the Authority.
- The Ministerial Council, comprising one Minister from each Basin Government (with the Commonwealth Minister being the Council chair) advises the Commonwealth Water Minister on the Basin Plan. The Ministerial Council can refer the Basin Plan back to the Authority for reappraisal, if necessary. The Ministerial Council also has a role in considering and determining outcomes and objectives on major policy issues not addressed in the Basin Plan.
- The Authority, in addition to the preparation, implementation, monitoring and enforcement of the Basin Plan, will implement decisions made by the Ministerial Council and the Basin Officials Committee;
- The Basin Officials Committee, comprising officials from the six Basin Governments, has an advisory role to the Authority on the Basin Plan. The Basin Officials Committee role also includes:
  - providing advice to the Ministerial Council on issues not addressed in the Basin Plan;
  - giving effect to policies and decisions which the Ministerial Council delegates;
  - setting objectives and outcomes in relation to River Murray operation by the Authority;
  - responsibility for resolving operational management and delivery inconsistencies arising from the application of the Basin Plan the States' management and delivery of water entitlements and allocations;
  - responsibility for high level decision making in relation to the operation of the River Murray System; and
  - responsibility for monitoring the asset management plan.
- A Basin Community Committee, consisting of a chair and 16 other members, including one member of the Authority. Members of the Basin Community

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3 IGA, Preamble, paragraph 17.

4 See IGA, 3 July 2008, pp 10-19, and Schedules B and C.

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Committee are appointed by the Ministerial Council. The Basin Community Committee will provide advice to the Authority, through the Authority member of the Committee, and provide advice to the Ministerial Council on matters for which it seeks the Committee's advice.

2.6 Under the IGA the Basin States also agreed to pass legislation providing for a referral of certain powers to the Commonwealth in accordance with paragraph 51(xxxvii) of the Constitution. The matters covered include:

- transferring the current powers and functions of the MDBC to the Authority;
- strengthening the role of the Australian Competition and Consumer Commission (ACCC); and
- enabling the Basin Plan to provide arrangements for meeting critical human needs.<sup>5</sup>

### *Adequacy of governance arrangements*

2.7 Submissions to the inquiry made a number of criticisms of the whole-of-Basin governance arrangements set out in the IGA, including:

- the decision making role of the States and the purported independence of the Authority;
- the IGA arrangements are not, in fact, 'whole-of-Basin', because it excludes key water sources in the Murray-Darling Basin (MDB or Basin); and
- the arrangements do not adequately provide for consultation and representation of Indigenous people.

### *Role of the States and independence of the Murray-Darling Basin Authority*

2.8 Responsibility for management of the MDB has historically been a difficult issue in Commonwealth-State relations. Associate Professor John Williams, of the University of Adelaide Law School, explained to the committee the negotiations which took place between the drafters of the Constitution in relation to the MDB, which resulted in States being assigned the authority for management of rivers. Associate Professor Williams described the MDB as 'not so much a national river system; it is the rivers of four states and one territory'.<sup>6</sup>

2.9 It is this fragmented management arrangement that some submitters believe is to blame for the current state of the Murray-Darling Basin. For example, the submission from Dr Kerrie Muller stated:

Current Governance structures are too clumsy and ill-co-ordinated to be effective at managing a system as complex as the Murray-Darling Basin.

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5 Department of the Environment, Water, Heritage and the Arts (DEWHA), *Submission 1A*, Part 1 of the inquiry, pp 3-4.

6 *Committee Hansard*, 10 September 2008, pp 46-7.

Tensions exist between community and Statutory Groups, Agencies within each State as well as between the States and the Commonwealth Agencies that prevent cohesive action. State borders as well as 'policy borders' such as the constrained scope of the *Living Murray* program also impede cohesive and timely action and key activities are falling between the gaps.<sup>7</sup>

2.10 The predominant criticism of the IGA governance arrangements is that, because of the continuing decision-making role that the Basin States have in the Ministerial Council, the Authority lacks the independence it needs to manage the Basin for the benefit of all. For example, the Coorong, Lakes and Murray Waterkeeper said:

The Intergovernmental Agreement is inadequate [and] promoted in a way that deceives the Australian public. Much has been made of the independence of the new Murray-Darling Basin Authority but it is not truly independent. It is subject to direction by the Ministerial Council and the Basin Officials Committee.

What we have is a system that establishes the same partisan and parochial capacity of the old system which is responsible for so much of the impact we are now confronting.<sup>8</sup>

2.11 Mr Mitch Williams, MP, the South Australian Shadow Minister for Water Security made the following observation:

We believe that the Governance arrangements under the Intergovernmental agreement fail to change the status quo leaving powers with individual states to at least frustrate if not prevent necessary changes.<sup>9</sup>

2.12 Professor Diane Bell expressed her disappointment at the scope of powers of the Authority:

I, along with a number of others concerned about over-allocation and mismanagement of water in the eco-system, had hoped that the referral of powers and the new IGA would make it possible for the new administrative body to address the needs of the eco-system as a whole. However, it appears that what we have is another layer of bureaucracy and no political will to exercise what powers exist or to explore creative possibilities that might extend existing powers.<sup>10</sup>

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7 *Submission 40*, Part 1 of the inquiry, p. 7. See also: MainStream Environmental Consulting and RiverSmart Australia, *Submission 12*, Part 1 of the inquiry, p. 4; Southern Alexandrina Business Association, *Submission 13*, Part 1 of the inquiry, p. 3; Ms Sarah Moles, *Submission 1*, p.1; Ms Liz Yelland, *Submission 8*, p. 2; Mr David Tipping, *Submission 16*, p. 13.

8 *Submission 57*, Part 1 of the inquiry, p. 8.

9 *Submission 24*, Part 1 of the inquiry, p. 5.

10 *Submission 46*, Part 1 of the inquiry, p. 4.

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2.13 The National Farmers' Federation (NFF) noted the criticism of the new governance arrangements. However, the NFF did see a positive side to the composition and role of the Ministerial Council:

...where governments are [required] to provide financial support for decisions, and where all can agree, then the decisions are robust and enduring.<sup>11</sup>

2.14 Although the NFF believes that the IGA arrangements provide for a robust decision making process, the NFF also acknowledged that the Authority's autonomy is constrained by retention of States management control via the Ministerial Council and Basin Official's Committee and that 'the expectations of some individuals and organisations of an autonomous Authority are gone'.<sup>12</sup>

2.15 The submission of the Department of the Environment, Heritage, Water and the Arts (DEHWA) noted that the Basin States would retain a decision-making role through a new Ministerial Council. However, DEHWA described the process as more 'streamlined' because the new Ministerial Council will have only a single representative from each of the Basin States. In contrast, the previous body, the Murray-Darling Basin Ministerial Council had up to three Ministerial representatives from each of the Basin States. DEHWA's submission also describes the Authority as an 'independent, expert' body.<sup>13</sup>

2.16 The committee also notes the evidence of Mr Rob Freeman, Chief Executive of the Authority, who described the relationship between the Basin States and the Authority as follows:

In undertaking this planning role [for the Basin Plan] the Murray-Darling Basin Authority is independent of basin states, but clearly the role has to be undertaken in partnership with states that will have responsibility for implementing consistent water resource plans.<sup>14</sup>

#### Alternative governance arrangements

2.17 The committee received a number of suggestions on how the Basin could be better managed. A number of submissions argue for a Commonwealth take-over of the management of the entire Basin. Some submissions support the establishment of an independent body with responsibility for management of the whole-of-Basin either in addition to, or as an alternative to, a Commonwealth take-over of the Basin. For example, the Southern Alexandrina Business Association suggests that whole of Basin

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11 *Submission 13*, p. 7.

12 *Submission 13*, p. 7.

13 *Submission 1A*, Part 1 of the inquiry, p. 4.

14 *Committee Hansard*, 26 September 2008, p. 57.

control can only be attained if States referred all necessary powers to the Commonwealth, with States having no power of veto.<sup>15</sup>

2.18 The Conservation Council of South Australia recommends 'immediate and urgent unilateral Commonwealth action to place control of the governance arrangements of the entire basin under a single, unified, independent, science-based, environmentally-focussed body'.<sup>16</sup> Similarly, Ms Liz Yelland argued for a 'strong integrated single management body at arms length from Government in the manner of the Reserve Bank'.<sup>17</sup>

2.19 The committee also heard from a number of witnesses emphasising the importance of regional governance across the Basin. For example, Mr Bruce Brown of the Namoi Catchment Authority told the committee that, particularly in relation to the spending of government money on water infrastructure, a skills based regional governance structure would be better than 'some central entity...preaching to a regional community about how those dollars should be dissipated'.<sup>18</sup> When pressed by the committee, Mr Brown refused to be drawn on whether catchment management authorities should be retained under state government control:

I think I am on the record that it would be better for the catchment management authorities in the Murray-Darling Basin to become in some way associated with the Murray-Darling Basin Authority and/or the Australian government. It is clear, simple management that I think would make everybody's job a hell of a lot easier ... but whether you can actually politically achieve that is another question.

...If the Murray-Darling Basin is under Commonwealth government control, and I am a catchment management entity that is in one of those catchments, does it make sense to be a statutory entity under a state government? I will not say any more.<sup>19</sup>

2.20 In contrast to many of the submissions that the committee received, Dr Willem Vervoot and Mr Floris van Ogtrop saw a role for all levels of government in

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15 *Submission 13*, Part 1 of the inquiry, p. 3. See also: Mr Mitch Williams, MP, South Australian Shadow Minister for Water Security, *Submission 24*, Part 1 of the inquiry, p. 5.

16 *Submission 14*, p. 1. See also: Mr Mitch Williams, MP, South Australian Shadow Minister for Water Security, *Submission 24*, Part 1 of the inquiry, p. 5; and Bruce and Annette Allnutt, *Submission 29*, Part 1 of the inquiry, p. 1.

17 *Submission 8*, p. 3. See also: Mr David Tipping, *Submission 16*, p. 14.

18 *Committee Hansard*, 10 March 2009, p. 20. See also: Mrs Deborah Kerr, National Farmers' Federation, *Committee Hansard*, 13 March 2009, pp 11-12; and Ms Beverly Smiles, Inland Rivers Network, *Committee Hansard*, 13 March 2009, p. 50. The focus of the discussion on this issue in the inquiry was in relation to the Australian Government's water entitlement buyback policy, *Restoring the Balance in the Murray-Darling Basin*, and infrastructure program, the *Sustainable Rural Water Use and Infrastructure Program*. This issue is discussed further in Chapter 5 of the report.

19 *Committee Hansard*, 10 March 2009, p. 26.

the management of the Basin. Dr Vervoot and Mr van Ogtrop described their vision of a 'holistic management approach' through a 'continuum of management decisions':

Both State governments and Federal government are equally equipped to make management decisions in the Basin. We firmly believe in a holistic management approach that eliminates State borders but maintains local knowledge and management input. A continuum of management decisions from the federal to the local level, supported by University and government research, is the only solution.<sup>20</sup>

### A Commonwealth take-over of the governance of the Murray-Darling Basin

2.21 Associate Professor Williams outlined the options open to the Commonwealth to take over management of the Basin:

The first alternative is a negotiated incremental take-over. This in part is what has been achieved to date through the use of cooperative schemes such as the Murray-Darling Basin Act or references of power by section 51(xxxvii) of the Constitution...

The second alternative, if we do not go down the referral of power approach, is the question of the Commonwealth wresting control over the rivers from the states by using its existing powers.<sup>21</sup>

2.22 In terms of the existing Constitutional powers which the Commonwealth might use to effect a take-over of the Basin, Associate Professor Williams identified section 51(i) of the Constitution (the trade and commerce power) as the primary source of power:

...it is arguable that the Commonwealth, in the regulation of trade and commerce, could regulate the supply of interstate water, and invalidate those impediments to the movement of interstate water in trade and commerce. So, for instance, the Commonwealth could eliminate caps that state governments put up, or instrumentalities, in the trade from one state to another.<sup>22</sup>

2.23 However, Associate Professor Williams indicated that section 100 of the Constitution would provide grounds for a challenge to the use of the trade and commerce power in this way.<sup>23</sup>

2.24 Other Constitutional powers which Associate Professor Williams stated may be relied upon include: section 51(xx) (the corporations power); section 51(xxix) (the external affairs power); and section 51 (xxx) (acquisition of property on just terms):

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20 *Submission 6*, pp 1-2.

21 *Committee Hansard*, 10 September 2008, p. 47.

22 *Committee Hansard*, 10 September 2008, pp 47-48.

23 Section 100 of the Constitution provides: 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 of rivers for conservation or irrigation.

...the Commonwealth parliament does have significant powers over the rivers, but in relation to things that are done to the rivers by corporations in trade and commerce and in terms of acquisition. It did not have that power in 1901. While it is not a perfect solution, and it would be subject to a High Court challenge by some states – I suspect not all states – and some users, I believe the Commonwealth parliament, having passed a law to deal with significant aspects of the river, would be on strong constitutional ground.<sup>24</sup>

2.25 The committee notes that Associate Professor Williams' preference would be for a single national authority and that could be achieved by a referral of powers from the States. However, the committee also notes the limitations of referrals of power:

First of all, the Commonwealth stands in the shoes of the states, but only where the states have given them the authority.

So, for instance, South Australia could refer today the whole of the river within its jurisdiction, but the Commonwealth would stand in exactly the same position as South Australia, an end user. It might have more money than South Australia, but it would be an end user. Referrals are usually partial and that is the thing. The incremental move up is the problem. The states give you a half a glass of water and you can play with what is left of it.

Lastly, the states can end the referral. There is provision for the states to pull out of the deal, by gazettal of a governance proclamation.<sup>25</sup>

#### *IGA arrangements are not 'whole-of-basin'*

2.26 Another criticism of the IGA governance arrangements is that they do not provide for 'whole-of-basin' control:

While the Intergovernmental agreement claims to [cover] the 'whole-of-basin', it leaves out of its control vast water resources in the Goulburn, Murrumbidgee and the northern reaches of the Darling. These are vital parts of the region drained by the Murray-Darling system.

Groundwater is excluded from the agreement.<sup>26</sup>

2.27 Other submissions also emphasised that control of the entire MDB system meant including all the tributaries in all of the States under the IGA.<sup>27</sup> The Acheron Valley Watch Inc expressed concern at the exclusion of the Goulburn River and the Murrumbidgee River from the IGA:

As major tributaries to the Murray River the Goulburn river and the Murrumbidgee river should not be excluded from the Intergovernmental Agreement on the Murray-Darling Basin Reform and in particular, from the

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24 *Committee Hansard*, 10 September 2008, p. 48.

25 *Committee Hansard*, 10 September 2008, p. 49.

26 Coorong, Lakes and Murray Waterkeeper, *Submission 57*, Part 1 of the inquiry, p. 9.

27 Bruce and Annette Allnutt, *Submission 29*, Part 1 of the inquiry, p. 1.



operation of the 'River Murray System' as established in clause 3.2.9 of the agreement ...

This political decision to exclude major tributaries of the Murray from the operation of the River Murray System is *wrong in principle and creates a dangerous precedence*, because it enhances the 'prisoners dilemma' with drastic effects on the state of the environment. The 'prisoners dilemma' describes a perception bias in which many projects of individual actors appear to be relatively small on their own with seemingly negligible impact, but when added up they create a large cumulative negative impact on the River Murray System and the subcatchments of its tributaries.<sup>28</sup>

2.28 The committee notes the evidence of Mr Rob Freeman, Chief Executive of the Authority, that:

- water resources of the Murrumbidgee River and Goulburn River are not excluded from the Commonwealth Water Act, and will be subject to the Basin Plan; and
- water resource plans that apply to those tributaries will have to be consistent with the Basin Plan.<sup>29</sup>

2.29 A description of the area encompassed by the MDB is set out in section 18A of the *Water Act 2007*, and an indicative map of the MDB is set out in Schedule 1A of the *Water Act 2007*.

#### *Role of Indigenous people in decision-making for the Basin*

2.30 The Australian Human Rights Commission (AHRC) provided the committee with a detailed submission outlining the importance of the MDB to the Indigenous Owner groups (who identify as 'Indigenous Nations'):

The Indigenous Nations of the Murray-Darling River Basin possess distinct cultural and customary rights and responsibilities including: a spiritual connection to the lands, waters and natural resources of the Basin; management of significant sites located along the river banks, on the river beds, and sites and stories associated with the water and natural resources located in the rivers and their tributaries; protection of Indigenous cultural heritage and knowledge; accessing cultural activities such as hunting and fishing, and ceremony.<sup>30</sup>

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28 Acheron Valley Watch Inc, *Submission 44*, Part 1 of the inquiry, p. 4 (emphasis in original). See also: Mr Kenneth Pattison, Plug the Pipe, *Committee Hansard*, 26 September 2008, pp 40-41. The committee's report into water management in the Coorong and Lower Lakes discusses the development of the pipeline from the Goulburn River to the Sugarloaf Reservoir to supply water to Melbourne. See: Senate Standing Committee on Rural and Regional Affairs and Transport, *Water management in the Coorong and Lower Lakes (including consideration of the Emergency Water (Murray-Darling Basin Rescue) Bill 2008*, October 2008, pp 47-48.

29 *Committee Hansard*, 26 September 2008, pp 58-59.

30 *Submission 15*, p. 6.

2.31 AHRC noted that historically Indigenous peoples have been excluded from water management and that Indigenous Australians have had little to no involvement in consultations processes, and the development of water policy, resulting in a limited capacity to negotiate enforceable water rights. The AHRC went on to state that governments must work collaboratively and develop policy that deals with Indigenous disadvantage from a holistic perspective, including participation and engagement in governance and water management reform processes in relation to the MDB.<sup>31</sup>

2.32 One of the key recommendations by the AHRC was that statutory provision should be made for mandatory Indigenous membership on the Authority and on the Basin Community Committee.<sup>32</sup>

### *Committee view*

2.33 Given the history of disjointed management of the MDB, the committee understands the appeal of a Commonwealth take-over of the MDB and the establishment of an independent body responsible for the MDB.

2.34 However, the committee also recognises that in the absence of a referral of full powers from the Basin States, any Commonwealth take-over would rely on an omnibus of Constitutional powers. While perhaps welcomed by some Basin States, such a take-over would inevitably be challenged by other Basin States.

2.35 Given the situation in the MDB, what is required right now is cooperation between the Commonwealth and the Basin States, not divisive political manoeuvring. For this reason, the committee feels that the governance arrangements under the IGA represent a positive step for the management of the MDB.

2.36 The committee notes the submission of the AHRC that there should be a role for Indigenous people in decision-making in the Basin. However, the committee notes that the Authority is a governing body, not a representative body. For this reason, the committee's view is that the appropriate selection criteria for members of the Authority is already set out in the *Water Act 2007*, specifically, people with a high level of expertise in one or more of the fields relevant to the Authority's functions and not a member of the governing body of a relevant interest group. The committee notes that Indigenous representation on the Basin Community Committee is provided for in the *Water Act 2007*.

### **Recommendation 1**

**2.37 The committee recommends that the Commonwealth work towards a full and unconditional referral of powers relevant to the management of the MDB**

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31 *Submission 15*, pp 6-7, and 12. See also: Inland Rivers Network, *Submission 9*, p. 2; and National Parks Association of NSW, *Submission 10*, pp 10-11.

32 *Submission 15*, pp 4-5.

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**and, in the absence of such full referral, consider pursuing other options to provide for complete federal management.**

