



Express law fast track information for clients

15 December 2008

New water reform laws commence

The [Water Amendment Act 2008](#) (the Amendment Act) commenced today. It amends the [Water Act 2007](#) to continue the reform of the management of water in the Murray-Darling Basin, primarily by transferring the functions of the Murray-Darling Basin Commission (the Commission), which operated under the former Murray-Darling Basin Agreement, to the Murray-Darling Basin Authority (the Authority), a Commonwealth statutory body, and by enabling the Basin Plan to deal with critical human needs.

Background

The Water Act provides primarily for the sustainable management of the water resources of the Murray-Darling Basin (the Basin), including by establishing an independent Authority. The Authority is required to prepare and enforce a Basin Plan, which, amongst other things, must set a sustainable limit on the amount of water that can be taken from the Basin and from each catchment within the Basin (Part 2). Although there was a possibility in 2007 that Basin States would refer constitutional powers to the Commonwealth to allow for broader coverage, the Water Act was ultimately enacted relying solely on the Commonwealth's constitutional powers.

At the COAG meeting of 26 March 2008, First Ministers of New South Wales, Victoria, Queensland, South Australia (the Basin States), the ACT and the Commonwealth entered into a Memorandum of Understanding in relation to the Murray-Darling Basin (the March MOU). The Ministers agreed in principle to implement further cooperative arrangements for the management of water in the Basin which build on the arrangements put in place under the Water Act, particularly in relation to matters on which the Commonwealth does not have power to legislate.

The March MOU was followed, on 3 July 2008, by the intergovernmental [Agreement on Murray-Darling Basin Reform](#) (the Reform IGA), under which the Basin States agreed to a limited text referral of constitutional powers to the Commonwealth under s 51(xxxvii) of the Constitution.

Over the next months, the Basin States each enacted a *Water (Commonwealth Powers) Act 2008* referring the agreed powers to the Commonwealth. (NSW provisions commenced 25 September 2008; Victorian provisions commenced 4 December 2008; Queensland provisions commenced 13 November 2008; and South Australian provisions commenced 4 December 2008).

The Commonwealth Parliament subsequently passed the Amendment Act, with Royal Assent granted on 8 December 2008.

The key elements of the Water Amendment Act are as follows.

Revision of Murray-Darling Basin Agreement and incorporation as Schedule to Water Act

One of the main elements of the Reform IGA was an agreement that the Commission would cease to exist and that its functions would be transferred to the Authority. The Commission was a 'joint venture' between the Basin States and the Commonwealth and operated on a consensus basis. It had responsibility, amongst other things, for the operation of the River Murray. The Commission was continued by the 1992 Murray-Darling Basin Agreement (the former MDB Agreement), which set out arrangements for the sharing of water in the River Murray, as well as providing for other aspects of planning and management for land and water in the Basin.

A new MDB Agreement was entered into by the Basin States and the Commonwealth on 1 December 2008 and it also came into effect today. The new MDB Agreement revokes the former MDB Agreement (thereby abolishing the Commission) and confers the Commission's former functions on the Authority. The Amendment Act inserts the text of the new MDB Agreement as Schedule 1 to the Water Act, and confers on the Authority the functions expressed to be conferred on it by that scheduled text.

In addition to replacing the Commission with the Authority, the new MDB Agreement confers most of the roles of the former Ministerial Council on a new Ministerial Council, and establishes the Basin Officials Committee, which has a high-level decision-making role in relation to river operations.

Greater attention has been given in the new MDB Agreement to management arrangements for the River Murray in times of drought, and, in particular, management arrangements to ensure that critical human water needs are met. The Agreement now provides for three tiers of water sharing: Tier 1 applies in conditions of normal water availability, Tier 2 applies in times of water shortages and Tier 3 applies in extreme or unprecedented circumstances.

Critical human water needs

As amended by the Amendment Act, the Water Act requires the Basin Plan to make provision for critical human water needs (Part 2A), which are the needs for a minimum amount of water required to meet core human consumption requirements in urban and rural areas, as well as those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs (s 86A).

In particular, the Basin Plan is required to specify:

- for planning purposes, the volume of water required to meet critical human water needs in South Australia, NSW and Victoria
- the amount of conveyance water required to deliver water to meet critical human water needs to communities reliant on the River Murray System
- trigger points that will determine when Tier 2 and Tier 3 water-sharing arrangements set out in the new MDB Agreement will take effect
- management arrangements that will apply in Tier 2 water sharing under the new MDB Agreement unless the Murray-Darling Basin Ministerial Council agrees otherwise.

Further, while Part 2A provides a management framework, each Basin State remains responsible for meeting critical human water needs in its jurisdiction and deciding how water from its share is to be used.

Strengthening the role of the ACCC

Part 4 of the Water Act allows the Minister to make water charge rules and water market rules. The water charge rules can regulate charges levied in the water industry (excluding urban water supply), including by determining charges. The water market rules relate to certain acts of irrigation infrastructure operators that may impose barriers to trade.

The Amendment Act revokes Part 4 of the Water Act, which is currently limited in application due to limits on Commonwealth constitutional power, and re-enacts it (in reliance on the referrals of power) so that it applies the water charge and water market rules to all relevant entities and transactions within the Basin. Further, the Amendment Act inserts a new Part 4A, which allows all States and the Northern Territory to opt in so that the water charge and water market rules also apply outside the Basin.

Risk allocation provisions

Under the National Water Initiative (NWI), the Commonwealth and the States and Territories agreed to a framework for sharing the risks of any future reductions in water availability. Under this framework:

- water access entitlement holders were to bear the risk of any reductions or changes in reliability of water allocations resulting from seasonal or long-term changes in climate, and periodic natural events such as bushfires and drought
- after 2014, the Commonwealth and the States and Territories were to bear specified proportions of the risk of any reductions or changes in reliability of water allocations in excess of 3% arising as a result of a bona fide improvement in the knowledge of water systems' capacities to sustain particular extraction levels, and
- the Commonwealth and the States and Territories were to bear the risks of any reductions or changes in reliability of water allocations arising from changes in their respective government policies.

Division 4 of Part 2 of the Water Act implemented the Commonwealth's risk-sharing obligations under the NWI in respect of reductions or changes in reliability of water allocations resulting from implementation of the Basin Plan. This Division sets out the Commonwealth's intention to manage these risks (including by water purchasing programs and investment in irrigation infrastructure efficiencies) but also provides a mechanism for irrigators to apply for payments from the Commonwealth.

Consistent with the agreement reached in the Reform IGA, in certain circumstances the Amendment Act increases the proportion of new knowledge risk that is attributed to the Commonwealth in respect of reductions in water allocations in the Basin (thereby taking on the proportion that the States were responsible for) and, for areas in the Basin subject to a transitional or interim water resource plan, brings forward the point in time at which this risk becomes a Commonwealth responsibility to the date at which these plans expire.

Referral of power

As mentioned above, the parliaments of the Basin States have each enacted legislation to grant an initial text reference and also an amendment reference to the Commonwealth

Parliament, for the amendments arising out of the Reform IGA that the Commonwealth Parliament did not otherwise have power to enact.

The mechanics of the referral are set out in the intergovernmental *Agreement on Murray-Darling Basin Reform – Referral* (the Referral IGA), entered into by the Commonwealth and Basin States, which includes a commitment by the Commonwealth not to amend the referred provisions of the Act without the agreement of the Basin States.

For further information on the Water Amendment Act 2008 please contact:

Alice Kingsland
Client Counsel to the Water Policy Branch
T 02 6274 1013 F 02 6253 7304
alice.kingsland@ags.gov.au

Robyn Briese
Client Counsel to the Water Policy Branch
T 02 6275 9773 F 02 6274 1884
robyn.briese@ags.gov.au

Robert Orr QC
Deputy General Counsel
T 02 6253 7129 F 02 6253 7304
robert.orr@ags.gov.au

Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:
<mailto:unsubscribe@ags.gov.au>