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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

WATER BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for the Environment and Water Resources,
the Honourable Malcolm Turnbull MP)

WATER BILL 2007

GENERAL OUTLINE

1. The *Water Bill 2007* (the Bill) gives effect to a number of key elements of the Commonwealth Government's \$10.05 billion *National Plan for Water Security*, announced by the Prime Minister on 25 January 2007. The Bill will enable water resources in the Murray-Darling Basin to be managed in the national interest, optimising environmental, economic and social outcomes.
2. The \$10.05 billion of funding under the *National Plan for Water Security* is not specifically addressed in the Bill. However, the funding is integral to the overall package and includes funding for:
 - modernising Australia's irrigation infrastructure;
 - addressing overallocation in the Murray-Darling Basin;
 - reforming management of the Murray-Darling Basin; and
 - new investments in water information.
3. This Bill relies solely on the Commonwealth's constitutional powers. The Commonwealth's original intention was that the Bill would address a broader range of issues, and would in respect of that broader coverage be reliant on referrals of power from Basin states. However, agreement could not be reached, in particular with the State of Victoria, on referral arrangements to allow the Commonwealth Parliament to enact the full range of measures.
4. The Bill has been informed by the *Intergovernmental Agreement on a National Water Initiative (National Water Initiative)*. Key elements of the Bill are outlined below.

Murray-Darling Basin Authority

5. The Bill establishes an independent Murray-Darling Basin Authority with the functions and powers, including enforcement powers, needed to ensure that Basin water resources are managed in an integrated and sustainable way.
6. Key functions of the Authority include:
 - preparing a Basin Plan for adoption by the Minister, including setting sustainable limits on water that can be taken from surface and groundwater systems across the Basin;
 - advising the Minister on the accreditation of state water resource plans;
 - developing a water rights information service which facilitates water trading across the Murray-Darling Basin;
 - measuring and monitoring water resources in the Basin;
 - gathering information and undertaking research; and
 - engaging the community in the management of the Basin's resources.
7. The Authority will report to the Commonwealth Minister for the Environment and Water Resources and will comprise a full-time Chair and four part-time members. The Authority members must have significant relevant expertise to be eligible for

appointment, for example in fields such as water resource management, hydrology, freshwater ecology, resource economics, irrigated agriculture, public sector governance and financial management.

The Basin Plan

8. The Bill requires the Authority to prepare a strategic plan for the integrated and sustainable management of water resources in the Murray-Darling Basin. This plan is referred to as the Basin Plan.
9. The Bill establishes mandatory content for the Basin Plan, including:
 - limits on the amount of water that can be taken from Basin water resources on a sustainable basis – known as long-term average sustainable diversion limits. These limits will be set for Basin water resources as a whole and for individual water resources;
 - identification of risks to Basin water resources, such as climate change, and strategies to manage those risks;
 - requirements that a water resource plan will need to comply with if it is to be accredited under this Bill;
 - an environmental watering plan to optimise environmental outcomes for the Basin by specifying environmental objectives, watering priorities and targets for Basin water resources;
 - a water quality and salinity management plan which may include targets; and
 - rules about trading of water rights in relation to Basin water resources.
10. The Basin Plan will be complemented through water resource plans prepared by Basin States and provided to the Commonwealth Minister for accreditation. The Authority will provide advice to the Minister on whether to accredit such plans. Water resource plans will only be accredited if they are consistent with the Basin Plan, including the long-term average sustainable diversion limits.
11. The Basin Plan will also play an important role in identifying responsibilities for managing risks associated with reductions in water availability and changes in reliability. Where the Basin Plan specifies a reduction in the long-term average sustainable diversion limit, the Basin Plan will also identify the percentage of that reduction for which the Commonwealth is responsible. This percentage relates to the risk sharing arrangements set out in the Bill, which are modelled on those agreed through the *National Water Initiative* in June 2004.
12. The Commonwealth Government has made a commitment to respect water sharing arrangements that are provided for in existing water resource plans. This commitment is implemented through the transitional arrangements set out in the Bill.
13. The Basin Plan will be prepared in consultation with Basin States and communities. It is intended that the first Basin Plan will be completed within two years of the Authority being established.

Commonwealth Environmental Water Holder

14. The Bill establishes a Commonwealth Environmental Water Holder. The Commonwealth Environmental Water Holder will manage the Commonwealth's environmental water to protect and restore the environmental assets of the Murray-Darling Basin, and outside the Basin where the Commonwealth owns water.
15. The Commonwealth Government's water holdings will include the Commonwealth's share of water savings made through the *National Plan for Water Security*.

Australian Competition and Consumer Commission (ACCC)

16. The Bill 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*. The aim of these new functions is to ensure that water markets are able to operate freely across state boundaries and that perverse outcomes from inconsistent water charging arrangements are avoided.

Bureau of Meteorology

17. The Bill gives the Bureau of Meteorology water information functions that are in addition to its existing functions under the *Meteorology Act 1955*. The Bureau will now be authorised to collect and publish high-quality water information. The publications will include a National Water Account and periodic reports on water resource use and availability. The Bureau will also be empowered to set and implement national standards for water information. A major outcome of the Bureau's work will be increased transparency, confidence and understanding of water information.

FINANCIAL IMPACT STATEMENT

18. Costings for the measures under the *National Plan for Water Security* were agreed by the Commonwealth Government in the 2007-08 Budget to an overall amount of \$10.05 billion ('total resourcing' basis) over 10 years.
19. The Murray-Darling Basin Authority will retain the fees and charges, if any, it collects for cost-recovery purposes.

NOTES ON INDIVIDUAL CLAUSES

PART 1 - PRELIMINARY

DIVISION 1 - GENERAL

Clause 1 - Short Title

20. This clause provides that the short title by which the Bill may be cited is the *Water Act 2007*.

Clause 2 - Commencement

21. This clause specifies when different provisions of the Bill commence.

Clause 3 - Objects

22. This clause sets out the objects of the Bill.

Clause 4 - Definitions

23. This clause defines certain terms that are used in the Bill.

Clause 5 - Referring States

24. The Bill provides for the enactment by certain State Parliaments of legislation referring certain matters to the Commonwealth Parliament in accordance with s51 (xxxvii) of the Constitution.
25. When the Prime Minister announced the *National Plan for Water Security* on 25 January 2007, it was the Commonwealth's intention that the Bill would address a broader range of issues than those in fact covered by the Bill, and would in respect of that broader coverage be reliant on referrals of power from the States of New South Wales, Victoria, Queensland and South Australia. Unfortunately, despite extensive negotiation, it has not been possible to secure Victoria's agreement to such a referral.
26. As a result, the Bill relies solely on Commonwealth constitutional powers. The Commonwealth remains hopeful, however, that in the near future all of the States of New South Wales, Victoria, Queensland and South Australia will be able to reach agreement on the broader vision in the *National Plan for Water Security* and has, therefore, retained in the Bill, a mechanism to support future State referrals.

Clause 6 - Planned environmental water

27. This clause defines *planned environmental water*. It is intended to be an expansive definition, to include what is sometimes referred to in various jurisdictions as 'rules-based' environmental water. Fundamentally, planned environmental water is regulated water that is used to achieve environmental outcomes.
28. By way of example, planned environmental water may be delivered through flow rules which specify flows that must be released from storages for environmental purposes. It may also be delivered or retained through restrictions upon the taking of water. Planned

environmental water may replicate natural flow patterns taking into account the timing, frequency and variability of flows. Planned environmental water may seek to achieve specific environmental outcomes such as maintaining the success of bird breeding events in specific wetlands, or may be aimed at maintaining general river health through passing flows or end-of-system flow targets.

Clause 7 - Infrastructure operators etc.

29. This clause defines what is meant by the terms *infrastructure operator* and specifically an *irrigation infrastructure operator*, and what is meant by *water service infrastructure* and by an *irrigation network*.

Clause 8 – River flow control works

30. This clause defines what is meant by the term *river flow control work*. The term river flow control work is used in clause 172 of the Bill.

Clause 9 - Constitutional basis for Act

31. This clause sets out the Commonwealth constitutional powers upon which the Bill is based.

Clause 10 - Basis for Basin water charge, water trading and water market rules

32. This clause is related to provisions in the Bill permitting plans and rules to be made, dealing with the trading and transfer of tradeable water rights in relation to the Basin water resources and certain water charges. The clause sets out the reasons for legislating with respect to these matters.

Clause 11 - Reading down provision in relation to the operation of sections 99 and 100 of the Constitution

33. This clause provides that, if the operation of a provision of this Bill or of a regulation or other instrument made under this Bill in reliance upon the trade and commerce power (s51(i)) or the corporations power (s51(xx)) would be invalid because of s99 or s100 of the Constitution, it is the intention of the Parliament that the provision operate in reliance on other Commonwealth legislative powers where invalidity because of s99 or s100 of the Constitution does not arise, including but not limited to legislative power under a State reference of power.
34. This clause also provides that, if the operation of a provision of this Bill or of a regulation or other instrument made under this Bill operates in relation to trade and commerce and the operation of the provision is invalid under s99 or s100 of the Constitution, in relation to trade or commerce between the States, it is the intention of the Parliament that the provision operate in relation to trade or commerce within the States.

Clause 12 - Application to Crown etc.

35. This clause provides that the Crown in each of its capacities is bound by the provisions of the Bill, subject to the express exceptions set out in this clause. Broadly, the exceptions provide that the Crown and an agency of the Commonwealth or the State are

not subject to monetary penalties and cannot be prosecuted for offences. They are, however, subject to all other civil enforcement mechanisms. Commonwealth and State-owned corporations do not fall within the exemptions and hence are liable to pay monetary penalties and/or be prosecuted for offences.

Clause 13 – The *Native Title Act 1993* not affected

36. This clause provides that nothing in the Bill affects the operation of the *Native Title Act 1993*.

DIVISION 2 – INTERACTION BETWEEN COMMONWEALTH WATER LEGISLATION AND STATE LAWS

Notes applicable to Clauses 14 to 18

37. Clause 15 provides that, in all circumstances where a Commonwealth law and a State law can operate concurrently, they are intended to do so. This means, for example, that if a State government sets more stringent targets than set under Commonwealth law, the targets would not be inconsistent with the Commonwealth law.
38. Where a state refers powers, it can displace the operation of the Bill in certain circumstances. Broadly, the displacement mechanism can operate in two circumstances: a) in relation to certain matters declared by State law to be excluded matters, and b) in relation to certain State laws. In addition, the Commonwealth can exercise the displacement mechanism by making regulations.
39. The circumstances governing the exercise of a referring State's power to displace some or all provisions of the Bill could be elaborated on in an agreement between the relevant parties at such a time as it is required.

PART 2 – MANAGEMENT OF BASIN WATER RESOURCES

DIVISION 1 – BASIN PLAN

Subdivision A - Introduction

Clause 19 – Simplified outline

40. This clause provides a simplified outline of the purpose and content of the Basin Plan, as well as the process for preparing, adopting, amending and reviewing the Basin Plan.

Subdivision B – Basin Plan, its purpose and contents

Clause 20 – Purpose of the Basin Plan

41. This clause describes the purpose of the Basin Plan. The Basin Plan will be a strategic plan for water resources in the Murray-Darling Basin, setting out the measures required to ensure that Basin water resources are managed in an integrated and sustainable way.

42. In particular, the clause requires the Basin Plan to give effect to ***relevant international agreements*** (to the extent that those agreements are relevant to the use and management of Basin water resources) and to balance environmental, social and economic considerations as they relate to the integrated management of Basin water resources.
43. ***Relevant international agreements*** is defined in clause 4, and includes the Ramsar Convention, the Biodiversity Convention, the Desertification Convention, the Bonn Convention, CAMBA, JAMBA, ROKAMBA and the Climate Change Convention.

Clause 21 – General basis on which Basin Plan to be developed

44. This clause sets out the basis on which the Basin Plan is to be developed.
45. In particular, subclause 21(1) requires the Basin Plan to be prepared with a view to giving effect to relevant international agreements (described above) to the extent that those agreements relate to matters dealt with in the Basin Plan. Subclause 21(2) requires the Basin Plan to be prepared having regard to the fact that use of Basin water resources is likely to have a significant impact on the conservation and sustainable use of biodiversity and that as a result, special measures are required to manage their use to conserve biodiversity. The Basin Plan must also promote the wise use of all Basin water resources and promote the conservation of declared Ramsar wetlands in the Murray-Darling Basin (subclause 21(3)).
46. Subclause 21(4) requires the Minister and the Authority to take account, or have regard to, of a range of issues and information in developing and adopting the Basin Plan, such as best available scientific knowledge and socio-economic analysis, the consumptive and other economic uses of Basin water resources and social, cultural, indigenous and other public benefit issues.
47. It is intended that the Basin Plan will at a minimum maintain the level of protection given to planned environmental water under existing State water management laws. Subclause 21(5) reflects this intention.
48. Subclause 21(6) requires the Basin Plan to not be inconsistent with the licence issued under the *Snowy Hydro Corporatisation Act 1997* of New South Wales (the Snowy water licence). This requirement reflects the previous commitments made by the Commonwealth, New South Wales and Victorian Governments to allow water within the Snowy Scheme to be managed to meet the rights and obligations set out in the Snowy water licence and the principles set out in the *Heads of Agreement on the Outcomes of the Snowy Water Inquiry*. Subclause 21(7) is intended to protect against a situation where the Snowy Licence is varied by the New South Wales Government in a manner that could compromise achieving the objectives of this Bill. It is intended that variations to the licence that do not have this effect will be prescribed in regulations.

Clause 22 – Content of Basin Plan

49. This clause lists the matters that must be included in the Basin Plan, described as mandatory content in the table in subclause 22(1). These matters are mandatory because they are fundamental to the integrated management of Basin water resources. These matters include:
 - identification of risks to Basin water resources and strategies to manage those risks;

- management objectives and outcomes;
- long-term average quantities of water that can be taken on a sustainable basis from Basin water resources and water resource plan areas;
- an environmental watering plan and a water quality and salinity management plan; and
- rules about trading of water rights in relation to Basin water resources.

Additional matters to be included in the Basin Plan may be specified in regulations under subclause 22(8).

50. In relation to item 11 of the table in subclause 22(1), subclause 22(3) specifies requirements for a water resource plan for a water resource plan area. Subclauses 22(4), 22(5) and 22(6) recognise that not all the requirements in 22(3) will apply to all water resource plan areas. The management objectives for a water resource plan area may mean that certain requirements are irrelevant (for example if a water resource plan area is being managed as a wild river). The Authority will need to be aware of the management objectives for water resource plan areas in developing the Basin Plan to ensure that the requirements included under item 11 of the table in subclause 22(1) are appropriately tailored to the range of different water resource plan areas in the Basin.
51. Subclause 22(5) limits the requirements that the Basin Plan can impose in relation to metering of stock and domestic water use under item 11 of the table in subclause 22(1). The intention is to ensure that metering would only be required in certain circumstances, for example where the water resources of an area are considered to be under stress, or where there are local disputes about water sharing. The effect of this subclause is that the Authority will need to make a judgement about whether metering of stock and domestic water use will be necessary for the effective management of Basin water resources.
52. Subclauses 22(9), 22(10) and 22(11) list matters that are not intended to be dealt with by the Basin Plan and will have no legal effect if they are covered in the Basin Plan. These subclauses ensure that while the Basin Plan is to provide for the integrated management of Basin water resources, it will not directly regulate land use or planning in relation to land, the management of natural resources (other than water resources) or the control of pollution. These matters are, and continue to be, regulated by Basin States.

Clause 23 - Long-term average sustainable diversion limits

53. This clause provides further detail on the long-term average sustainable diversion limit referred to in item 6 of the table in subclause 22(1). A long-term average sustainable diversion limit will be identified for Basin water resources as a whole and for the water resources, or particular parts of the water resources, of each water resource plan area.
54. The intention is to ensure that water is taken from Basin water resources on an environmentally sustainable basis rather than based on historical levels of surface water use as is the case for current long-term diversion caps set under Schedule F of the *Murray-Darling Basin Agreement*.
55. The long-term average sustainable diversion limit is also relevant to Division 4 (Allocation of risks in relation to reductions in water availability). Part 11 (Transitional) describes the arrangements regarding existing water resource plans.

Clause 24 - Temporary diversion provision

56. This clause provides further detail regarding the temporary diversion provisions referred to in item 7 of the table in subclause 22(1). The intention of the temporary diversion provision is to provide for a transition to occur when a long-term sustainable diversion limit is lowered, so as to mitigate any significant social and economic impacts on affected communities. However, requirements are included to ensure that the transition occurs within a reasonable timeframe (subclause 24(5) refers to a period of five years). In addition, a temporary diversion provision can only be set where the sustainable diversion limit is reduced by more than 5% (subclause 24(6) refers).
57. Subclause 24(3) provides that the temporary diversion provision may be zero. In this case there is no temporary diversion provision, and there is nothing to be added to the long-term average sustainable diversion limit when calculating the long-term annual diversion limit (refer information in item 7 of the table in subclause 22(1)).

Clause 25 - Water quality and salinity management plan

58. This clause sets out the mandatory content of the water quality and salinity management plan.

Clause 26 – Water trading and transfer rules

59. This clause sets out the types of matters that the rules for the trading or transfer of tradeable water rights in the Basin Plan may deal with (referred to in item 12 of the table in subclause 22(1)). These matters include rules, terms and processes governing the trade or transfer of tradeable water rights consistent with the *National Water Initiative*. The matters also include all matters currently covered by Schedule E to the *Murray Darling Basin Agreement* and Protocols made under that Agreement (except for those matters that are to be covered by the water charge and water market rules provided for in Part 4 of the Bill).

Clause 27 - Basin Plan to be published on Authority's website

60. This clause obliges the Authority to publish the Basin Plan electronically, including amendments. This will ensure that the Basin Plan is available to the public.
61. The Authority will also have an obligation to maintain archived versions of previous Basin Plans on its website. This obligation is imposed in light of the fact that water resource plans current at any particular point in time may be accredited against an earlier version of the Basin Plan (refer clause 56).

Subdivision C – Environmental management

Clause 28 - Environmental watering plan

62. This clause sets out the purpose and content of the environmental watering plan which item 9 of the table in subclause 22(1) identifies as a mandatory component of the Basin Plan. Broadly, the purpose of the environmental watering plan is to safeguard existing environmental water, plan for the recovery of additional environmental water and to coordinate the management of existing and additional environmental water with an

overall view to protecting and restoring environmental assets of the Murray-Darling Basin.

63. The environmental watering plan will be a strategic document that specifies the environmental objectives, watering priorities and targets for Basin water resources. It will set out the methods and principles applied to identify assets to be watered. These methods and principles will also be applied in developing environmental watering schedules under clause 30.
64. The Authority will be required to take into account other programs for water recovery and environmental watering in the Murray-Darling Basin when preparing the environmental watering plan. This will assist in the coordination of held environmental water and will also develop links between the environmental watering plan and the planned environmental watering provisions of water resource plans developed and accredited under Division 2.
65. Note that there will be consultation on the environmental watering plan as part of the consultation requirements for the Basin Plan (set out in clauses 42 and 43).

Clauses 29 to 31 - Authority to consult holders and managers of environmental water in implementing environmental watering plan; Environmental watering schedules and Authority to coordinate delivery of environmental water

66. For the purpose of implementing the environmental watering plan, clause 29 requires the Murray-Darling Basin Authority to consult with the holders and managers of environmental water, and owners of environmental assets with a view to agreeing on environmental watering schedules.
67. Environmental watering schedules are consensual and facilitative agreements between holders of held environmental water, managers of planned environmental water, and owners of environmental assets that seek to ensure that the use of environmental water available from diverse sources is coordinated so as to maximise the environmental benefits of environmental watering.
68. Environmental watering schedules to which the Authority is a party must include environmental watering priorities that are consistent with the environmental watering plan. The Authority has the function of coordinating the delivery of environmental water managed under environmental watering schedules to which it is a party.

Clause 32 – Authority to identify and account for held environmental water

69. This clause requires the Authority to separately identify and account for held environmental water in the Murray-Darling Basin for each financial year.

Subdivision D – Effect of Basin Plan

Clause 33 - Basin Plan is a legislative instrument

70. This clause defines the legal nature of the Basin Plan and any subsequent amendments to the Basin Plan. As a legislative instrument, the Basin Plan must be tabled in Parliament, is subject to disallowance and sunset after a 10 year period, and will be published on the Federal Register of Legislative Instruments.

Clause 34 - Effect of Basin Plan on Authority and other agencies of the Commonwealth

71. This clause sets out the legal obligation of Commonwealth agencies (including the Authority) to act consistently with the Basin Plan.
72. Subclause 34(2) clarifies that the provision does not apply to the Authority's or the Minister's functions in preparing or adopting a Basin Plan. This ensures that the Authority and the Minister are not constrained by earlier versions of the Basin Plan when preparing or adopting amendments to the Basin Plan.

Clause 35 – Effect of Basin Plan on other agencies and persons

73. This clause requires:
 - the Murray-Darling Basin Commission;
 - agencies of Basin States; and
 - operating authorities, infrastructure operators and holder of water access rights;to not act inconsistently with the Basin Plan when they are exercising powers or functions that may impact on the use or management of Basin water resources.

Clause 36 – Constitutional operation of section 35 (general)

74. This clause provides that the Basin Plan only has effect so far as the Constitution permits. The clause sets out the principal powers under s 51 of the Constitution upon which the Basin Plan relies for its validity as a law of the Commonwealth.

Clause 37 – Constitutional operation of section 35 (water trading rules)

75. This clause provides that the water trading rules in the Basin Plan only have effect so far as the Constitution permits. A separate clause is provided for the trading rules because their constitutional basis is slightly different to the constitutional basis of the remainder of the Basin Plan (covered in clause 36).

Clause 38 - Regulations may provide for exceptions

76. This clause provides that regulations may provide for exemption to the effects of the Basin Plan subject to conditions or a period specified in the regulations. This regulation making power is one to be exercised rarely, in circumstances where compliance with the Basin Plan would be inappropriate or jeopardise other important policy objectives. Such policy objectives may be objectives identified by the Commonwealth or by the Basin States.

Clause 39 – Obligations under both Basin Plan and water resource plans

77. Clauses 58 and 59 impose obligations to comply with water resource plans. Water resource plans are accredited against the original Basin Plan or the Basin Plan as it was in force two years prior to seeking accreditation of each water resource plan. The effect of this is that an accredited water resource plan might be based on standards or obligations that have been superseded in the current version of the Basin Plan. The purpose of clause 39 is to provide that where an obligation is imposed under both the Basin Plan and an accredited water resource plan, the State agency or other person who

has obligations to comply with the Basin Plan and water resource plan is not subject to two inconsistent legal requirements. Rather, obligations under the water resource plan take precedence and obligations under the Basin Plan, if any, are disregarded.

Clause 40 – Effect on State laws

78. The clause clarifies that a State may take additional measures to protect or conserve the Basin water resources (i.e. the limits on take set in the Basin Plan are maximum limits not minimum limits).

Subdivision E – Procedure for making Basin Plan

Clause 41 - Authority to prepare Basin Plan and give to Minister for adoption

79. This clause requires the Authority to prepare a Basin Plan and provide it to the Minister for adoption as soon as practicable after the commencement of this Part of the Bill.

Clause 42 - Consultations by Authority in preparing Basin Plan

80. This clause sets out who the Authority must consult with in preparing the Basin Plan. Under subclause 42(3) the Authority may undertake other consultation at its own discretion. This means there is no limitation as to whom the Authority may consult with in preparing the Basin Plan. Subclause 42(3) also allows the Authority to publish such information to facilitate consultation as it considers appropriate.

Clause 43 - Authority to seek submissions on proposed Basin Plan

81. This clause sets out the process the Authority must follow in terms of seeking and receiving submissions from Basin States and the public on a proposed Basin Plan.
82. Comment on the proposed Basin Plan will be facilitated through the preparation of a plain English summary of the Plan by the Authority. The summary will include an outline of the information base used to make the Basin Plan.
83. The Authority is also required to allow at least 16 weeks for submissions to be made on the proposed Basin Plan (paragraph 43(4)(b)). This is the minimum period of time that can be allowed. The Authority is able to establish a longer period if it considers that more time is appropriate. The Authority will determine the most appropriate consultation strategy, including considering advice from the Basin Community Committee.
84. To ensure that the Authority is accountable for how it takes into consideration submissions received, the Authority is required to prepare a document summarising submissions and the changes made to the Basin Plan subsequent to the consultation period. This document must be provided to the Minister with the final Basin Plan that the Authority proposes for adoption, and must be published on the Authority's website.

Clause 44 - Minister may adopt Basin Plan

85. This clause sets out the Minister's obligations following receipt of a Basin Plan from the Authority. The Minister has 60 days within which to either adopt the Basin Plan or give the Plan back to the Authority with suggestions for consideration.

86. Where the Minister provides suggestions back to the Authority, subsection 44(2) prescribes the steps the Authority must take (including additional consultations where the Authority decides such consultations are appropriate). The requirements on the Minister after receiving a revised Basin Plan back from the Authority under subsection 44(2), are set out in subclause 44(3).
87. If the Minister is still not prepared to adopt the Basin Plan, the Minister must direct the Authority to make modifications to that version of the Basin Plan and provide the Plan back for adoption. The Minister cannot direct on matters of a factual or scientific nature. Subclause 44(5) lists those items in the Basin Plan that are considered to be entirely of such a nature.
88. A direction by the Minister is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. However, when the Basin Plan is tabled before a House of the Parliament (required under subclause 44(7)), the Minister must table any directions to the Authority. This ensures that the Minister is accountable for any directions given to the Authority.

Subdivision F – Amendment of Basin Plan

Clause 45 - Authority may prepare amendment of Basin Plan

89. This clause allows the Authority to prepare an amendment to the Basin Plan.

Clause 46 - Consultations by Authority in preparing amendment of Basin Plan

90. This clause sets out who the Authority must consult with in preparing the amendment of the Basin Plan. However, the Authority is not limited in terms of who it can consult with (subclause 46(3)). This clause also allows the Authority to publish such information to facilitate consultation as it considers appropriate.

Clause 47 - Authority to seek submissions on proposed amendment of Basin Plan

91. This clause sets out a process the Authority must follow in terms of seeking and receiving submissions from Basin States and the public on a proposed amendment of the Basin Plan. Except for the slightly shorter timeframes for public consultation, the process is identical to the process for making the original Basin Plan (see clause 43 above).

Clause 48 - Minister may adopt amendment of Basin Plan

92. This clause sets out the Minister's obligations following receipt of a Basin Plan from the Authority. The process for adoption of amendments to the Basin Plan is similar to the process for adoption of the original Basin Plan (see clause 44 above).

Clause 49 - Minor or non-substantive amendments of Basin Plan

93. This clause provides for regulations that allow the Authority to make minor or non-substantive amendments to the Basin Plan. The consultation and adoption process set out in clauses 46, 47 and 48 are not applicable to such amendments.

94. Minor or non-substantive amendments may include (but are not limited to) addressing simple typographical or grammatical errors, streamlining of procedural issues that do not affect the substantive nature of the Basin Plan and the elaboration and clarification of matters already contained in the Basin Plan. Minor or non-substantive amendments would not include changes that alter the rights or water access rights holders or obligations imposed by the Basin Plan.

Subdivision G – Review of Basin Plan

Clause 50 - Review of Basin Plan—general

95. This clause requires the Authority to review the Basin Plan every 10 years following its commencement. Under subclause 50(2) the Authority must also review the Basin Plan where requested by the Minister or all Basin States, acting together. Such a request can not be made within the first 5 years after the Basin Plan takes effect, or within 5 years after the latest review. This restriction is imposed to ensure that sufficient time is allowed for the effect of the limits and measures prescribed in the Basin Plan to be seen on the ground.

Clause 51 - Authority to prepare discussion paper and seek submissions

96. This clause requires the Authority to prepare a discussion paper in consultation with particular parties specified in subclause 51(2) setting out the issues to be addressed in a review of the Basin Plan for the purposes of clause 50. The discussion paper must be published and provided to Basin States. The Authority must allow for Basin States and the public to make submissions to the review process. Specific requirements in relation to this process are established by this clause.

Clause 52 - Review may lead to amendment of Basin Plan

97. This clause confirms that a possible outcome of a review of the Basin Plan under clause 50 is that the Authority may prepare an amendment of the Basin Plan (under clause 45) and give it to the Minister for adoption.

DIVISION 2 – WATER RESOURCE PLANS FOR PARTICULAR WATER RESOURCE PLAN AREAS

Subdivision A - Introduction

Clause 53 - Simplified outline

98. This clause provides a simplified outline of the Division.

Subdivision B – Water resource plans

Clause 54 - Water resource plans for water resource plan areas

99. This clause requires there to be a water resource plan for each water resource plan area. The Basin Plan will identify the water resource plan areas (item 2 of the table in subclause 22(1) refers). Generally speaking the water resource plan areas identified in

the Basin Plan will correspond with the management areas prescribed under State water management laws.

100. A water resource plan will only take effect for the purposes of the Bill if it is accredited or adopted by the Minister.

Clause 55 - Content of water resource plan

101. This clause sets out the content of a water resource plan. Importantly, the water resource plan needs to be consistent with the Basin Plan, including:
- the long-term average sustainable diversion limit for that water resource plan area (refer item 6 of the table in subclause 22(1)); and
 - any requirements identified in the Basin Plan for that water resource plan (refer item 11 of the table in subclause 22(1)).
102. A water resource plan may be constituted of a number of instruments of a Basin State (refer subclause 63(1)).
103. The water resource plans will give effect to the Basin Plan, ensuring that integrated management of Basin water resources is brought to bear in on-ground actions.
104. Water resource plans will operate within the Basin State's legislative framework. This legislative framework may contain requirements specified for water resource plans. In light of this, the consistency of each water resource plan with the Basin Plan will need to be assessed having regard to the relevant legislative framework.

Clause 56 - General basis for accrediting and making water resource plans

105. This clause sets out the general basis for accrediting and making water resource plans. Water resource plans will take a period of time to prepare, and the Basin Plan may change during this time. To address this issue, this clause provides that the water resource plan should be assessed for consistency against the original version of the Basin Plan, or the version in effect 2 years before the proposed water resource plan is given to the Minister. The Minister must have regard to the advice of the Authority in exercising functions under this Division.

Subdivision C – Effect of a water resource plan

Clause 57 – Water resource plans adopted under section 69 is a legislative instrument

106. This clause provides that water resource plans adopted under clause 69 (being water resource plans prepared by the Authority) are legislative instruments.

Clause 58 - Effect of water resource plan on Authority and other agencies of the Commonwealth

107. This clause sets out the legal obligation of Commonwealth agencies (including the Authority) to act consistently with the water resource plan.
108. Subclause 58(2) clarifies that the provision does not apply to the Authority or the Minister's functions in preparing and adopting a water resource plan. This ensures that

the Authority is not constrained by an existing water resource plan when requested to prepare a water resource plan for adoption by the Minister.

Clause 59 - Effect of water resource plan on other agencies and bodies

109. This clause requires:

- the Murray-Darling Basin Commission and the Murray-Darling Basin Ministerial Council;
- agencies of Basin States; and
- operating authorities, infrastructure operators and holder of water access rights;

to not act inconsistently with the water resource plans when they are exercising powers or functions that may impact on the use or management of Basin water resources.

Clause 60 – Constitutional operation of section 59 (general)

110. This clause provides that a water resource plan only has effect under the Bill so far as the Constitution permits. The clause sets out the principal powers under s 51 of the Constitution upon which the water resource plan relies for its effect under a law of the Commonwealth.

Clause 61 – Constitutional operation of section 59 (water trading rules)

111. This clause provides that the trading related rules in water resource plans only have effect under the Bill in so far as the Constitution permits. A separate clause is provided for the trading related rules because the constitutional basis for their effect under the Bill is slightly different to the constitutional basis for the effect under the Bill of the remainder of the water resource plans (covered in clause 60).

Clause 62 - Regulations may provide for exceptions

112. This clause provides that regulations may provide for exemption from the effects of the water resource plans set under subsections 58(1) and 59(1) subject to conditions or a period specified in the regulations. This regulation making power is one to be exercised rarely, in circumstances where compliance with the water resource plans would be in appropriate or jeopardise other important policy objectives. Such policy objectives may be objectives identified by the Commonwealth or by the Basin States.

Subdivision D – Accrediting water resource plans prepared by Basin States

Clause 63 - Accrediting water resource plans prepared by Basin States

113. This clause sets out the process for accrediting water resource plans prepared by Basin States. The clause enables Basin States to provide a water resource plan to the Authority and ask the Authority to provide that plan to the Minister for accreditation. The Authority will provide recommendations to the Minister on whether to accredit the water resource plan.

114. Subclause 63(4) prevents the Authority recommending against a water resource plan unless the relevant Basin State has been provided with an opportunity to make a

submission to the Authority about the issues of concern. It is anticipated that before the Authority takes this formal step there will have been significant informal discussion between the Authority and the Basin State putting forward a water resource plan for accreditation.

115. The Minister makes the decision regarding whether to accredit the proposed water resource plan. If the Minister acts against the recommendations of the Authority, the Minister must table a statement showing reasons for acting against the Authority's recommendations in each House of Parliament within a specified period. This ensures that the Minister will be accountable for any decision not to follow the advice of the Authority.
116. A decision by the Minister on whether to accredit or not accredit a proposed water resource plan is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. However section 42 (disallowance) of that Act does not apply. The purpose of this exemption is to avoid the significant uncertainty in the management of Basin water resources that would arise if an accredited water resource plan that has been given effect under Basin State law is subsequently disallowed by the Commonwealth Parliament.
117. Subclause 63(9) of this clause provides for the making of regulations that set out a timetable for the various steps required for accreditation of water resource plans and more detail in relation to the process to be followed.

Clause 64 - Duration of accreditation

118. This clause provides that water resource plans are accredited for a period of 10 years or until the plan ceases to have effect under the State water management law, whichever is the earlier. However, under subclause 64(2) the Minister may extend the period of accreditation by a period of up to one year. This provision is included for cases of unforeseen or administrative delays in preparing or accrediting a new water resource plan which requires continuation of an old plan for a short period of time. A limit is included in subclause 64(4) to ensure that extensions do not continue indefinitely.
119. Subclause 64(3) provides that an extension of accreditation is a legislative instrument. However, for the same reasons as set out in respect to the initial accreditation (clause 63 above), extension of accreditation is exempt from the requirement of section 42 (disallowance) of the *Legislative Instruments Act 2003*.

Clause 65 - Accrediting amendments of accredited water resource plans

120. This clause sets out the process for accrediting amendments of accredited water resource plans prepared by Basin States. The process for accrediting amendments is the same as the process for accrediting a new water resource plan (see clause 63 above).
121. A decision by the Minister on whether to accredit or not accredit a proposed amendment of a water resource plan is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. However, section 42 (disallowance) of that Act does not apply for the same reasons as set out in respect to accreditation of water resource plans (clause 63 above).

Clause 66 - Accrediting minor or non-substantive amendments of accredited water resource plans

122. This clause provides for regulations that allow a Basin State to make minor or non-substantive amendments to a water resource plan which has been accredited under clause 63. These minor or non-substantive amendments will be taken to have been accredited under clause 63. The intention of this clause is to ensure that the formal process for accrediting amendments to water resource plans does not prevent Basin States making minor or non-substantive amendments to their water resource plans.
123. Minor or non-substantive amendments may include (but are not limited to) addressing simple typographical or grammatical errors, streamlining of procedural issues that do not affect the substantive nature of a water resource plan and elaboration and clarification of matters already contained in a water resource plan. Minor or non-substantive amendments would not include changes that alter the rights of water access rights holders or obligations imposed by the water resource plan.

Clause 67 - Authority may assist Basin State to prepare water resource plan

124. This clause allows the Authority to assist a Basin State in preparing a water resource plan or amendment to a water resource plan. The clause is also intended to make clear that the Authority is able to participate in the development of water resource plans. Through the Authority's participation at an early stage, any problems relating to the conformity of the water resource plan with the requirements of the Basin Plan should be raised and solved in sufficient time to allow for timely accreditation and to provide certainty to water rights holders.

Subdivision E – Water resource plan prepared by Authority and adopted by Minister

Clause 68 - Minister may request Authority to prepare water resource plan

125. This clause allows the Minister to request the Authority to prepare a water resource plan for adoption by the Minister. Certain conditions must be met before such a request can be made, detailed in subclauses 68(2), (3), (4) and (5). For example, if the Basin State does not provide the Authority with a proposed water resource plan or if the Minister decides not to accredit a water resource plan proposed by a Basin State because it is not consistent with the Basin Plan. This clause is intended to be used as a measure of last resort by the Minister, for example where absolutely necessary to ensure an accredited water resource plan that is consistent with the Basin Plan is able to be put in place.

126. Note that the step-in provision does not apply to water resource plan areas where a *transitional water resource plan* is in effect (refer Division 1 of Part 11).
127. In preparing the water resource plan for the Minister, the Authority must have regard to requirements of the laws of the relevant Basin State (subclause 68(7)). The Authority must also adopt any water resource plan provided by that Basin State under clause 63 to the extent possible (subclause 68(9)).

Clause 69 - Minister may adopt water resource plan

128. This clause sets out the Minister's obligations following receipt of a water resource plan prepared by the Authority under clause 68.
129. If the Minister directs the Authority to amend the water resource plan under subclause 69(3)(b)(ii), the Minister must table a document showing reasons for that direction in each House of Parliament at the time that the water resource plan is tabled in a House of Parliament (refer paragraph 69(7)(a)). This ensures that the Minister will be accountable for any decision not to accept the water resource plan prepared by the Authority.
130. A direction under subparagraph (3)(b)(ii) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is just included to assist readers.

Clause 70 - Duration of plan adopted under section 69

131. This clause provides the period a plan is adopted for under clause 69.

Subdivision F – Reporting obligations

Clause 71 - Reporting obligations of Basin States

132. This clause imposes reporting obligations on Basin States. The purpose of these obligations is to ensure that the Authority has the information needed to monitor compliance with the long-term average sustainable diversion limits set in the Basin Plan.

DIVISION 3 – PROCEDURES TO BE FOLLOWED BEFORE TAKING STEP-IN ACTION

Clause 72 – Scope of division

133. This clause outlines the scope of Division 3, which is to provide the procedure to be followed before the Minister exercises his or her power to request the Authority to prepare a water resource plan (refer clause 68).

Clause 73 – Procedure to be followed before exercising step-in power

134. This clause sets out the procedure to be followed by the Minister before exercising a step-in power. The procedure includes:
- trying to resolve matters without using a step-in-power;

- issuing a preliminary notice to the relevant State Minister that the Minister is contemplating using the power, including an offer of mediation. The clause includes requirements regarding mediation, if the State Minister is willing to engage in that process; and
 - if the State refuses to mediate or no resolution has been reached within 2 months of the preliminary notice, issuing a formal notice of the Minister’s intention to consider using the step-in power if action identified in the notice as being necessary to deal with the circumstances is not taken within the specified period. The Basin State may make a formal response setting out matters including additional facts or mitigating factors, and proposing alternative action to that specified in the formal notice. After receiving the State’s response, the Minister may issue a further notice indicating the Minister’s intention to proceed to consider whether to exercise the step-in power.
135. The clause provides that once the procedure has been followed, the Minister may determine to exercise the step-in power, provided certain criteria are met. The criteria include that not less than two weeks has passed since issuing the further notice, and that the Minister has considered the State’s response and is satisfied of various matters including that the circumstances, if not dealt with, will materially and adversely impact on the efficient or effective implementation of the Basin Plan, and that there is no feasible and effective alternative to exercising the step-in power to deal with the circumstances.
136. The clause also provides that the extent and duration of the exercise of the step-in power must be limited to what is reasonable to deal with the circumstances.
137. A preliminary notice, formal notice and further notice are not legislative instruments. This provision is included to assist readers, as the notices are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*, The provision is declaratory only, and is not an exemption from the provisions of the Legislative Instruments Act.

DIVISION 4 – ALLOCATION OF RISKS IN RELATION TO REDUCTIONS IN WATER AVAILABILITY

138. This division deals with risks of reductions in water allocations that must be borne by the Commonwealth. The provisions adopt the *National Water Initiative* as the basis for the definition of the risks and their management by the Commonwealth.
139. The risks and are dealt with according to how they arise and their effect, viz:
- Subdivision A deals with reductions in water allocations arising from changes in the long-term sustainable diversion limit provided for by the Basin Plan. The risks that have to be managed have two components, the quantity of water allocations and their reliability.
 - Subdivision B deals with changes in reliability, arising from other provisions in the Basin Plan. There is no need to deal with changes in the size of water allocations in this subdivision as changes to average allocation quantities are reflected in the long-term sustainable diversion limit. This subdivision will come into effect if the average diversion limits are unchanged but the reliability of

allocations changes, for example if there are increased allocations in some years and reduced allocations in others.

Subdivision A—Risks arising from reductions in diversion limits

Clause 74 - Simplified outline

140. This clause provides a simplified outline of the way in which the risk of reductions in water availability will be borne by particular parties. The risk management approach draws on the relevant provisions of the *National Water Initiative*.
141. Paragraph 48 of the *National Water Initiative* provides that water access entitlement holders are to bear the risks of any reduction or less reliable water allocation, under their water access entitlements, arising from reductions to the consumptive pool as a result of:
- seasonal or long-term changes in climate; and
 - periodic natural events such as bushfires and drought.
142. Paragraph 49 of the *National Water Initiative* provides that risks of any reduction or less reliable water allocation under a water access entitlement, arising as a result of bona fide improvements in the knowledge of water systems’ capacity to sustain particular extraction levels are to be borne by users up to 2014. Risks arising under comprehensive water plans commencing or renewed after 2014 in relation to bona fide improvements in knowledge are to be shared over each ten year period in the following way:
- water access entitlement holders to bear the first 3 per cent reduction in water allocation under a water access entitlement;
 - State/Territory governments and the Commonwealth Government to share one-third and two-thirds respectively reductions in water allocation under water access entitlements of between 3 per cent and 6 per cent; and
 - State/Territory and Commonwealth governments to equally share reductions in water allocation under water access entitlements greater than 6 per cent.

The table below summarises these sharing arrangements

Reduction	Water access entitlement holder share	State share	Commonwealth share
0 to 3%	All of the reduction	Nil	Nil
3 to 6%	All of the reduction to 3%	1/3 of any reduction from 3 to 6%	2/3 of any reduction from 3 to 6%
More than 6%	All of the reduction to 3%	1/3 of any reduction from 3 to 6%, plus 1/2 of any reduction from 6% and above	2/3 of any reduction from 3 to 6%, plus 1/2 of any reduction from 6% and above

1. Paragraph 50 of the *National Water Initiative* provides that governments are to bear the risks of any reduction or less reliable water allocation that is not previously provided for, arising from changes in government policy (for example, new environmental objectives).

2. The Commonwealth will meet its responsibilities as far as is practical by investing in works and measures to reduce water wastage and improve the efficiency of consumptive water use and water delivery and by purchasing entitlements. The Commonwealth will make payments to water entitlement holders to cover the value of any reductions in entitlements for which it is responsible where the reductions for which it is responsible have not been fully mitigated by its investments and purchases.

Clause 75 - Basin Plan to specify Commonwealth share of reduction in long-term average sustainable diversion limit

3. This clause requires the Basin Plan to specify the reductions that arise and the degree to which the Commonwealth is responsible for bearing the risks of those reductions. The Commonwealth's responsibility will be determined consistently with the *National Water Initiative*. There may be reductions for which the Commonwealth is not responsible, in whole or in part, in accordance with these provisions and the *National Water Initiative*.
4. Subclause 1(b) refers to the *Commonwealth Government policy component*, being the amount of the reduction attributable to changes in Commonwealth Government policy. For the purposes of clarity, adoption of new environmental objectives, but not implementing existing environmental objectives, by the Commonwealth Government would qualify as a change in Commonwealth Government policy. The Commonwealth share of the reduction includes all of this component.
5. Subclause 1(c) refers to the *new knowledge component*. Under subclause (2)(b) the Commonwealth share of this component is only for a reduction that takes effect after 1 January 2015. The Commonwealth share of this component is worked out under subclause (3) which is in accordance with paragraph 49 of the *National Water Initiative*. The full Commonwealth share of this component is worked out over 10 year periods. Subclause (4) provides that the reference diversion limit to be used for converting volumetric reductions arising from new knowledge to percentage reductions will be the earliest diversion limit that applied in the ten year period being considered.
6. There will be an opportunity for water users and others to provide comment upon determinations made in the Basin Plan regarding any reduction, and to put different views, during the consultations associated with preparing a Basin Plan.
7. The Authority is not subject to Ministerial direction in drafting this component of the Basin Plan (see sub-clause 44(5)).

Clause 76 - Commonwealth to manage Commonwealth share of reduction in diversion limit

8. This clause requires the Commonwealth to manage its share of the reductions in the long-term average sustainable diversion limits. However, the Bill does not oblige the Commonwealth to take any particular steps.
9. The Commonwealth proposes to assist water service providers and water users to improve their efficiency of use, allowing them to more easily adapt to lower water allocations. The Commonwealth may also invest in augmenting water supply works and purchase entitlements in order to increase supply and reduce the demand on the consumptive pool.

10. The *National Plan for Water Security* will provide considerable financial resources to allow the Commonwealth to manage reductions in preparation for and following the setting of sustainable diversion limits in the first Basin Plan.

Clause 77 – Payments to water access entitlement holders

11. Should the Commonwealth not entirely mitigate the impacts of reductions that are its responsibility, and a water access entitlement holder suffers a reduction in size or reliability of the water allocation because of this, the Commonwealth can incur a liability to pay an amount to offset the loss in value of the entitlement. This clause sets out how any Commonwealth's payment will be determined.
12. It is intended that the reductions in water allocation that give rise to the Commonwealth liability will be those that are ongoing, or permanent, consistent with the long-term average sustainable diversion limit reduction. Seasonal reductions in water allocations are not covered.
13. The Bill provides for the Minister to determine whether a water access entitlement holder qualifies for a payment, and if they do qualify, any amount to be paid. The clause also sets out the process for calculating the amount to be paid. Decisions regarding the change in value of the entitlement will be based on market values. The change in value that is to be a liability of the Commonwealth is that caused by, and proportionate to, the actual reductions in water allocations that are the Commonwealth's responsibility. This assessment must take into account the actions of the Commonwealth in attempting to mitigate the impacts of the reductions, and other provisions in the Basin Plan which may offset the effect of the reductions.
14. The Bill provides for an appeal to be made to the Administrative Appeals Tribunal for a review of a determination by the Minister under subclause 3(b) (denying a claim) or paragraph 3(a)(ii) (determining the amount of the claim).
15. The Commonwealth is not required to accept liabilities arising in respect of new entitlements that create additional demands on water resources for which there is no transitional management plan (subparagraph 77(1)(b)(ii)), or new water resource plan (subparagraph 77(1)(b)(iv)). The Minister's formal concurrence is required that such new entitlements do not relate to an already overallocated resource before liabilities will be accepted (refer subparagraph 77(1)(b)(iii)). However, subclause (8) allows for conversions of earlier water rights into substitute entitlements, for example where older forms of rights are converted to *National Water Initiative* compliant entitlements as is happening in Queensland as the reformed planning arrangements are implemented. The intention is that a substitute entitlement would not be equivalent to the earlier water right if it leads to an increase in the amount of water that can be taken.

Clause 78 - Applying Subdivision when transitional or interim water resource plan ends

16. Where a transitional or interim water resource plan made by a Basin State is in effect before the long-term average sustainable diversion limit has first been determined in the Basin Plan, it will be necessary to estimate the diversion limit that is established by those transitional or interim plans, so as to determine whether there is any reduction under the Basin Plan. This limit will be described in the Basin Plan and used to determine the reductions (if any) and the Commonwealth share of those reductions in

the first Basin Plan. The diversion limit will be the one that applies just before the water resource plan ceases or is renewed.

17. The *National Water Initiative* does not provide for risks to be assigned to particular parties when a plan is first made. It is generally established practice to provide for compensation for reductions only after the diversion limits are first established in water resource plans. Accordingly the Bill does not create a requirement for the management of the risks when a water resource plan is first established. Nevertheless the *National Plan for Water Security* may apply and Commonwealth investment in mitigating water reductions and purchasing entitlements may be made under the Plan.

Clause 79 - Regulations

18. This clause provides for regulations to set out in detail any procedures and formulae required to administer and determine the value of the entitlements and liability. As water markets are not well developed in many areas there may be a need to provide for an alternative valuation process.
19. As reliability of the water allocation is an important component of its value the regulations make it clear that reliability may be considered in determining the value and the losses.

Subdivision B—Risks arising from other changes to Basin Plan

Clause 80 - Simplified outline

20. This subdivision provides for the management of the Commonwealth share of the risks that arise from changes in the Basin Plan that do not affect the volume of water allocations (and therefore do not show up in changes to the long-term average sustainable diversion limit) but affect the reliability of the allocations.
21. The strategy is as close as is practical to that adopted in Subdivision A to deal with changes arising from reductions in the long-term sustainable diversion limit.

Clause 81 - Basin Plan to specify certain matters if Plan results in change in reliability of water allocations

22. This clause mirrors clause 75 and requires the specification of the change in reliability of water allocations arising from the Basin Plan (other than from a change in the long-term average sustainable diversion limit). The clause permits but does not require the Basin Plan to specify the Commonwealth share of the change in reliability of allocations.
23. If a Commonwealth share is not specified in the Basin Plan, the Authority will be required to determine the share under paragraph 83(2)(b).
24. The clause requires that the provisions of the *National Water Initiative* are used in determining the Commonwealth's share along with any regulations not inconsistent with the *National Water Initiative* that are made under this clause.

Clause 82 - Commonwealth to manage Commonwealth share of change in reliability

25. This clause places similar requirements on the Commonwealth as does clause 76 in relation to Subdivision A in that this clause requires the Commonwealth to try to

manage its share of the relevant changes in reliability. However the Bill does not oblige the Commonwealth to take any particular steps.

Clause 83 - Payments to water access entitlement holders

26. This clause mirrors clause 77 but provides for the Authority to determine the Commonwealth share of the change in reliability if the Basin Plan has not specified the share and for the *National Water Initiative* to directly guide this determination.
27. Regulations may be made to further define the basis on which the determination is made but these must not be inconsistent with the *National Water Initiative*.

Clause 84 - Applying Subdivision when transitional or interim water resource plan ends

28. Similar to clause 78, this clause ensures that transitional or interim water resource plans are the basis for determining baseline or reference conditions against which any requirements of the initial Basin Plan can be compared in relation to risks to be borne by the Commonwealth.

Clause 85 - Regulations

29. This clause mirrors clause 79 with an additional scope for defining how the provisions of the *National Water Initiative* are to be applied.

Clause 86 - Operation of Subdivision

30. This clause makes it clear that the obligations of the Commonwealth under this subdivision are no greater than those imposed by the *National Water Initiative*.
31. This clause also makes clear that this subdivision does not impose any liability on the Commonwealth arising from its purchase of water access rights, including entitlements, and the exercise of any of the rights associated with water access rights held by the Commonwealth. This covers actions that can be taken by any person who holds such rights.

PART 3 – AUDITS BY NATIONAL WATER COMMISSION

Clause 87 – Power to conduct audits

32. This clause empowers the National Water Commission to audit the effectiveness of the implementation of the Basin Plan and the water resource plans. Subclause 87(2) provides that the National Water Commission must take account of such matters (if any) as are specified in the regulations in carrying out an audit.

Clause 88 – When audits must be conducted

33. This clause clarifies when audits must be conducted. The first audit under this Part must be completed within 5 years after the commencement of this Bill. Any subsequent audit under this Part must be completed within 5 years after the completion of the most recent audit under this Part.

Clause 89 – Reports on audits

34. Subclause 89(1) provides for the provision of reports on audits. The National Water Commission must give to the Minister a written report on each of its audits and give copies of the report to the Authority and to the relevant State Minister for each of the Basin States.
35. Subclause 89(2) is intended to clarify that subsection 7(4A) of the *National Water Commission Act 2004* does not apply to reports given to the Minister under this clause.

Clause 90 – Tabling reports

36. This clause provides that the Minister must cause copies of each report given to the Minister under clause 89 to be laid before each House of the Parliament within 15 sitting days of that House after being given the report.

PART 4 – BASIN WATER CHARGE AND WATER MARKET RULES

DIVISION 1 – WATER CHARGE RULES

Clause 91 – Regulated water charges

37. This clause defines the types of charges that will be subject to water charge rules provided for in clause 92. The rules cannot deal with charges in respect of urban water supply.

Clause 92 – Water charge rules

38. This clause sets out the basis on which the Minister may make water charge rules, the legal nature of the rules and what matters the water charge rules may cover. The water charge rules must contribute to the objectives and principles set out in Schedule 2, which are drawn from the *National Water Initiative*.
39. The water charge rules establish the role of the Australian Competition and Consumer Commission (ACCC) in relation to regulated water charges. Whereas the charges levied by irrigation infrastructure operators for access fees may be covered by the rules, clause 92(3)(c) excludes the ACCC from making determinations or approving those charges.
40. The rules may provide for the ACCC to accredit agencies of the State to undertake determinations in the ACCC's place. Terms and conditions would be set around any such accreditation, including the circumstances in which accreditation could be revoked. The intention of this provision is to allow State agencies to continue to make determinations where the ACCC is confident that the determinations are being made consistently with the water charge rules.
41. Existing price paths that have been set by regulators or by clearly agreed government policy will be respected and allowed to run their course. If pricing regimes are changed after this period by the ACCC, it will be done in a way and at a rate that is within the adaptive capacity of the service providers and their customers. Paragraph 92(3)(k) provides for the rules to include transitional arrangements of this nature.
42. Rules made under this clause may be subject to civil penalties of up to 200 penalty units. This level of penalty was set after consultation with ACCC about an appropriate penalty level for this type of conduct and is equivalent to the civil penalty amounts set in the National Electricity law and the Gas Pipelines Access law.

Clause 93 – Process for making water charge rules

43. This clause sets out the process the Minister must follow to make water charge rules and establishes the role of the ACCC in rule making. The process includes a requirement for consultation with Basin States and irrigation infrastructure operators (subclause 93(6)). Importantly, if the Minister does not follow the advice of the ACCC in making the rules, the Minister must table in Parliament a document setting out why the ACCC's advice was not followed. This requirement will ensure that the Minister is accountable for any decision to depart from the advice of the ACCC.

Clause 94 – Constitutional operation of water charge rules

44. This clause sets out the Constitutional operation of the water charge rules.

Clause 95 – ACCC to monitor water charges and compliance

45. This clause establishes the ACCC’s role in monitoring water charges and compliance with the water charge rules.

Clause 96 – Minister may formulate model water charge rules

46. This clause allows the Minister to formulate model water charge rules. These model rules would not have legal effect, but may provide a useful guide to ensuring consistency with the water charge rules.

DIVISION 2 – WATER MARKET RULES

Clause 97 – Water market rules

47. This clause sets out the basis on which the Minister may make water market rules, the legal nature of the rules and what matters the water market rules may cover. The rules must contribute to the objectives and principles set out in Schedule 3, which are drawn from the *National Water Initiative*.
48. The rules relate to the actions of irrigation infrastructure operators and seek to free up the trade of water access rights within the Murray-Darling Basin by ensuring that policies or administrative requirements of infrastructure operators do not represent a barrier to trade.
49. *Irrigation infrastructure operators* is defined in clause 7.
50. Rules made under this clause may be subject to civil penalties of up to 200 penalty units. This level of penalty is the same as set for the water charge rules (refer discussion in clause 92).

Clause 98 – Process for making water market rules

51. This clause sets out the process the Minister must follow to make water market rules and establishes the role of the ACCC in rule making. The process includes a requirement for consultation with Basin States and irrigation infrastructure operators (subclause 98(5)). Importantly, if the Minister does not follow the advice of the ACCC in making the rules, the Minister must table in Parliament a document setting out why the ACCC’s advice was not followed. This requirement will ensure that the Minister is accountable for any decision to depart from the advice of the ACCC.

Clause 99 – Constitutional operation of water market rules

52. This clause sets out the Constitutional operation of the water market rules.

Clause 100 – ACCC to monitor compliance

53. This clause establishes the ACCC's role in monitoring compliance with the water market rules.

PART 5 – MURRAY-DARLING BASIN WATER RIGHTS INFORMATION SERVICE

Clause 101 – Registrable water rights

54. This clause outlines a broad scope of water rights, in relation to Basin water resources, over which the Murray-Darling Basin Water Rights Information Service is intended to apply. The intent is to provide coverage for all water rights that relate to Basin water resources, including water access and delivery rights and irrigation rights.

Clause 102 – Registers to which this Part applies

55. This clause defines registers to which this Part of the Bill applies. It is intended to link the Murray-Darling Basin Water Rights Information Service to the registers of registrable water rights kept by State-based agencies, infrastructure operators, or any other person prescribed by regulations.

Clause 103 – Murray-Darling Basin Water Rights Information Service

56. This clause allows the Authority to provide an information service based on information contained in registers of registrable water rights. The information service may bring together all of the information contained in various registers and provide a single information service. The intent is to support distribution of information about water access rights and to facilitate trading in these rights.
57. The Water Rights Information Service is simply a facilitative mechanism. It is not intended to replace the state-based registers. Prime responsibility for water access rights information, including responsibility for keeping information up to date, will continue to rest with Basin States.

PART 6 – COMMONWEALTH ENVIRONMENTAL WATER HOLDER

DIVISION 1 – ESTABLISHMENT AND FUNCTIONS

Clause 104 - Establishment

58. This clause establishes the Commonwealth Environmental Water Holder.

Clause 105 - Functions

59. This clause establishes the functions of the Commonwealth Environmental Water Holder. The functions are managing the *Commonwealth environmental water holdings* (defined in clause 108) and administering the Special Account established under clause 111. The Commonwealth Environmental Water Holder is required to carry out these functions for the purpose of protecting and restoring the environmental assets of the Murray-Darling Basin and outside the Basin where the Commonwealth owns water.

60. Subclause 105(2) describes things that the Commonwealth Environmental Water Holder can do in managing Commonwealth environmental water holdings. They include conducting trade in permanent water entitlements or temporary water allocations; entering into contracts for buying and selling water rights and the use of those rights; and maintaining records of the water rights owned by the Commonwealth. These activities are intended to allow the Commonwealth Environmental Water Holder to make best use of water holdings through active management.
61. The Commonwealth Environmental Water Holder is required to manage Commonwealth environmental water holdings in accordance with applicable planning documents, where they exist. For the Murray-Darling Basin, this includes the environmental watering plan and its associated environmental watering schedules, established under Part 2, Subdivision C of this Bill.
62. Outside the Murray-Darling Basin, the applicable planning document is any plan which relates to environmental water in that area and which has been specified in regulations. Where there is no such document, the Commonwealth Environmental Water Holder will still be able to deliver water to Commonwealth environmental priorities. In managing its water holdings, the Commonwealth Environmental Water Holder must also have regard to any operating rules which the Minister may make under clause 109, and any relevant environmental watering schedules which have been established under clause 30 (consistently with the environmental watering plan in respect of watering in the Murray-Darling Basin).

Clause 106 - Limitation on disposal of water and Commonwealth environmental water holdings

63. This clause establishes limits on when the Commonwealth Environmental Water Holder can sell water and Commonwealth environmental water holdings. These limits are intended to ensure that the Commonwealth Environmental Water Holder operates to meet environmental objectives, not as a profit-making enterprise.
64. However, the limits do not apply if selling water or Commonwealth environmental water holdings will allow the Commonwealth Environmental Water Holder to better protect or restore environmental assets. This exception is to ensure that the highest priority environmental assets can receive water.

Clause 107 - Limitation on directions to Commonwealth Environmental Water Holder

65. This clause establishes limits regarding directions that the Minister or the Secretary of the Department can give to the Commonwealth Environmental Water Holder. The limits are intended to safeguard the independence of the Commonwealth Environmental Water Holder in relation to key trading decisions.
66. Clause 109 allows the Minister to make operating rules relating to aspects of the matters on which he or she cannot make directions. These operating rules are intended to establish the general framework within which the Commonwealth Environmental Water Holder should operate, rather than providing specific direction on individual entitlements or contracts etc.

Clause 108 - Meaning of *Commonwealth environmental water holdings*

67. This clause specifies that the meaning of *Commonwealth environmental water holdings* is all the different types of water rights that the Commonwealth may own at any time for the purposes of this Bill. It includes rights held on trust, leased rights and donated rights. Subclause 108(3) clarifies that not all water held by the Commonwealth constitutes Commonwealth environmental water holdings. This ensures that the Bill does not lead to unintended consequences in relation to water held by the Commonwealth for other purposes, for example water rights held by the Department of Defence.

Clause 109 - Operating rules

68. This clause allows the Minister to make operating rules relating to the Commonwealth Environmental Water Holder. These rules will be a legislative instrument. The rules may relate to the Commonwealth Environmental Water Holder's role in purchasing, selling or dealing in any other way in water rights, including by entering into contracts. As mentioned above, the operating rules are to establish the general framework within which the Commonwealth Environmental Water holder operates, rather than providing specific direction on individual entitlements or contracts etc.
69. This clause specifies that the operating rules can only apply to the Commonwealth Environmental Water Holder, and do not override or limit the operation of a law in any State.

Clause 110 - Application of State laws to the Commonwealth Environmental Water Holder

70. This clause ensures that State laws do not prevent the Commonwealth obtaining a water use licence (or similar authority required under State law to use water) simply because it is a non-landholder. The clause only applies where water will be applied to: any declared Ramsar wetlands; water dependent ecosystems supporting nationally listed threatened species, communities and migratory species; and any other sites in the regulations requiring environmental water.
71. This clause is not intended to allow the Commonwealth to apply water to sites without appropriate approvals. The Commonwealth is still required to obtain the consent of the owner of the land before applying environmental water. Rather, the intention is to ensure that the Commonwealth is not denied a water use licence (or similar authority) simply because it is not a landholder.

DIVISION 2 – ENVIRONMENTAL WATER HOLDINGS SPECIAL ACCOUNT

Clause 111 - Establishment of the Environmental Water Holdings Special Account

72. This clause creates the Environmental Water Holdings Special Account and establishes this account as a Special Account for the purposes of the *Financial Management and Accountability Act 1997*.

Clause 112 - Credits of amounts to the Account

73. This clause provides for money to be credited to the Account. The intention of the clause is to include money received by the Commonwealth Environmental Water

Holder, whether dedicated, bequeathed, donated or given to the Commonwealth Environmental Water Holder; or whether received through an appropriation.

Clause 113 - Purpose of the Account

74. This clause establishes the purpose of the Account. The Account is to be used for expenses incurred by the Commonwealth Environmental Water Holder in undertaking its functions (for example water delivery, storage and release (headworks) charges, conveyancing and brokerage fees) and for expenses incurred in administering the Account. Salaries for the Commonwealth Environmental Water Holder or the support staff engaged under the *Public Service Act 1999* which are referred to in clause 116 are not to be met from the Special Account. These will be a Departmental expense.

DIVISION 3 – REPORTING REQUIREMENTS

Clause 114 - Annual report

75. This clause establishes the reporting obligations of the Commonwealth Environmental Water Holder to ensure transparency and accountability for its operations.
76. The Commonwealth Environmental Water Holder must provide to the Minister an annual report about its operations as soon as practicable after 30 June each year. This annual report must contain information on:
- the achievements of the Commonwealth Environmental Water Holder's operations against the objectives of the environmental watering plan established under Part 2, Subdivision C;
 - management of the Special Account established under Clause 111; and
 - all directions that the Commonwealth Environmental Water Holder has received during the year from the Secretary of the Department and from the Minister.
77. This clause also establishes that within 15 days of receipt, the Minister must table a copy of the annual report in each house of Parliament; and give a copy to the relevant Ministers in the Basin States on the same day or before the report is tabled in Parliament.

DIVISION 4 – APPOINTMENT, STAFF AND DELEGATION

Clause 115 - Appointment

78. This clause establishes that the Commonwealth Environmental Water Holder is engaged as a public servant, under the *Public Service Act 1999*.

Clause 116 - Staff

79. This clause establishes that support staff for the Commonwealth Environmental Water Holder are to be engaged under the *Public Service Act 1999*, and employed in the Department and made available by the Secretary of the Department.

Clause 117 - Delegation

80. This clause establishes that the Commonwealth Environmental Water Holder may, through a signed instrument, delegate any or all of his or her powers to an SES employee or acting SES employee.

PART 7 - WATER INFORMATION

DIVISION 1 – APPLICATION OF THIS PART

Clause 118 – Geographical application of this Part

81. This clause describes the geographical application of the Bill as covering all of Australia including its external territories.

Clause 119 – Application of this Part limited to certain legislative powers

82. This clause describes the legislative powers which support this Part. The powers are census and statistics (within the meaning of paragraph 51(xi) of the Constitution), meteorological observations (within the meaning of paragraph 51(viii) of the Constitution), weights and measures (within the meaning of paragraph 51(xv) of the Constitution) and external affairs (within the meaning of paragraph 51(xxix) of the Constitution).

DIVISION 2 – FUNCTIONS AND POWERS OF THE BUREAU AND DIRECTOR OF METEOROLOGY

Clause 120 – Additional functions of the Bureau

83. This clause describes the functions that the Bureau will have in addition to its existing functions under the *Meteorology Act 1955*. These functions relate to matters concerned with the collecting, holding, managing and dissemination of information on water resources, its usage and availability, water accounting, the forecast of future water availability and with the undertaking of investigations to enhance understanding of Australia's water resources.

Clause 121 – Contents of the National Water Account

84. This clause requires the National Water Account to include any matters specified in regulations.

Clause 122 – Publishing water accounts

85. This clause requires the Director of Meteorology to annually publish a National Water Account. The clause allows the Director to publish other accounts and to update the National Water Account from time to time.

Clause 123 – Publishing water information

86. This clause allows the Director of Meteorology to publish at any time water information in a form readily accessible by the public.

87. However, the Director is prevented from publishing water use information where the Director believes such publication would not be in the public interest, or where the water information expressly identifies a person's water use unless the information is already published or is already in the public domain in a form that expressly identifies the person's water use.
88. While the Director is prevented from publishing water information that expressly identifies a person's water use, the Director is not prevented from publishing water information that could enable the identification of a person's water use. The publication of such information may be necessary to enable the Bureau to effectively provide regular reports on the status of Australia's water resources and patterns of usage of those resources under clause 120, or to publish an annual water account under clause 121. In determining whether publishing particular water information is in the public interest, the Director may have regard to a range of matters including consideration of commercial confidentiality.

DIVISION 3 – WATER INFORMATION

Clause 124 – Object of this Division

89. This clause outlines the object of this Division which is to enable the Bureau of Meteorology to collect water information.

Clause 125 – Meaning of *water information* etc.

90. This clause defines *water information*. Water information includes contextual information such as land use information which the Bureau may require to develop secondary water information products.

Clause 126 – Giving of water information to the Bureau

91. This clause provides for regulations to identify:
- persons or classes of persons that are required to give the Bureau a copy of water information;
 - the kind of water information that they are required to provide;
 - the timeframe within which the copy of water information must be provided; and
 - the form or manner in which the copy of water information must be provided.
92. The water information must also comply with the National Water Information Standards.
93. It is a civil penalty to contravene an obligation imposed by the regulations, or to provide information that is false or misleading. The civil penalty amounts are 50 and 60 penalty units respectively, which is consistent with the penalty benchmarks in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.
94. The civil penalty provisions are subject to a reasonable excuse defence. Commerciality provisions do not qualify as a reasonable excuse. Where commercial interests are cited and found to be reasonable, the Bureau may discuss with the proponent approaches to publishing the information to protect commercial interests.

Clause 127 – Director of Meteorology may require water information

95. This clause provides the Director of Meteorology with the power to require water information within a specified timeframe, form and in accordance with any applicable National Water Information Standards.
96. It is a civil penalty to fail to comply with such a requirement or to provide information that is false or misleading. The civil penalty amounts are 50 and 60 penalty units respectively, which is consistent with the penalty benchmarks in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.
97. The civil penalty provisions are subject to a reasonable excuse defence. Commerciality provisions do not qualify as a reasonable excuse. Where commercial interests are cited and found to be reasonable, the Bureau may discuss with the proponent approaches to publishing the information to protect commercial interests.

Clause 128 – Prohibitions on disclosure of information do not apply

98. This clause clarifies that this Division applies despite any existing law that prohibits disclosure of information.

Clause 129 – Ownership etc. of information unaffected by its disclosure

99. This clause provides that while a person may be required to give water information to the Bureau, their property rights with respect to that information are not changed. However, the existence of a property right will not constrain the Bureau in using the information for a purpose relevant to its functions.

DIVISION 4 – NATIONAL WATER INFORMATION STANDARDS

Clause 130 – National Water Information Standards

100. This clause allows the Director of Meteorology to issue Water Information Standards. These standards will be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, and will be available both on the Federal Register of Legislative Instruments and the Bureau's website.
101. This clause describes matters which may be dealt with in National Water Information Standards.

Clause 131 – Adoption of other standards

102. This clause allows the Director of Meteorology, in issuing National Water Information Standards, to adopt, incorporate or apply matters contained in any standard that relates to water information. This will allow the Director to adopt existing standards where relevant. This clause relates to water information standards matters that may potentially overlap with standards for other matters, such as for example trade measurement standards relating to water measurement devices. The clause requires the Director, in so

doing, to make any such matter or subsequent amendments thereto, that are adopted, applied or incorporated, publicly available on the Bureau's website.

Clause 132 – Consultations in preparing National Water Information Standards

103. This clause requires the Director of Meteorology to consult with the States in preparing National Water Information Standards and allows the Director of Meteorology to consult others as he or she considers appropriate.

Clause 133 – Compliance notices

104. This clause provides for compliance notices to be issued in relation to a contravention of the National Water Information Standards. A failure to comply with a compliance notice gives rise to a civil penalty. The penalty amount is 60 penalty units. This penalty is consistent with the penalty benchmarks in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. This civil penalty provision is subject to a reasonable excuse defence.

DIVISION 5 - MISCELLANEOUS

Clause 134 – Delegation by Director of Meteorology

105. This clause allows the Director of Meteorology to delegate all or any of his or her functions and powers under this Part of the Bill to an SES or acting SES employee. Functions and powers in relation to making National Water Information Standards, including adoption of other standards cannot be delegated.

106. If the relevant State or Territory agrees to the delegation, the Director may also delegate all or any of his or her powers under this Part of the Bill to a person who holds or acts in an office with a state or territory or an authority of a state or territory. Delegates so appointed must comply with written directions from the Director of Meteorology.

Clause 135 – Directions by Minister

107. This clause authorises the Minister to direct the Director of Meteorology in writing, in regard to the performance of the Bureau's functions or the exercise of its powers. Such a direction is a legislative instrument. However, consistently with Table items 44(2) and 54(2) of the *Legislative Instruments Act 2003*, Ministerial directions are not subject to section 42 (disallowance) or Part 6 (sunsetting) of the *Legislative Instruments Act 2003*.

PART 8 – ENFORCEMENT

DIVISION 1 - PRELIMINARY

Clause 136 - Contraventions to which this Part applies

108. This clause establishes the contraventions to which the Part applies.

Clause 137- Appropriate enforcement agency for contraventions to which this Part applies

109. This clause identifies:

- the Authority as the appropriate enforcement agency for Part 2 (which provides for the Basin Plan and water resource plans);
- the ACCC as the appropriate enforcement agency for Part 4 (which provides for water charge rules and water market rules); and
- the Minister as appropriate enforcement agency for Part 7 (relating to the provision of water information and compliance with the National Water Information Standards).

Clause 138 - References to Court

110. This clause lists the Courts that have jurisdiction to hear proceedings relating to this Bill.

Clause 139 - Jurisdiction of Federal Magistrates Court

111. This clause explains that the Federal Magistrates Court does not have jurisdiction with regard to proceedings under this Part against a State. It is considered more appropriate for proceedings between the Commonwealth and a State to be heard in the first instance in the Federal Court.

DIVISION 2—INJUNCTIONS

112. This Division deals with the granting of injunctions in relation to contraventions of the Bill, regulations or rules.

Clause 140 - Injunctions for contravention of the Act, regulations or rules

113. This clause explains who can apply for injunctions and the different types that can be granted. The clause provides for prohibitory injunctions (with or without additional orders), mandatory injunctions and interim injunctions.

114. An example of a situation where an injunction may be sought would be where an irrigation infrastructure operator is refusing to allow a person to trade out of the irrigation district in contravention of a water market rule (relevant to clause 92). A mandatory injunction could be sought to require that irrigation infrastructure operate to permit the trade.

Clause 141 - Discharge or variation of injunctions

115. This clause allows a Court to discharge or vary an injunction granted under clause 140.

Clause 142 - Certain considerations for granting injunctions not relevant

116. This clause provides that certain considerations are not relevant in the Court's considerations regarding granting of prohibitory and mandatory injunctions. Broadly, these criteria aim to ensure that an injunction can be granted in circumstances where the

contravention is a one off contravention and not only circumstances in which a person has repeatedly contravened the Bill, regulations or rules.

Clause 143 - Powers conferred are in addition to other powers of the Court

117. This clause clarifies that the powers conferred on a Court by this Division (Injunctions) are in addition to any other powers of the Court (for example under the *Judiciary Act 1903*).

DIVISION 3—DECLARATIONS

Clause 144 - Declarations of contravention

118. This clause sets out the process to be followed by an enforcement agency to have a Court declare that a person has committed a contravention. For example, a declaration may be sought where there is a disagreement between a State and the Commonwealth about whether certain conduct was in contravention of the Basin Plan.

Clause 145 - Discharge or variation of declarations

119. This clause allows a Court to discharge or vary a declaration made under clause 144.

DIVISION 4—CIVIL PENALTIES

120. This Division sets out procedural provisions for civil penalties. These procedural provisions have been prepared following the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Subdivision A—Civil penalty orders

Clause 146 - Civil penalty provisions

121. This clause explains what constitutes a civil penalty provision in the Bill and rules. Broadly speaking where a clause in the Bill or the rules includes the words ‘civil penalty’ at the end of the clause, then it is a civil penalty provision. An example of a civil penalty provision in the Bill is a failure under clause 126 to provide water information required by regulations made under Part 7 of the Bill.

Clause 147 - Court may order person to pay pecuniary penalty for contravening civil penalty provision

122. This clause allows the Court to order a person to pay a pecuniary penalty for contravening a civil penalty provision (defined in clause 146). The clause includes requirements in relation to the timeframe in which an application for a civil penalty can be made, maximum pecuniary penalties and matters that the Court must have regard to in determining the amount of the pecuniary penalty.

123. An order cannot be sought in relation to Ministers, officers/employee of the Crown and Commonwealth or State agencies (refer clause 12). It is considered that in the context of this Bill, civil penalty provisions are not an appropriate remedy to deploy against

government agencies. Enforcement against States and Territories and their agencies is therefore limited to enforceable undertakings, declarations and injunctions.

124. If specified conduct contravenes 2 or more civil penalty provisions, the person engaging in that conduct can only be held liable for one pecuniary penalty under this clause for that conduct.

Clause 148 - Contravening a civil penalty provision is not an offence

125. This clause clarifies that a contravention of a civil penalty provision is not an offence.

Clause 149 - Persons involved in contravening civil penalty provision

126. This clause makes it possible to apply the civil penalty provisions to any person who assists, encourages, induces, or conspires in respect of, conduct that constitutes a contravention of a civil penalty provision.

Clause 150 - Recovery of a pecuniary penalty

127. If a person is ordered by the Court to pay a pecuniary penalty, the penalty is to be paid to the Commonwealth.

Subdivision B—Civil penalty proceedings and criminal proceedings

Clause 151 - Civil proceedings after criminal proceedings

128. This clause prevents a pecuniary penalty order being made against a person if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting a contravention of a civil penalty provision.

Clause 152 - Criminal proceedings during civil proceedings

129. This clause requires civil proceedings to be stayed if criminal proceedings have commenced for an offence that is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention of the civil penalty provision. If the person is not convicted under the criminal proceeding, the civil proceedings can be resumed.

Clause 153 - Criminal proceedings after civil proceedings

130. This clause ensures that a person found to have contravened a civil penalty provision in a civil proceeding can still face criminal proceedings for the same conduct constituting a contravention of a civil penalty provision.

Clause 154 - Evidence given in proceedings for penalty not admissible in criminal proceedings

131. This clause explains that evidence given in proceedings for contravention of civil penalty provisions is not admissible in criminal proceedings. The exception to this general rule is where the criminal proceedings are brought because it is alleged a person provided false evidence in the civil penalty proceedings.

DIVISION 5—INFRINGEMENT NOTICES

Clause 155 - Object

132. This clause sets out the object of this Division, which is to establish a system of infringement notices that can be used as an alternative method to penalise contraventions of civil penalty provisions without engaging a Court.

Clause 156 - When an infringement notice can be given

133. This clause sets out the circumstances in which an infringement notice can be given instead of bringing proceedings for a civil penalty. This option is provided for contraventions of:

- the charging rules and the market rules provided for in Part 4; and
- the requirements to provide water information and comply with National Water Information Standards in Part 7.

134. Regulations may specify additional civil penalty provisions to which the infringement notice regime can apply.

135. The option is provided for these contraventions on the basis that these contraventions are individually of a relatively minor nature in the context of the Bill and that determining whether the civil penalty provision has been contravened will turn on fairly straightforward and objective criteria rather than complex legal distinctions. Further, in respect of each of these civil penalty provisions, there is potential for a number of contraventions (decisions to allow or not allow trade in tradeable water rights, charging decisions and requests for water information are all likely to be made on a frequent basis).

Clause 157 - Matters to be included in an infringement notice

136. This clause sets out what information must be included in an infringement notice. The notice will provide a brief description of the alleged contravention including the date, time, place and the civil penalty provision contravened and of the rights of the persons who receives the notice.

Clause 158 - Amount of penalty

137. This clause determines the amount of the penalty to be specified in the infringement notice. This penalty must be equal to one fifth of the maximum penalty that a Court could impose if proceedings were brought for a civil penalty instead of issuing an infringement notice.

Clause 159 - Withdrawal of an infringement notice

138. This clause allows infringement notices to be withdrawn. If a penalty has been paid, the Commonwealth must refund that payment.

Clause 160 - Paying the penalty in accordance with the notice

139. This clause sets out the consequences of paying the penalty specified in an infringement notice. Essentially payment of the infringement notice penalty means that no further action can be taken against that person in respect of that particular contravention of the civil penalty provision.

Clause 161 - Effect of this Division on civil proceedings

140. The clause explains the effect of this Division on any civil proceedings. Broadly it provides that the ability to give an infringement notice does not mean that an enforcement agency is obliged to give an infringement notice instead of bringing civil penalty proceedings. The appropriate enforcement agency will decide whether to issue an infringement notice or bring civil penalty proceedings in a court based on relevant policy considerations.
141. The clause further provides that if a person does not comply with an infringement notice, civil penalty proceedings can be brought.

Clause 162 - Regulations

142. The clause enables further infringement notice provisions to be made through regulations.

DIVISION 6 - ENFORCEABLE UNDERTAKINGS

Clause 163 - Acceptance of undertakings relating to contraventions to which this Part applies

143. The clause allows for written undertakings to be accepted by the appropriate enforcement agency in situations where a person's action or inaction constitutes a contravention of the Bill, or regulations and rules made under the Bill. For example, an undertaking might be to provide information that ought to have been provided at an earlier time under regulations made under Part 7 (Water Information) within a further specified period and to put in place systems that will ensure compliance with the relevant obligation to provide information in the future.
144. Enforceable undertakings can be used instead of commencing civil proceedings for civil penalty or an injunction to remedy contraventions of the Bill, the regulations or the rules.
145. A person may withdraw or vary an undertaking they have given at any time, but only with the consent of the appropriate enforcement agency. The appropriate enforcement agency may cancel the undertaking by writing to the person.
146. Undertakings may be published on the appropriate enforcement agency's website (i.e. the Authority's website for contravention of Part 2 (Management of Basin Water Resources) or regulations made under Part 2, the ACCC's website for contraventions of Part 4 or the rules made under Part 4 (Water charge and water market rules) or the Department of the Environment and Water Resources for contraventions of Part 7 (Water Information) or regulations and Standards made under Part 7.

Clause 164 - Enforcement of undertakings

147. This clause allows for the appropriate enforcement agency to apply to a Court for an order to enforce an enforceable undertaking if a person breaches that undertaking.

DIVISION 7—ENFORCEMENT NOTICES

Clause 165 - Authority may issue an enforcement notice

148. This clause permits the issuing of enforcement notices by the Authority to enforce compliance with provisions of Part 2 (Management of Basin water resources) or regulations made for the purposes of Part 2.
149. Enforcement notices can also be issued where a person is taking or proposing to take action that is inconsistent with the Basin Plan or a water resource plan, would prejudice or have an adverse effect on the effectiveness or implementation of the Basin Plan or a water resource plan, or poses a serious threat to the health or continued availability of the Basin water resources. Enforcement notices stop or prevent conduct which, while not clearly a contravention of the Bill or the regulations, is conduct that runs counter to the objectives and outcomes sought to be achieved by the Basin Plan or the water resource plans.
150. An enforcement notice must contain certain basic information about the conduct or omission giving rise to the notice.
151. The fact that the conduct the subject of an enforcement notice is also an offence under a State or Territory law, does not prevent the giving of an enforcement notice.

Clause 166 - Breach of enforcement notice—civil penalty provision

152. This clause makes a breach of an enforcement notice a civil penalty provision, with a penalty equal to 600 penalty units. A separate contravention is committed each day during which the contravention continues.

Clause 167 - Discharge or variation of enforcement notices

153. This clause allows the Authority to vary or revoke a notice issued under clause 165, but it must be in writing.

DIVISION 8—LIABILITY OF EXECUTIVE OFFICERS OF CORPORATIONS

Clause 168 - Civil penalties for executive officers of bodies corporate

154. This clause provides that in certain circumstances an executive officer of a body corporate will be liable for contraventions of civil penalty provisions committed by the body corporate. The clause replicates similar provision applying to criminal offences in the Criminal Code.

155. In assessing the liability of an executive officer that officers state of mind in respect of the contravention by the body corporate is relevant as well as whether the executive officer had taken reasonable steps to prevent such a contravention occurring.

Clause 169 - Did an executive officer take reasonable steps to prevent contravention?

156. This clause outlines the matters that a Court must have regard to in determining whether an executive officer took reasonable steps to avoid a contravention.

DIVISION 9—CONDUCT OF DIRECTORS, EMPLOYEES AND AGENTS

Clause 170 - Conduct of directors, employees and agents

157. This clause describes the circumstances in which the conduct of directors, employees or agents of a body corporate can be taken to be the actions of the body corporate for the purposes of this Bill. In summary the conduct of directors, employees or agents of a body corporate will generally be taken to be conduct by that body corporate unless the body corporate had taken reasonable precautions to avoid its directors, employees or agents engaging in contraventions of the Bill, regulations or rules.

PART 9 – MURRAY-DARLING BASIN AUTHORITY (ADMINISTRATIVE PROVISIONS)

DIVISION 1 - AUTHORITY'S ESTABLISHMENT, FUNCTIONS, POWERS AND LIABILITIES

Clause 171 - Establishment

158. This clause provides for the establishment of the Murray-Darling Basin Authority (Authority).

Clause 172 - Authority's functions

159. This clause sets out the functions of the Authority. It is intended to provide the Authority with the functions necessary to promote the integrated management of Basin water resources. Additional functions can be conferred on the Authority through:

- the Bill and its regulations; and
- State and Territory laws. This must be with the Minister's consent, and can be revoked (subclause 172(4)).

160. Subclause 172(2) allows the Authority to adopt measurements, records and conclusions made by the Murray-Darling Basin Commission or a Basin State, and to request the Murray-Darling Basin Commission or a Basin State to carry out measuring, monitoring or recording that the Authority considers necessary. This clause is intended to avoid

duplication between the activities of the Authority and the activities of the Murray-Darling Basin Commission or a Basin State.

161. Paragraph 172(1)(g) allows the Authority to make recommendations to Basin States about matters that the Authority considers could affect the quality or quantity of Basin water resources. Subclause 172(3) requires the Authority to inform the Minister and the Basin Officials Committee of any such recommendation as soon as practicable. This will ensure that the recommendations of the Authority are known to all Basin States.
162. The Authority must give advice to the Minister if the Minister requests advice about a matter relating to the Authority's functions (paragraph 172(1)(m)). The Minister can withdraw such a request (paragraph 172(4)(b)).
163. Subclause 172(5) confirms that the consents or requests given under paragraphs 172(1)(l) and 172(1)(m) are not legislative instruments, within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 173 - Authority's powers

164. This clause gives the Authority the power to do all things necessary and convenient for performing its functions. However, the Authority does not have the power to acquire, hold or dispose of real or personal property, enter into contracts or lease the whole or any part of any land or building for its purposes. The Authority Chair may on behalf of the Commonwealth acquire, hold and dispose of property, and enter into leases and contracts.
165. Subclause 173(2) provides that a right to sue is not taken to be personal property for the purposes of paragraph 173(1)(a). The purpose of subclause 173(2) is to make clear that the Authority is able to exercise rights to sue in connection with its statutory functions.

Clause 174 - Authority's financial liabilities are Commonwealth liabilities

166. The purpose of subclause 174(1) is to make clear that any financial liabilities of the Authority will be taken to be liabilities of the Commonwealth. *Financial liability* is defined in subclause 174(2).

Clause 175 - Minister may give directions to Authority

167. Subclause 175(1) enables the Minister to direct the Authority on its performance of functions. The purpose of the note is to indicate that the Minister may through other provisions in the Bill give directions to the Authority, such as those in subparagraph 44(3)(b)(ii) that enables the Minister to give directions in relation to the Basin Plan.
168. There are limits in relation to the directions that the Minister may give under this clause. Subclause 175(2) states that the Minister cannot direct the Authority in relation to:
 - a. a determination under 83(2)(b) (relating to determining the *Commonwealth's share* of the relevant Plan change);
 - b. powers under Division 3 (Information gathering) of Part 10 (Murray-Darling Basin Authority (Special powers));

- c. monitoring of compliance with , or the investigation of possible contraventions of Part 2 or regulations made for the purposes of Part 2, or Division 3 of Part 10; or
 - d. powers under Part 8 (Enforcement).
1. To ensure transparency in relation to directions made by the Minister, the directions are taken to be legislative instruments. This means they must be tabled in the Parliament. However, consistently with Table items 44(2) and 54(2) of the *Legislative Instruments Act 2003*, Ministerial directions are not subject to section 42 (disallowance) or Part 6 (sunsetting) of the *Legislative Instruments Act 2003*.
2. The Authority is required to include the particulars of all directions given during the year by the Minister under this clause in its annual report (subclause 214(2)).

DIVISION 2 - AUTHORITY'S CONSTITUTION AND MEMBERSHIP

Subdivision A – Authority's constitution

Clause 176 - Authority's constitution

3. This clause establishes that the Authority will be a body corporate, with perpetual succession. It will also have a seal and be able to sue and be sued in its corporate name. The Authority's seal is to be kept in safe custody and must not be used except as authorised by the Authority.
4. The clause requires that all courts, judges and other persons acting in a judicial capacity must take judicial notice of the imprint of the Authority's seal on a document and presume that the imprint was duly affixed.

Subdivision B – Authority's membership

Clause 177 - Authority's membership

5. This clause establishes that the Authority will consist of a Chair and four other members.

Clause 178 - Appointment of Authority members

6. This clause establishes the requirements in relation to appointment of Authority members. Subclause 178(1) requires that appointments will be made by the Governor-General by written instrument. The Chair will be appointed on a full-time basis, ensuring that they are able to dedicate the time needed to effectively fill the functions of the office. Other members must be appointed part-time (subclause 178(6)).
7. To be eligible for appointment all Authority members must have a high level of expertise in one of more fields relevant to the Authority's functions. Subclause 178(3) provides an inclusive list of such fields. The intention is to ensure that the Authority members have the breadth of experience and expertise to effectively fulfil the functions of the Authority.
8. Subclause 178(2) also specifies that an individual cannot be appointed if at the time of appointment they are the member of the governing body of a relevant interest group.

Subclause 178(4) defines what is meant by *a member of the governing body of a relevant interest group*. This requirement is intended to minimise the opportunity for conflicts of interest. The requirement does not preclude any such individual from being nominated for appointment. However, they would be required to resign their membership of the governing body prior to any appointment.

9. Subclause 178(7) means that a defect or irregularity in connection with a person's appointment does not make their appointment invalid.

Clause 179 - Period of appointment for Authority members

10. This clause allows Authority members to be appointed for a period of time specified in their respective instruments of appointment, but that the period cannot exceed four years. This approach provides flexibility around the term of members and should avoid appointments terminating on the same date.

Clause 180 - Acting Authority members

11. Subclause 180(1) specifies the circumstances in which the Minister can appoint another Authority member to act as Chair. Only a current Authority member can act as Chair.
12. Subclause 180(2) specifies the circumstances in which the Minister can appoint an individual to act as an Authority member. Importantly, that individual cannot act in the role of Chair. Subclause 180(3) sets criteria around the eligibility of individuals to act as an Authority member. These eligibility criteria are the same as those set for appointing Authority members. Acting arrangements cannot continue for more than 12 months.

Subdivision C – Terms and conditions for Authority members

Clause 181 - Remuneration

13. This clause specifies that remuneration for Authority members is to be determined by the Remuneration Tribunal. To allow for any period between appointment of a member and a determination being made, the clause allows for the member to be paid the remuneration prescribed in regulations. Subclause 181(2) provides for members to be paid allowances that are prescribed in the regulations.
14. Clause 181 has effect subject to the *Remuneration Tribunal Act 1973* which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders (subclause 181(3)).

Clause 182 - Standing obligation to disclose interests

15. This clause establishes a standing obligation for Authority members to disclose any interest if that interest could conflict with the proper performance of the functions of the member's office. Subclause 182(2) requires the disclosure to be in writing to the Minister as soon as practicable after the member becomes aware of the potential for conflict of interest. Importantly, the obligation applies irrespective of whether the interest would directly or indirectly conflict with the performance of the member's functions of office, or whether the interest is pecuniary or otherwise, and whether the interest was acquired before or after the member was appointed (subclause 182(3)).

16. Obligations in relation to matters being considered by the Authority are established in clause 183.

Clause 183 - Obligation to disclose interests before considering a particular matter

17. This clause establishes an obligation for members to disclose interests before a matter is considered by the Authority. Subclause 183(4) prohibits the member taking part in any deliberations or decisions relating to the matter, unless the Authority determines otherwise. The Authority must document in the meeting minutes the disclosure and the determination on whether to include or exclude the affected member from deliberations or discussions on the matter.
18. As for clause 182, the obligation applies irrespective of whether the interest would directly or indirectly conflict with the performance of the member's functions of office, or whether the interest is pecuniary or otherwise, and whether the interest was acquired before or after the member was appointed (subclause 183(7)).

Clause 184 - Chair must keep Minister informed

19. This clause requires the Authority Chair to keep the Minister informed about the performance of the Authority and to provide the Minister with information on the operation of the Authority as required and within the specified time limits.

Clause 185 - Outside employment

20. This clause prevents the Chair engaging in paid employment outside the duties of his or her office without the Minister's approval. This clause ensures that the Chair is able to fulfil their obligation to the office, to which they are appointed full-time.

Clause 186 - Member of the governing body of a relevant interest group

21. Clause 178 requires that Authority members not be a member of the governing body of a relevant interest group at the time of their appointment. It also provides a definition of what is meant by *a member of a governing body of a relevant interest group*. Clause 186 adds to this requirement, preventing Authority members from becoming a member of the governing body of a relevant interest group following their appointment.

Clause 187 - Leave of absence

22. This clause provides for the recreational leave entitlements of the Authority Chair to be determined by the Remuneration Tribunal. The Minister may grant a leave of absence for leave, other than recreational.

Clause 188 - Resignation

23. This clause provides for the resignation of Authority members.

Clause 189 - Termination of appointment

24. This clause describes the circumstances under which the Governor-General can terminate the appointment of an Authority member.

Clause 190 - Other terms and conditions

25. This clause provides that an Authority member will hold office on terms and conditions (if any) in relation to matters that are not covered by the Bill as are determined by the Governor-General.

DIVISION 3—DECISION-MAKING AND DELEGATION BY AUTHORITY

Subdivision A - Meetings

Clause 191 - Holding of meetings

26. This clause requires the Authority to hold such meetings as are necessary for the performance of its functions. Subclause 191(2) allows the Authority Chair to convene a meeting at any time, but requires the Chair to:
- call a meeting within 30 days after receiving a written request from the Minister or from at least 2 other Authority members; and
 - convene at least 9 meetings each financial year.

Clause 192 - Presiding at meetings

27. This clause establishes that the Authority Chair presides at all meetings at which he or she is present. When the Chair is absent, the Authority members must appoint one of themselves to preside.

Clause 193 - Quorum

28. This clause sets requirements for what constitutes a quorum at a meeting of the Authority. In a normal situation, four members will constitute a quorum. However, in the situation where a member is required by clause 183 (Obligation to disclose interests before considering a particular matter) to absent themselves from deliberations regarding their declaration and any decision of the Authority on the matter, the remaining members present would constitute a quorum for the purposes of the deliberation or any decision with respect to the particular matter.

Clause 194 - Decisions at meetings etc.

29. This clause establishes how decisions will be made by the Authority. Subclause 194(2) gives the person presiding at a meeting a deliberative vote and, in the case where there is equality of votes, a casting vote.

Clause 195 - Conduct of meetings

30. This clause allows the Authority to regulate proceedings at its meetings as it considers appropriate, subject to this Subdivision. Regulations may regulate proceedings at meetings of the Authority.

Clause 196 - Minutes

31. This clause requires the Authority to keep minutes of its meetings.

Subdivision B – Decisions without meetings

Clause 197 - Decisions without meetings

32. This clause describes the circumstances in which the Authority can make decisions without holding a meeting.

Clause 198 - Record of decisions

33. This clause requires the Authority to keep a record of all decisions made in accordance with clause 197.

Subdivision C - Delegation

Clause 199 - Delegation by Authority

34. This clause describes the arrangements for the Authority to delegate its functions and powers. Note that clause 200 limits how some functions and powers can be delegated.

Clause 200 - Limits on how some functions and powers can be delegated

35. This clause limits the delegation of functions and powers by the Authority. Importantly, the Authority cannot delegate its function of preparing the Basin Plan or any amendments to the Basin Plan.

Subdivision D – Advisory committees

Clause 201 - Basin Officials Committee

36. This clause requires the Authority to establish an advisory committee to be known as the Basin Officials Committee. The Basin Officials Committee will provide an important opportunity for communication between the Authority, the Commonwealth and the Basin States. The Committee will have the functions specified in subclause 201(2).
37. Subclauses 201(3) to 201(5) set out the arrangements regarding membership of the Basin Officials Committee.

Clause 202 - Basin Community Committee

38. This clause requires the Authority to establish an advisory committee to be known as the Basin Community Committee. The Basin Community Committee will provide an important opportunity for communication between the Authority and community members. The Committee will have the functions specified in subclause 202(2).
39. Subclause 202(3) requires the Basin Community Committee to establish an irrigation subcommittee and an environmental water subcommittee. The Basin Community Committee can also establish other subcommittees as it sees fit.
40. The clause also sets out the arrangements regarding membership of the Basin Community Committee. Importantly the Authority is required to make a call for expressions of interest from the public before appointing a member to the Committee.
41. The Basin Community Committee members will be appointed on the basis of expertise (subclause 204(3) refers). The Committee will consist of a Chair and up to 16 other members. The Committee must include at least one Authority member and at least 8 individuals who are representatives of one or more water users. The term *water user* is defined in subclause 202(7).

Clause 203 - Other advisory committees

42. This clause enables the Authority to establish other advisory committees to assist it in the performance of its functions. The members of these committees will be appointed under subclause 204(1).

Clause 204 - Appointments to advisory committees

43. This clause outlines the process to appoint members to advisory committees. Each member is to be appointed by written instrument. An instrument used to appoint members to the advisory committees will determine the terms and conditions of the appointments, including remuneration and allowances (subclause 204(4)). The Authority may terminate an appointment at any time in writing (204(5)).

44. An advisory committee member may resign at any time in writing, the resignation will take effect on the day that the Authority receives the resignation or on a day specified (204(6)).

Clause 205 - Procedural matters

45. This clause allows the Authority to give written directions to any advisory committee to be referred to as procedural directions. Procedural directions may include directions on the way the committee carries out its functions and procedures to be followed in relation to meetings. The Authority cannot make procedural directions to the Basin Officials Committee or the Basin Community Committee without first having regard to the recommendations of that Committee about the matter.
46. It should be noted that a procedural direction is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

DIVISION 4 – AUTHORITY’S STAFF ETC.

Clause 206 - Staff

47. This clause specifies that the Authority’s staff will consist of persons engaged under the *Public Service Act 1999* and for the purposes of the *Public Service Act 1999*, the Chair and the Authority staff will together constitute a Statutory Agency. The Chair will be the Head of that Statutory Agency.

Clause 207 - Persons assisting Authority

48. This clause provides that the Authority may be assisted by officers and employees of Agencies (within the meaning of the *Public Service Act 1999*), of a State or Territory, and of authorities of the Commonwealth, a State or a Territory. It is intended that the Authority Chair will be able, on behalf of the Commonwealth, to engage consultants to perform services for the Authority.

Clause 208 - Chair not to be directed about certain matters

49. This clause explains that the Authority Chair is not subject to direction by the Authority when performing his or her function or powers under the *Financial Management and Accountability Act 1997* or the *Public Service Act 1999*. These are areas in which the Chair, as the Head of the Statutory Agency, must have unfettered decision making power.

DIVISION 5—FINANCE AND REPORTING REQUIREMENTS

Subdivision A – Murray-Darling Basin Special Account

Clause 209 - Murray-Darling Basin Special Account

50. This clause establishes the Murray-Darling Basin Special Account. The Account is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*. The Murray-Darling Basin Special Account will ensure an appropriate level of transparency and control regarding Authority funds.

Clause 210 - Credits to the Account

51. This clause specifies the amounts that may be credited to the Murray-Darling Basin Special Account.

Clause 211 - Purposes of the Account

52. This clause sets out the purposes of the Murray-Darling Basin Special Account. The clause describes the circumstances in which amounts standing to the credit of the Account can be debited.

Subdivision B – Authority may charge fees

Clause 212 - Fees

53. This clause allows the Authority to charge fees for the services provided in performing its functions. Importantly, the Authority may not charge certain prescribed fees unless the ACCC has advised that such fees are reasonable. The fees will also be subject to water charge rules provided for in clause 92.

Subdivision C – Exemption from taxation and charges etc.

Clause 213 - Exemption from taxation and charges etc.

54. This clause provides that for the purposes of section 50-25 of the *Income Tax Assessment Act 1997* the Authority is taken to be a public authority constituted under an Australian law. The effect of this, as explained in the legislative note, is that the Authority would be exempt from income tax.
55. This clause also ensures that no rate, tax, charge or fee is payable under a law of the State or Territory in respect of actions undertaken by the Authority or the Commonwealth for the benefit of the Authority.

Subdivision D – Reporting requirements

Clause 214 - Annual report

56. This clause sets out the Authority's reporting requirements to ensure transparency and accountability in relation to its operations. The Minister must ensure that a copy of the Authority's annual report is tabled in each House of the Parliament within 15 sitting days of that House after the day on which the Minister receives the report. The Minister must also ensure that a copy of the annual report is given to the Basin States on or before the day the report is first tabled in a house of the Parliament.

DIVISION 6 – CONFIDENTIALITY

Clause 215 – Confidentiality

57. This clause requires the Authority to take reasonable measures to protect confidential information that is given to it in the performance of its functions. The clause provides guidance on what constitutes authorised uses and disclosures, and allows for regulations

which can provide further detail. This clause should provide confidence to those individuals that are required to provide information to the Authority that their information will be used appropriately.

PART 10 – MURRAY-DARLING BASIN AUTHORITY (SPECIAL POWERS)

DIVISION 1—APPLICATION OF THIS PART

Clause 216 – Application of this Part limited to certain legislative powers

58. This clause provides that this Part only has effect so far as the Constitution permits. The clause sets out the principal powers under s 51 of the Constitution upon which the Basin Plan relies for its validity as a law of the Commonwealth. As this Part provides powers to enter land for the purposes of gathering information necessary for the proper management of the Basin water resource and to monitor compliance with the Basin Plan and water resource plans, these powers are broadly the same as the constitutional powers supporting Part 2 of the Bill.

DIVISION 2—ENTRY ONTO LAND ETC.

59. This Division confers power on officers authorised by the Authority to enter onto land for both non-compliance and compliance purposes.

Subdivision A – Authorised Officers

Clause 217 - Appointment of authorised officers

60. This clause provides for the appointment of authorised officers by the Authority to enter onto land for the purposes of exercising the powers under this Division. Authorised officers must have a high level of expertise in one or more fields relevant to the performance of an authorised officer's duties (paragraph 217(2)(b)). Clause 221 describes the types of activities that may be undertaken by an authorised officer. Individuals with the expertise to undertake these activities may work for a range of organisations including private consultancies as well as State and Territory governments. This reality is reflected in the range of individuals that are listed as eligible for appointment as authorised officers in subclause 217(2).
61. State and Territory employees can only be appointed as authorised officers with the agreement of the State, Territory or State or Territory authority.
62. All authorised officers must comply with written directions from the Authority (subclause 217(4)).

Clause 218 - Identity cards

63. This clause requires the Authority to issue an identity card to an authorised officer to have access to premises for the purposes of this Bill. The identity card must be in the format prescribed by the regulations and must contain a recent photograph of the

authorised officer. An authorised officer must carry their identity card at all times when performing the functions of an authorised officer under this Bill.

64. An officer will not be entitled to remain on land or premises if they fail to produce their identity card when requested.
65. It is an offence for an authorised person to fail to return an identity card when that person ceases to be an authorised person. The penalty is set at 1 penalty unit.

Subdivision B – Powers to enter land etc. other than for compliance purposes

66. This subdivision confers a power to enter land for the purposes of Part 2 (Management of the Basin water resources) and for the purposes of measuring and monitoring the water resources and the condition of water dependent ecosystems. Entry onto land for non-compliance purposes is required in order for the Authority to properly perform its functions. As the primary water management authority for the Basin, the Authority needs to be able to access water resources in the Murray-Darling Basin, and to install monitoring and measuring devices to ensure that it can collect the scientific information that is necessary for it to plan for the management of the Basin water resources and associated water dependent ecosystems.
67. It will sometimes be necessary to cross private land to reach the water resources, or undertake activities on private land, where such land is adjacent to or includes Basin water resources.
68. It is to be noted that provisions providing for entry onto land are common in State legislation providing for the functions and powers of State water management authorities.

Clause 219 - When authorised officers can enter premises

69. This clause identifies when authorised officers can enter land or premises. Authorised officers are only permitted use these powers when performing functions for the Authority. These functions are functions relevant to Part 2 (Management of the Basin water resources), and monitoring and measuring functions. Principally, these powers will be used to gather the information the Authority requires to prepare the Basin Plan, or any amendments to the Plan. Regulations may add to the reasons for which an authorised officer may enter land for non compliance purposes.
70. The clause clarifies that this subdivision does not extend to authorising entry onto land to monitor compliance or search for evidence of contraventions of this Bill or its regulations. That entry is dealt with under Subdivision C of Division 2 of Part 10.

Clause 220 - Obligations of authorised officers before entering premises

71. This clause establishes requirements that must be met for an authorised officer to be authorised to enter premises. The authorised officer is required to: give reasonable notice to the occupier prior to entering land, obtain consent from the occupier if the premises are residential premises, show his or her identity card if required by the occupier and give the occupier a written statement of the occupier's rights and obligations.

72. These requirements can only be waived in an emergency situation, for example where there are structural problems with a dam or flooding is occurring, or where an occupier of the premises voluntarily consents to the authorised officer entering the premises (paragraph 220(2)).
73. Consent must be informed (subclause 220(3)) and can be withdrawn (subclause 220(4)).

Clause 221 - Powers of authorised officers while on premises

74. This clause describes the powers of authorised officers while on premises. The powers are those necessary to perform the Authority's functions described in clause 219. Subclause 221(2) provides further detail on some of the activities that authorised officers can undertake whilst on premises. These include for example affixing or placing monitoring equipment, conducting tests, or collecting samples.

Clause 222 - Duties of authorised officers

75. This clause establishes the duties of authorised officers while on premises. The intention of this clause is to require authorised officers to behave in a reasonable manner whilst on the premises and to minimise their impact on those premises. In particular an authorised officer must:
- take all reasonable steps to ensure that the doing of the thing causes as little detriment and inconvenience, and does as little damage, as is practicable to the land or premises and to anything on, or growing or living on, the land or premises; and
 - cooperate as far as practicable with an occupier of the land or premises; and
 - remain on the land or premises only for such period as is reasonably necessary; and
 - leave the land or premises, as nearly as practicable, in the condition in which it was immediately before the thing was done.
76. It is to be noted that under the Criminal Code it is an offence for the occupier to obstruct, hinder, intimidate or resist the officer when they are performing their lawful functions.

Subdivision C – Powers to enter land etc. for compliance purposes

77. This subdivision confers a power to enter land for the purposes of monitoring compliance and looking for evidence of a contravention of Part 2, or regulations made for the purposes of Part 2. This includes for example monitoring compliance with the sustainable diversion limit and other management standards that may be set in the Basin Plan, including by reading fixed water meters.
78. The Bill is primarily a civil regime, hence the need to rely on authorised officers for investigation and enforcement of contraventions of the Bill rather than the Australian Federal Police. The few offences provided for in the Bill, which relate to improper conduct by authorised officers remain matters to be prosecuted by the Australian Federal Police.

Clause 223 - Entering premises to monitor compliance

79. This clause provides for authorised officers to enter premises for the purpose of monitoring compliance. An authorised officer entering land for that purpose can exercise any of the powers set out in clause 221(2) and, in addition, can search premises, make copies of documents and question persons.
80. Entry onto land to monitor compliance can only occur with the consent of the landholder or pursuant to a monitoring warrant (clause 225). This is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Clause 224 - Entering premises to search for evidential material

81. This clause provides for authorised officers to enter premises to search for evidential material. An authorised officer entering land for that purpose can exercise any of the powers set out in clause 221(2) and, in addition, can search the premises and inspect and copy documents. If the authorised officer uncovers additional evidential material during a search, the authorised officer can also take reasonable steps to investigate that material.
82. Once again an authorised officer is not permitted to enter unless the occupier has given consent or the entry is made under a contravention-related warrant (clause 226).

Clause 225 - Monitoring warrants

83. This clause sets out the procedure to be followed for a magistrate to issue a warrant for an authorised officer to enter premises for the purposes of monitoring compliance with a contravention of Part 2 of the Bill or regulations made for the purposes of Part 2, and the information that must be included in such a warrant.
84. A magistrate may not issue a warrant unless satisfied that entry onto land is reasonably necessary for the purposes of monitoring compliance with Part 2 of the Bill or the regulations made for the purposes of Part 2.

Clause 226 - Contravention-related warrants

85. This clause sets out the procedure to be followed for a magistrate to issue a warrant for an authorised officer to enter premises for the purposes of looking for evidence of a contravention of Part 2 of the Bill or the regulations made under Part 2, and the information that must be included in such a warrant.
86. A magistrate may not issue a warrant unless satisfied that there are reasonable grounds for suspecting that there is, or may be within the next 72 hours, evidential material on or in the premises.

Clause 227 - Contravention-related warrants by telephone, telex, fax etc.

87. This clause allows an authorised officer to apply to the magistrate for a contravention-related warrant by telephone, telex, fax or other electronic method for urgent cases. The clause explains the circumstances in which this is permitted and the procedures to be followed.

Clause 228 - Obligations of authorised officers—all cases

88. This clause explains the obligations of authorised officers when entering premises under clauses 223 and 224. In particular the authorised officer must show his or her identity card and must give the occupier a written statement of the occupiers' rights and obligations.

Clause 229 - Obligations of authorised officers—entry by consent

89. This clause explains the obligations of authorised officers when entering premises with the occupiers consent. In particular the authorised officer must inform the occupier that they are entitled to refuse consent and must leave if asked to do so.

Clause 230 - Obligations of authorised officers—entry by warrant

90. This clause explains the obligations of authorised officers when access to a premise is granted by a warrant. In particular, an authorised officer must where practicable and safe announce that he or she is authorised to enter the premises and where possible give the occupier a copy of the warrant.

Clause 231 - Use of equipment at premises

91. This clause allows an authorised officer who has entered a premises under a warrant to operate equipment at the premise where operating that equipment may access information relevant to determining whether there has been compliance with Authority compliance provisions or information that is evidential material. The authorised officer must believe on reasonable grounds that they can operate the equipment without damaging it.

Clause 232 - Expert assistance to operate a thing

92. This clause allows an authorised officer who has entered premises under a warrant to secure a thing that requires expert assistance to operate for up to 24 hours, where the officer believes on reasonable grounds that by operating the thing, information relevant to monitoring compliance or evidential material could be obtained, and that the information or material could be destroyed or altered if not secured. The authorised officer must notify the occupier of their intent to secure the thing for up to 24 hours. A magistrate can grant an extension to the 24 hours if the expert assistance is not available.

Clause 233 - Compensation for damage

93. This clause provides that the owner of a thing is entitled to compensation if the thing is damaged as a result of being operated by an authorised officer, or person assisting the officer, who exercised insufficient care.

Clause 234 - Offences relating to warrants

94. This clause describes offences relating to warrants. The offences are associated with the use of false or misleading information by authorised officers and improper use and execution of warrants by authorised officers. The maximum penalty associated with the offences is imprisonment for 2 years or 120 penalty units.

Clause 235 - Subdivision does not apply to authorised officers who are contractors

95. This clause excludes contractors from being appointed as authorised officers for the purposes of entering premises for compliance purposes. The consequence is that only Commonwealth or State public servants can be appointed as authorised officers for the purpose of monitoring compliance or searching for evidential material.

Subdivision D – Other matters

Clause 236 - Division not to abrogate privilege against self-incrimination

96. This clause prevents the Division abrogating the privilege against self-incrimination.

Clause 237 - Occupier entitled to be present during entry

97. This clause gives the occupier the right to accompany an authorised officer at all times whilst on their premises. However, they cannot impede the authorised officer.

DIVISION 3 - INFORMATION GATHERING

Clause 238 - Power to request information

98. This clause confers upon the Authority a power to request information relating to the preparation and implementation of the Basin Plan, the investigation of possible contraventions of the Part 2 and regulations made for the purposes of Part 2 and other matters relevant to the Authority's functions that are specified in regulations. These powers are considered appropriate as information in relation to these matters is crucial to the management of the Basin water resources.
99. The clause sets out requirements in relation to any such request. It is a civil penalty not to provide information requested or to provide false and misleading information. The civil penalty amounts are 50 and 60 penalty units respectively. The civil penalty provisions are subject to a reasonable excuse defence.

Clause 239 - Prohibitions on disclosure of information do not apply

100. This clause requires that the Division has effect despite any law of the Commonwealth, a State or a Territory prohibiting disclosure of the information.

PART 11 – TRANSITIONAL

DIVISION 1 – MANAGEMENT OF BASIN WATER RESOURCES (PART 2)

Clause 240 - Reference to water resource plan area

101. This clause allows for water resource plan areas to be identified prior to the first Basin Plan coming into effect. This allows for areas covered by transitional or interim water resource plans to be identified as water resource plan areas under the Bill.

Clause 241 - Transitional water resource plans

102. This clause provides a unique status to water resource plans and any instruments made under those plans that are characterised as transitional water resource plans (identified in Schedule 4 or prescribed in regulations). These water resource plans are plans that came into effect prior to the 25 January 2007 when the Prime Minister, the Hon John Howard MP, announced the *National Plan for Water Security*, or as specified in regulation.
103. The recognition of the continuing effect of these plans gives effect to a commitment by the Commonwealth Government to irrigators that water sharing arrangements in place as at 25 January 2007 would be respected for the remaining life of the plans.
104. Subclause 241(3) specifies that transitional plans will cease to have effect under the Bill on the date that they would expire or be subject to review under State law. This date is, or will be, set out in Schedule 4 or in regulations.

Clause 242 - Interim water resource plans

105. This clause provides a unique status to water resource plans and any instruments made under those plans that are characterised as interim water resource plans. These water resource plans are plans that came into effect on or after the 25 January 2007 when the Prime Minister, the Hon John Howard MP, announced the *National Plan for Water Security* and before the first Basin Plan comes into effect.
106. The purpose of recognising interim plans is to ensure that planning processes are not delayed until the first Basin Plan comes into effect, but to require such planning processes to take account of advice from the Authority on whether the proposed water resource plans will provide for the sustainable management of the Basin water resources as soon as the Authority is established. Interim plans are also accorded a shorter lifespan than transitional water resource plans.
107. Subclause 242(3) provides a limited lifespan for interim water resource plans. This limited lifespan is imposed in order to prevent interim plans from unduly delaying the implementation of the Basin Plan, while recognising that a minimum timeframe for planning instruments is required to give a degree of certainty to stakeholders.

Clause 243 - Transitional water resource plans taken to have been accredited

108. This clause provides that transitional water resource plans identified under clause 241 are deemed to have been accredited by the Minister under Subdivision D of Division 2 of Part 2. This means that until the expiry date for the plan, or if the plans do not expire, their next major review, there will be no requirement upon a Basin State under Subdivision D of Division 2 of Part 2 to prepare a further plan for accreditation in relation to the water resource area covered by the transitional plan.
109. Subclause 243(2) also provides that the regulations may provide for minor or non-substantive amendments to a transitional water resource plans to be deemed to be accredited by the Minister under Subdivision D of Division 2 of Part 2.
110. Minor or non-substantive amendments may include (but are not limited to) addressing simple typographical or grammatical errors, streamlining of procedural issues that do not affect the substantive nature of a transitional water resource plan and elaboration and clarification of matters already contained in the transitional water resource plan.

Minor or non-substantive amendments would not include changes that alter the rights of water access rights holders or obligations imposed by the transitional water resource plan.

Clause 244 - Interim water resource plans taken to have been accredited

111. This clause provides that interim water resource plans identified under clause 242 are also deemed to have been accredited by the Minister under Subdivision D of Division 2 of Part 2. This means that until the interim water resource plan expires, there will be no requirement upon a Basin State under Subdivision D of Division 2 of Part 2 to prepare a further plan for accreditation in relation to the water resource area covered by the interim plan.
112. Subclause 244(2) also provides that the regulations may provide for minor or non-substantive amendments to a transitional water resource plans are deemed to be accredited by the Minister under Subdivision D of Division 2 of Part 2.
113. Minor or non-substantive amendments may include (but are not limited to) addressing simple typographical or grammatical errors, streamlining of procedural issues that do not affect the substantive nature of a interim water resource plan and elaboration and clarification of matters already contained in the interim water resource plan. Minor or non-substantive amendments would not include changes that alter the rights of water access rights holders or obligations imposed by the interim water resource plan.

Clause 245 - Operation of transitional water resource plans and interim water resource plans

114. This clause clarifies that transitional and interim water resource plans are not required to be consistent with the Basin Plan for their deemed accreditation and prevail over the Basin Plan during the period that they have effect. This means that if a person is under an obligation to comply with an element of the Basin Plan, and the transitional or interim water resource plan contains an inconsistent obligation, then the obligation in the water resource plan is the binding obligation.

Clause 246 - Amendment of transitional water resource plans and interim water resource plans

115. Substantive or non-minor amendments of transitional or interim water resource plans will require accreditation by the Minister. This clause provides that where a Basin State provides a substantive or non-minor amendment for accreditation, the Minister must be satisfied that the amendment would make the transitional or interim plan no less consistent with the Basin Plan. The purpose of this provision is to ensure a progressive transition to consistency with the Basin Plan by the time transitional and interim water resource plans expire.

Clause 247 - Authority may provide assistance

116. This clause provides the Authority with the ability to assist Basin States in relation to reviews or amendments to transitional and interim water resource plans.

DIVISION 2 – COMMONWEALTH ENVIRONMENTAL WATER HOLDER

Clause 248 - The functions of the Commonwealth Environmental Water Holder prior to Basin Plan taking effect

117. This clause establishes transitional arrangements to enable the Commonwealth Environmental Water Holder to exercise its functions prior to the Basin Plan taking effect. The environmental watering plan (including its environmental watering schedules) forms part of the Basin Plan. As the Commonwealth Environmental Water Holder will not be able to fulfil its functions in accordance with the Basin Plan before the Basin Plan takes effect, the Water Holder's obligation to do so is replaced during that period with an obligation to fulfil its functions in a way that meets the objectives of this Bill to protect or restore the environmental assets in the Basin.

Clause 249 - Disposals of water or Commonwealth water holdings prior to Basin Plan taking effect

118. This clause establishes that before the Basin Plan takes effect, the Commonwealth Environmental Water Holder may only trade in water rights it owns in accordance with clause 106, however clause 106 is modified such that references to meeting the objectives of the environmental watering plan are replaced with references to protecting or restoring the environmental assets of the Murray-Darling Basin. Once again, this clause is transitional in nature and is inserted to ensure that the Commonwealth Environmental Water Holder is not prevented from fulfilling his or her functions in the period before the first Basin Plan takes effect.

DIVISION 3 – MURRAY-DARLING BASIN AUTHORITY

Clause 250 – First annual report for Authority

119. This clause provides that where the Authority is established in the last quarter of a financial year, it need not prepare an annual report for that financial year. Rather, it is to include a report on its activities during that quarter in the annual report for the subsequent financial year.

PART 12 – MISCELLANEOUS

Clause 251 – Delegation by Minister

120. This clause sets out the circumstances in which and the persons to whom the Minister can delegate his or her functions. Importantly, the Minister cannot delegate his or her function of adopting the original Basin Plan and amendments to the Plan or of accrediting water resource plans. The powers to make water market and water charge rules cannot be delegated. Neither can the powers to give directions to the Authority in respect of its functions, or issue operating rules to the Commonwealth Environmental Water Holder.

Clause 252 – Instruments not invalid for failure to publish on website

121. This clause ensures that an instrument is not invalid merely because of a failure to comply with a requirement in the Bill to publish that instrument on a website.

Clause 253 – Review of operation of Act

122. This clause requires a review of the operation of the Bill and the extent to which the objects of the Bill have been achieved before the end of 2014. The clause describes the terms of reference for the review and the consultation processes. To ensure that the review findings are available to the public, the Minister must ensure that a copy of the results of the review are tabled in each House of the Parliament within 15 sitting days of that House after receipt by the Minister. The review will need to be undertaken, bearing in mind that because of the extended transition period for water resource plans already in place as at 25 January 2007, it will not be possible for all of the objectives and outcomes sought by the Basin Plan to have been met by 2014.

Clause 254 – Compensation for acquisition of property

123. This clause requires the Commonwealth to pay reasonable compensation to a person if the operation of the Bill would result in an acquisition of property from that person otherwise than on just terms. The clause defines the terms *acquisition of property* and *just terms*. The clause establishes the mechanism for resolving disputes in relation to the amount of compensation.

Clause 255 – Act does not authorise compulsory acquisition of water access rights

124. This clause clarifies that nothing in the Bill, the regulations or any other instrument made under the Bill authorises the Commonwealth, the Authority, the Commonwealth Environmental Water Holder or any other agency of the Commonwealth to compulsorily acquire a water access right or an interest in a water access right.

Clause 256 – Regulations

125. This clause empowers the Governor-General to make regulations prescribing matters required or permitted to be prescribed by this Bill, or necessary or convenient to be prescribed, for carrying out or giving effect to this Bill.

SCHEDULE 1 – THE MURRAY-DARLING BASIN

126. This Schedule delineates the boundaries of the Murray-Darling Basin.

SCHEDULE 2 – BASIN WATER CHARGING OBJECTIVES AND PRINCIPLES

127. This Schedule sets out the water charging objectives and principles for the Basin. The objectives and principles are based on those set out in the *National Water Initiative*. The intent is that these objectives and principles will provide overarching guidance to the formulation of water charge rules under the Basin Plan.

128. The objectives and principles are intended to support and assist in giving effect to the *National Water Initiative* requirements. Measures other than charging may be considered for dealing with environmental externalities.

SCHEDULE 3 – BASIN WATER MARKET AND TRADING OBJECTIVES AND PRINCIPLES

129. This Schedule sets out the water market and trading objectives and principles for the Basin. The objectives and principles are based on those set out in the *National Water Initiative*. The intent is that these objectives and principles will provide overarching guidance to the formulation of trading and market rules under the Basin Plan.

SCHEDULE 4 – TRANSITIONAL WATER RESOURCE PLANS

130. This Schedule lists the transitional water resource plans under clause 241 and the dates that these transitional water resource plans cease to have effect.