



Murray-Darling Basin Agreement Consistency Review Issues Analysis

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For the Murray-Darling Basin Commission

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ACRONYMS AND ABBREVIATIONS

In this report, the following acronyms and abbreviations are used:

BSMS	Basin Salinity Management Strategy
Consistency Review	The review on inconsistency between the MDBA and the NWI and TLM IGA (subject of this Issues Analysis)
COAG	Council of Australian Governments
Commission	Murray-Darling Basin Commission
Council	Murray-Darling Basin Ministerial Council
E-water	Water for environmental and other public benefit outcomes
Governance Review	The ‘Governance and Basin Management Review’ mandated by the Murray-Darling Basin Ministerial Council, at Ministerial Council Meeting 40 (May 2006)
MDBA	Murray-Darling Basin Agreement 1992, including its Schedules
NCP	National Competition Policy
NWI	Intergovernmental Agreement on a National Water Initiative, 2004
Participants	Jurisdictions’ nominees who participated in interviews with the consultants, as detailed in Appendix 2
Parties	The Parties to the MDBA, unless otherwise stated
Preliminary Review Report	Preliminary report on Review of the MDBA (a) for consistency with the NWI and (b) to identify any changes required to implement TLM IGA, Megan Dyson, May 2006
Recovered e-water	Water recovered under TLM IGA
RMW	River Murray Water
SRA	Sustainable Rivers Audit
Systems review	Major MDBC review of River Murray Water’s river system operating rules for the Upper River Murray (as defined in the MDBA)

Taskforce	Murray-Darling Basin Agreement Consistency Review Taskforce
TLM IGA	Intergovernmental Agreement on addressing water over-allocation and achieving environmental objectives in the Murray-Darling Basin, 2004
Unregulated flows ¹	The component of flow that is in excess of the immediate needs of downstream users and the capacity of any downstream storage to re-regulate the flow to meet a subsequent water user need

¹ This definition is extracted from an unpublished Draft Report Unregulated Environmental Flows in the River Murray System, July 2006.

EXECUTIVE SUMMARY

This Issues Analysis report has been prepared to inform the Consistency Review being conducted by the Murray-Darling Basin Commission (Commission).

This report explores the views of jurisdictional nominees about consistency between the Murray-Darling Basin Agreement (MDBA) and both the NWI and TLM IGA. In this Summary, the views of the jurisdictions' nominees are referred to as views of jurisdictions. However, it is noted that jurisdictions have not formally endorsed the views of their nominees as necessarily being the views of the jurisdiction.

Many of the matters discussed by jurisdictions in the course of interviews undertaken for this report relate not only to the question of consistency, but also to matters that will be considered by the Parties in the course of the Governance and Basin Management Review. The Governance and Basin Management Review (termed the Governance review) mandated by the Council at its meeting in May 2006, will be a wide-ranging review, to cover the governance and financing of the Commission and Basin water sharing and natural resource management arrangements generally.

The question of consistency

The threshold question – what is meant by ‘consistency’ for the purposes of the Consistency Review – is discussed in Part 2 of the report.

Jurisdictions hold a variety of views about consistency, but most agree that:

MDBA should not work against NWI or TLM IGA – ‘consistency’ for the purposes of the Issues Analysis means that there should be nothing in the MDBA, which could work against implementation of NWI and TLM IGA.

No direct inconsistency, on a narrow interpretation – on a narrow interpretation of ‘consistency’, there is probably no direct inconsistency between the MDBA and the NWI. The recent adoption of the new Schedule E has delivered the MDBA’s direct role in relation to interstate trade matters in the NWI.

There is inconsistency on a broad level – the MDBA is not entirely compatible with NWI policies and TLM IGA objectives. This broad inconsistency occurs in two areas: in terms of policy and framework of the MDBA (for example, in water sharing and e-water management) as well as operationally (for example, in the way the works must be managed under the MDBA).

One jurisdiction disagreed that many, if any, changes should be made under the banner of ‘inconsistency’ with NWI. The jurisdiction notes that many changes might be necessary simply because they represent good practice.

Issues identification and analysis

Part 3 of the report identifies the issues raised by jurisdictions during discussions.

Main areas of concern

The report highlights four main areas of concern for potential inconsistency (in the broad sense) between MDBA and either or both NWI and TLM IGA:

Water sharing – Jurisdictions have a range of concerns about Part X of the MDBA, which governs water sharing arrangements, and water sharing was seen as a key focus area for the Governance review. Issues revolve around:

- the way the water shares are expressed;
- absence of identification of water for the environment;
- the need to share storage capacity;
- accounting for impacts of groundwater use; and
- accounting for tributaries, and end-of-valley flows.

Management of water for environmental outcomes – Jurisdictions see a number of significant issues relating to the management of e-water, namely:

- absence of e-water management provisions in the MDBA;
- powers of the Commission;
- management of unregulated flows;
- the role and function of the Cap;
- institutional arrangements for e-water including environmental managers; and
- funding management of e-water.

Most jurisdictions agree that the issues indicate that the MDBA fails to assist (or might actively hinder) delivery of environmental objectives and implementation of TLM IGA, and is also likely to be, in the broad sense, inconsistent with NWI provisions for managing e-water.

Prescriptive content of the MDBA: water sharing, accounting and infrastructure management – There are a number of provisions in the MDBA that prescribe the distribution of entitlements to water, and a number of complex and interrelated accounting rules by which shares are tracked and managed. Other provisions prescribe the management of infrastructure, or allow the Commission to do so.

Participants of the three Southern jurisdictions generally agreed that the provisions are excessively prescriptive. Two of those jurisdictions feel that this area should be a priority for change, while the third feels that prescription does not represent a real hindrance to delivery of TLM IGA and NWI. Participants of the other jurisdictions did not express a view on the issue.

Financial management – Most participants agree that although recent amendments to the financial provisions of the MDBA have improved transparency of cost sharing, the MDBA should explicitly embed NWI-consistent cost recovery principles as a matter of good business practice. A range of concerns were raised by the jurisdictions on various aspects of pricing and cost recovery, summarised in Part 3.

This is seen as a reasonably high priority, and one that should be dealt with by the Governance review. It is noted that financial arrangements are earmarked for consideration in the Governance review.

Areas of lesser concern

Institutional separation – there was little agreement, with consensus being that separation is a low priority, mostly because benefits would be unlikely to be worth the costs.

Lack of statutory status of TLM IGA – although TLM IGA is not supported by statute, most jurisdictions do not see this is likely to hinder the delivery of TLM IGA, and there is no need for the MDBA to be amended formally to incorporate TLM IGA itself.

Integrated water resources management in the Basin – jurisdictions discussed the Council’s direction for a ‘One River’ approach to environmental flow management. While there was general lack of agreement about what ‘One River’ might mean, most agree that common high-level goals are appropriate. Many feel that end-of-valley outcomes would satisfy a ‘One River’ approach. However, the MDBA does not presently require end-of-valley outcomes.

Competing State and Basin interests – the NWI requires the States to adopt joint arrangements for e-water management of shared resources, but is not explicit about dealing with possible needs for trade-off against internal State NWI e-water provision. The tension that this may create between State and Basin outcomes was discussed. Most jurisdictions saw the tension as inevitable, and that the proper forum for negotiation was the Commission.

Other matters

Other matters were raised by jurisdictions, which do not relate directly to the consistency of the MDBA with NWI, or implementation of TLM IGA. They are also recorded in Part 3.

Need for and scope of change

There was general lack of agreement about the need for, scope and urgency of change required by the issues raised. The need for and scope of change has been included in Part 3 of this report as one of the 'high priority' areas for resolution, as it is a threshold issue for both the Consistency and Governance reviews.

Jurisdictions generally agree that the MDBA is outdated, and has been overtaken by current water resources management policy and programs as embodied in both the NWI and TLM IGA. Most also agree that this renders the MDBA, in a broad sense, 'inconsistent' with either or both those agreements.

However, there is disagreement amongst the participants over whether this fact is or is not critical to delivery of NWI and TLM IGA and accordingly, over the scope and pace of, and appropriate forum for, any change needed.

Timing and process for change

There is great variance in views on the urgency of addressing the inconsistencies between the MDBA with the NWI and TLM IGA. However, jurisdictions generally agree that:

- the broader policy level inconsistencies identified should be considered as part of the Governance review;
- specific identified operational prescription within the MDBA that demonstrably hinders achievement of NWI or TLM IGA should be reviewed and amended expeditiously. However, there is disagreement about whether such amendments should be presented ahead of any more fundamental amendments to the MDBA that might be pursued as a result of the Governance review²;
- the Governance review is a critical exercise, and one whose July 2007 deadline represents a significant challenge; and
- the Systems review is likely to be difficult and also time-consuming, with a timeframe of around 4 to 5 years considered realistic. Identified constraints on the Systems review

² The view of some participants was that only a single set of amendments to the MDBA, incorporating all changes, should be presented to the party Governments. These participants felt that policy positions in key areas (primarily management of environmental flows) would be likely to affect operational rules in any case, and that to attempt to consolidate amendments for operational rules ahead of policy agreement on key areas would be pre-emptive.

include the availability and consistency of modelling data across the jurisdictions, and the complex layering of operational protocols and modelling that has grown over the years.

Conclusions

Part 4 of this report sets out a series of conclusions drawn from the matters raised by jurisdictions as detailed in Part 3. The conclusions in summary form are:

- (1) The range of positions within the jurisdictions varies considerably. These positions range from full agreement to totally opposite views. Within their positions the priority on issues can vary, even on the same issue;
- (2) There is no inconsistency on a narrow interpretation of the MDBA and NWI and TLM IGA;
- (3) On a broader interpretation, there are some significant inconsistencies between the MDBA and the other two agreements. The inconsistencies are in both the policy and operational areas. Many arise because of, or are symptomatic of, the general out-datedness of the MDBA;
- (4) The Governance review is the appropriate forum for resolution of the policy issues. The policy issues relate to water sharing, e-water rights management including Cap implications, and financial arrangements. Past decisions of the Council in relation to these matters should be taken into account when devising any new policy arrangements;
- (5) Progressing operational issues in an expeditious way, preferably concurrently with the resolution of the policy issues, is very important, as some of the matters identified are likely actively to hinder delivery of TLM IGA and other e water objectives. Possible forums for resolution of these matters are the Systems review, or the TLM IGA 3-year Review or Business Plan reviews. The Parties will need to assess the likely progress of those reviews. It may be that an alternative forum is needed to resolve, in a timely way, identified operational issues; and
- (6) The Governance review will require support from the Commission in the form of provision of information, or undertaking of further work.

Recommendations

It is recommended the Commission:

- (1) notes the issues raised and conclusions reached from the Issues Analysis;
- (2) notes the Commission's involvement will be required in a number of areas; and
- (3) refers this Consistency Review Issues Analysis final report to the Governance review.

CONSULTANTS' BRIEF AND METHODOLOGY

Consultants' brief

The consultants' brief required the preparation of a report that explores and documents the jurisdictional perspectives regarding issues of consistency between the MDBA and both the NWI and TLM IGA, particularly in relation to the potential inconsistencies noted for consideration in the preliminary review report.

The issues analysis report was to draw out areas of close agreement amongst jurisdictions, and areas of disagreement, and suggest a process to address identified inconsistencies.

A copy of the consultants' brief is attached as Appendix 1.

Methodology

Interviews and agreed summaries of interviews

Interviews were conducted with nominees of each Party by consultants Warren Martin and Megan Dyson. Julianne Martin of the Commission Office was in attendance at each interview. Interview participants (in this report referred to as the participants) are listed in Appendix 2.

Interviews were based around a series of questions, which were provided to interviewees prior to interview. A copy of the questions is attached as Appendix 3.

Following the interviews, a detailed summary of each interview was prepared by the consultants. Summaries were provided only to the jurisdiction the subject of each, and were not circulated amongst all jurisdictions.

A jurisdictional response was requested initially, but this has not proved feasible to obtain. Many participants did not feel that a formal jurisdictional response is necessary at this stage in any case.

Interview summaries have been considered by jurisdictional nominees and returned to the consultants with comments to clarify the position of participants.

Views relayed within this report are therefore expressed as the views of the participants unless otherwise indicated. They do not necessarily constitute the formal view of a jurisdiction. Views relayed are not attributed to any named jurisdiction or participant.

1 CONTEXT OF CONSISTENCY REVIEW ISSUES ANALYSIS

1.1 Nature of the MDBA

The MDBA is a legal instrument that has been ratified by an Act of Parliament in each participating jurisdiction, and constitutes part of the laws of each jurisdiction. It sets out rules by which the States agree to share water in the shared rivers of the Murray-Darling Basin, and is the framework under which both the Council and Commission operate, and from which they derive their powers and responsibilities.

The MDBA contains two types of provisions – specific rights and obligations of Contracting Governments and duties of the Commission, and broad provisions setting out the purpose of the MDBA and functions of the Commission and Council. The relevance of the NWI to each is different.

The MDBA because of its nature as a compact between Governments does not provide for statutory water plans nor does it allocate water entitlements in the sense those terms are used in the NWI.

1.2 Requirements for review of the MDBA

1.2.1 National Water Initiative

The NWI is an intergovernmental agreement entered into by the Commonwealth and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory on 25 June 2004.

The NWI contains a set of general objectives, stating the parties' aims for a nationally compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimizes economic, social and environmental outcomes by achieving ten specified goals. The NWI also sets out actions required by the parties to meet the stated objectives. Some parts of the NWI relate directly to the Murray-Darling Basin, and apply only to the Governments that are party to the MDBA.

Clause 14(i) of the NWI requires the Parties to “agree to review the 1992 Murray-Darling Basin Agreement where necessary, to ensure that it is consistent with this Agreement”.

1.2.2 TLM IGA

The Intergovernmental Agreement on Addressing Water Overallocation and Achieving Environmental Objectives in the Murray-Darling Basin (TLM IGA) is an agreement of the Commonwealth and the Governments of New South Wales, Victoria, South Australia and the Australian Capital Territory. It was entered into in June 2004 at the same time as the NWI, and is contingent on parties being party to both the NWI and IGA.

Both TLM IGA and the Living Murray Business Plan adopted by the Council for the purposes of TLM IGA, refer to the intention to review the MDBA.

Clause 56 of the TLM IGA states that the Council will “identify as soon as reasonably practicable consequential changes to the [MDBA] required to implement this Agreement”.

Clause 10(a) of the Business Plan states that the Council will “review the [MDBA] to ensure full implementation of the [TLM IGA] and this Business Plan”.

1.3 Preliminary review report

The Preliminary review report³ was provided to the Task Force for the consideration of jurisdictions. A number of issues were recommended in that report for further discussion and consideration by the Parties to determine the extent to which the Parties wished to pursue them either as points of inconsistency between the MDBA and NWI, or because they might hinder implementation of TLM IGA.

Issues raised in the preliminary review report were discussed with the interview participants. As detailed in Part 3 of this report, participants seldom felt that there was any direct inconsistency with the NWI, but nevertheless agreed that a number of the issues are matters that raise questions of broad consistency with NWI or TLM IGA, and that the appropriate forum in which the Parties should discuss and resolve most of those issues is the Governance review.

3 Preliminary report on Review of the Murray-Darling Basin Agreement (a) for consistency with the National Water Initiative and (b) to identify any changes required to implement the intergovernmental agreement on addressing water overallocation and achieving environmental objectives in the Murray-Darling Basin, May 2006.

1.4 Other reviews underway

It is noted that a number of other reviews are underway which are relevant to the Consistency review. The relevant reviews⁴ are:

Governance Review – by resolution of the Council in May 2006, the Parties will undertake a review of the governance and financing of the Commission and Basin water sharing and natural resources management arrangements generally. The review is to be completed by mid 2007, and is to be undertaken by a committee of officials from the partner Governments. It was resolved that the terms of reference for the review would include matters such as:

- The future operating model for the Commission including River Murray Water;
- The case for creating a new legal entity to hold and operate water entitlements acquired with Commission resources; and
- Better alignment within the Murray-Darling Basin of responsibilities, asset ownership and funding contributions with decision-making structures and authorities.

Systems review – the review will be a major review of River Murray Water's river system operating rules for the Upper River Murray (as defined in the MDBA). The terms of reference have not yet been defined.

Mid-term review of the Basin Salinity Management Strategy (BSMS) – the review will assess the performance of the BSMS against the objectives specified in MDBA Schedule C. The review is quite broad in scope. A work-plan, including terms of reference, has recently been prepared. The terms of reference include a requirement that the review take account of a number of matters including:

- relevant decisions of the Council and recommendations of the Independent Audit Group on Salinity; and
- imperatives presented by other policies and programmes including the National Action Plan for Salinity and Water Quality, the NWI, and the MDBA reviews, TLM IGA, the Cap, and Risks to Shared Water Resources project.

Cost Efficiency and Effectiveness Review – the review will investigate five Commission programs (Environmental Works and Measures, the BSMS, River Murray Water, Mouth Dredging and Corporate Services) to identify opportunities to improve cost effectiveness and efficiency, risks of realising any savings, and risks of cost escalations. The review will also

⁴ Source of information on status of reviews: Commission Office, August 2006.

investigate whether the programs could be delivered at lower cost, and the implications of doing so.

TLM IGA three year review and Review of TLM IGA Business Plan – a three-year review is required by clause 81 of TLM IGA. However, due to recent significant funding increases, which aim to accelerate delivery of TLM IGA, the Three Year Review has been postponed in favour of completing a review of the TLM Business Plan. The review of the Business Plan will focus on changes needed to accelerate delivery of programs to make best use of the additional funding. The review is to take into account, amongst other things, all aspects of the management of recovered water, and will ensure that all aspects of the Business Plan will be established in operational protocols.

2 THE QUESTION OF CONSISTENCY

2.1 The question of consistency

The question of consistency is a threshold issue that was discussed with all participants.

Responses varied, but there was general agreement that ‘consistency’ with the NWI could range from a very narrow and direct interpretation, focusing on specific operational detail within the MDBA, to a broad assessment of consistency, assessing the compatibility of NWI and MDBA objectives and policy frameworks.

In this Part, the views of participants expressed during interviews are referred to as views of ‘jurisdictions’. It is acknowledged that in most cases participants have not provided jurisdictionally–endorsed opinions, so opinions should not be read as indicating a formal government view.

2.2 Consistency of the MDBA with the NWI

2.2.1 Differences between two instruments makes comparison difficult

Determining what should be meant by the term ‘consistency’ for the purposes of comparing the NWI and MDBA is not straightforward, because the MDBA and the NWI are very different instruments and ‘consistency’ may be interpreted in a number of ways.

The MDBA is a legal instrument ratified by an Act of Parliament in each participating jurisdiction. It sets out rules by which the States agree to share water in the shared rivers of the Murray-Darling Basin. The MDBA because of its nature as a compact between Governments does not provide for statutory water plans nor does it allocate water entitlements in the sense those terms are used in the NWI.

The NWI on the other hand is not drafted as a legal document, and (apart from provisions about interstate trade) it does not speak directly about or to the MDBA. In most clauses the NWI speaks to State and Territory Governments in their role as managers of their water resources.

2.2.2 NWI consistency as discussed in the preliminary review report

The preliminary review report for the Consistency review took ‘consistency’ to mean that the MDBA should be *compatible* with the NWI, in the sense that there should be nothing in the

MDBA contrary to any specific provisions of the NWI, or that would hinder the outcomes sought by the NWI.

The preliminary review report also noted that there is another level at which ‘consistency’ can be considered. At this level, consistency would mean that the MDBA should promote (or be able to be used to promote) the NWI by actively working to achieve NWI objectives and outcomes, so far as that is consistent with the purpose of the MDBA itself. At this level, it may also be relevant to ask, ‘to what extent is the institutional framework established by the MDBA, and the premises on which the Agreement proceeds suited to or compatible with the broad objectives of the NWI?’

2.3 Implementing TLM IGA through the MDBA

The TLM IGA requirement for review of the MDBA is not expressed as a requirement that the MDBA be ‘consistent’ with TLM IGA. Rather, the intention is that the MDBA be reviewed to ensure that it will enable implementation of TLM IGA.

The TLM IGA requirement may nevertheless be interpreted as a question of ‘consistency’. If the MDBA prevents or hinders TLM IGA implementation it is not consistent with TLM IGA, and changes to the MDBA are required.

2.4 Views of jurisdictions on consistency

General agreement on meaning of consistency – Jurisdictions hold differently expressed views on what should be meant by ‘consistency’ for the purposes of the NWI review requirement⁵. Despite this, it is not the view of the consultants that there is any significant disagreement amongst the parties about what is meant by consistency. The consultants have summarised views as generally being that:

‘There should be nothing in the MDBA which could work against implementation of NWI and TLM IGA.’

⁵ Participants used subtly different language and emphases to articulate their views. For example, ‘consistency’ has been variously expressed as meaning key principles and policies in the MDBA should not cut across implementation of NWI and TLM objectives, no provision of the MDBA should cause or allow things to happen that would cut across or work against implementation of NWI and TLM, operational provisions of the MDBA should not hinder delivery of NWI and TLM objectives, the MDBA as a whole should be compatible with the NWI and should be consistent with achieving the objectives of the NWI and IGA.

Participants in the interviews generally treated the TLM IGA review requirement as a requirement to ensure consistency between MDBA and TLM IGA, and to recommend changes to the MDBA if hindrances to implementing TLM IGA were identified.

No inconsistency on narrow interpretation – There is general agreement that at the most conservative, narrow interpretation of ‘consistency’ there is probably no direct inconsistency between the MDBA and the NWI. The recent adoption of the new Schedule E has delivered the MDBA’s direct role in relation to interstate trade matters in the NWI.

Inconsistency on broader interpretation – There is general agreement that at a broader level – the extent to which the MDBA is compatible with NWI and TLM IGA objectives, and does not allow anything to happen that would cut across NWI or TLM IGA objectives – there is inconsistency. This broader level inconsistency occurs in the policy and framework of the MDBA (for example, in water sharing and e-water management) as well as operationally (for example, in the way the works must be managed under the MDBA):

- ***Policy level*** – broad inconsistency between the MDBA framework for water sharing and management, and the objectives and delivery of the NWI and TLM IGA, is a matter discussed by all participants, detailed in Part 3. The MDBA is felt to be out of step with current thinking and policy on natural resources management, due to its age and the changes that have taken place in natural resources management policy since the early 1900s and even since the last major changes to the MDBA in the 1980s. There is considerable difference however over the question whether being ‘out of step’ is in fact a hindrance to delivering the parties’ objectives for management of the shared water resources of the Basin, sufficient to warrant fundamental change as part of the current round of reviews.
- ***Operationally*** – inconsistency at the operational level is a concern of a number of jurisdictions, as detailed in Part 3. It has been a reasonably common thread that there is potential for operational rules within the MDBA and Schedules to hinder best management of water for environmental and other public benefit outcomes.

No NWI or TLM IGA inconsistency, but MDBA could reflect better practice – Participants of one jurisdiction agree on the need for some changes to the MDBA, but did not believe this was necessarily due to either the NWI or TLM IGA, but rather a matter of good practice.

Participants of this jurisdiction were cautious about embarking on change until there has been an adequate opportunity to ‘bed down’ TLM IGA under existing arrangements.

3 ISSUES - IDENTIFICATION AND EXTENT OF AGREEMENT

3.1 Overview

This part of the report identifies the issues raised and views expressed by the participants during interviews and subsequently in comments on the summaries of interviews.

In this issues identification, the extent to which participants agree or disagree has been expressed as follows:

All	all participants who commented on the issue
Most/generally	where the issue concerns only the southern connected Basin, participants of any 3 of the southern Basin jurisdictions and the Commonwealth; or where the issue concerns all jurisdictions, participants of 4 or more jurisdictions
Many	where the issue concerns only the southern connected Basin, participants of 2 jurisdictions; or where the issue concerns all jurisdictions, participants of 3 or more jurisdictions
Some	where the issue concerns only the southern connected Basin, participants of 2 of the jurisdictions, or 1 State jurisdiction and the Commonwealth; or where the issue concerns all jurisdictions, participants of 2 or more jurisdictions

Sections 3.2 to 3.6 identify and analyse those issues that were generally agreed to be of a higher priority. Section 3.7 discusses those issues in respect of which there was no such agreement, or alternately a general agreement that the issue was of a lesser priority. The priority classifications are based on the consultants' assessments of the participants' responses.

Discussion of both high and lower priority issues looks at:

- the nature of each issue, and how it is related to the question of 'consistency' with either or both the NWI or TLM IGA; and
- the extent to which the participants agreed about the overall importance of the issue, and how, in terms of process, the issue should be resolved.

Section 3.8 outlines other matters raised by participants which did not relate directly to the question of consistency, but which should nevertheless be considered further by the Parties, as appropriate.

3.1.1 Summary of high priority issues

Need for and scope of change – Issues include whether the MDBA remains an effective instrument in the face of current challenges, and the extent to which its effectiveness is or is not critical to delivery of NWI and TLM IGA; and the appropriate pace of, and forum for, change.

Water sharing – Issues relate to Part X of the MDBA, and include queries about the broad consistency of the Part with NWI principles, usefulness of the way waters are shared and the need to consider alternative sharing arrangements, including looking at sharing storage capacity and risk, and the availability and sharing of water for meeting environmental outcomes.

Management of water for environmental outcomes – Issues include the absence of ‘environmental’ management provisions within the MDBA; the role of TLM IGA and its relationship with the MDBA and with State laws; the role and function of the Cap; the fact that water that can be managed for environmental purposes comes in a range of forms⁶, and that different types of water are managed under different legal and administrative arrangements; the adequacy of Part X of the MDBA to provide or allow for environmental management of water, including specific provisions which may hinder management of water for environmental outcomes; institutional arrangements for management of e-water, including powers of an e-manager and the potential role of the Commission; and funding the management of e-water.

Prescriptive content of the MDBA – The MDBA is considered ‘patchy’ in its coverage: in respect to some matters, it is overly prescriptive (a number of specific operational provisions were raised, some of which are considered by some participants to be hindering management of water for environmental outcomes, including implementation of TLM IGA), while some participants feel that in other matters it does not contain enough detail (for example, in financial management and compliance).

⁶ Water available for environmental outcomes can include ‘recovered’ TLM water, environmental entitlements already held within a State prior to or outside of TLM IGA, unregulated water, and water held under a consumptive entitlement, whose delivery and/or use can have environmental benefits. This is an important issue and one which will require attention in developing any formal structure around e-water rights.

Financial management – Participants noted recent amendments to the financial provisions of the MDBA which have improved transparency in cost sharing, but nevertheless raised the application of ‘best practice’ principles to the MDBA financial management provisions.

3.1.2 Summary of lower priority issues

Institutional separation – The Commission presently undertakes aspects of each of the roles of water resource management, asset management, standard setting, policy development and service provision. Participants held a range of views about the need for institutional separation.

Status of TLM IGA – There was some discussion over whether TLM IGA ought to be explicitly linked to either or both the MDBA or State legislation, and whether its lack of statutory status has implications for its implementation and the management of recovered e-water.

Integrated water resources management and a ‘One River’ approach – Participants discussed the Council’s decision about a ‘One River’ approach and the NWI requirements for joint management of shared resources, and what these expressions of policy might mean.

3.1.3 Summary of other matters raised

Requirement to use Constructing Authorities for works under the MDBA – Concerns were raised about prospects of inefficiencies inherent in the requirement to use Constructing Authorities for the MDBA works.

Status of the MDBA itself – The role of the MDBA and its status in relation to other State legislation and to States’ rights to water was raised by a participant, as was the ‘transparency’ of amendments made to the MDBA.

Schedule G – Snowy Scheme – The Snowy Scheme was briefly mentioned by some participants, but was not seen as relevant to the Consistency review.

Compliance by the Parties with MDBA – Some participants raised as a concern the absence of MDBA provisions to enforce compliance by the Parties with their obligations.

Capability of works and the River to deliver e-water – There are some constraints within the River itself and in the capabilities of some works to pass flows at the rates that might be required for the delivery of e-water, including pursuant to the Basin e-water management plan. The issues are briefly identified.

Possible elements for a new Murray-Darling Basin compact – Although no participants indicated a need for a paradigm change in the MDBA, many volunteered ideas for possible elements of a new Agreement for further consideration. The suggestions are outlined in Section 3.9.

3.2 Need for and scope of change

3.2.1 Need for and scope of change

All participants agree that the Consistency review issues analysis is a valuable exercise in identifying areas of commonality amongst the Parties, and highlighting areas of difference.

Participants generally agree that the MDBA is outdated, and has been overtaken by current water resources management policy and programs as embodied in both the NWI and TLM IGA. Most also agree that this renders the MDBA, in a broad sense, ‘inconsistent’ with either or both those agreements. However, there is disagreement amongst the participants over whether this fact is or is not critical to delivery of NWI and TLM IGA and accordingly, over the scope and pace of any change needed.

Views expressed included:

Promote NWI broad principles and delivery of TLM and other e-water objectives – Most participants generally support a need for change to the MDBA to better promote NWI principles and/or the ability of the MDBA to deliver environmental outcomes and TLM IGA in particular⁷. Those participants feel that such change should be considered by the Governance review and Systems review, and are also not averse to considering fundamental changes to the MDBA during the Governance review should the other Parties agree.

Undertake a comprehensive review of the MDBA – One jurisdiction’s participants feel strongly that the NWI, TLM IGA and recent decisions of the Council have clearly overtaken the content, and perhaps even the underpinning framework, of the MDBA, and that the MDBA is in need of comprehensive and urgent review. For this jurisdiction, comprehensive review within the Governance review forum is a high priority.

⁷ Participants of one of these jurisdictions were non-committal due to the location of the jurisdiction within the Basin, but stated that they would not be opposed to a comprehensive review if the other Parties wished to pursue it during the Governance review. Participants of another jurisdiction were cautious that there should be no charge to change ahead of the significant policy debate yet to occur in respect of management of environmental water.

Most participants expressed views about a possible new Murray-Darling Basin arrangement, should the Parties agree to consider fundamental change, either as part of the Governance review or at some other time in the future.

The need for review is pressing to deliver TLM IGA and other e-water objectives – Participants of one jurisdiction consider that the need for review is pressing, but feel that the majority of issues pertain to delivery of environmental objectives (and in particular to delivery of TLM IGA), rather than to the NWI. These participants feel that while ideally some of the difficulties might be resolved through comprehensive change as a result of the Governance review, the Systems review is the appropriate forum for the more immediate and obvious operational changes to take place.

Changes to MDBA are required as a matter of good practice – Participants of one jurisdiction agree on the need for some changes to the MDBA, but did not believe this was necessarily due to either the NWI or TLM IGA, but rather a matter of good practice and should not be causally linked to the NWI.

Evolutionary changes have had anomalous or unintended outcomes, increasing the need for comprehensive review – The development of the MDBA from 1915 to date has been primarily a process of evolution. While there have been only two major shifts in the MDBA institutional framework, in recent times its functional scope has broadened to address quality and quantity management and natural resource management coordination within the Basin. The Parties have expanded the powers of the Commission in this respect through amendments to the MDBA and inclusion of Schedules, as well as through the development of standing procedures directed at the specific policy areas.

Participants in one jurisdiction expressed concern that the ‘layering’ that has occurred over the last two decades has allowed or led to outcomes that are anomalous to policy intentions. Schedule C and the limitations that it imposes on environmental management (see paragraph 3.5.2 below) were raised as an example.

3.2.2 Timing and process for review of MDBA

Variance in views – There is great variance in views on the urgency of addressing the inconsistencies between the MDBA and the NWI and TLM IGA.

However, participants generally agree that:

- the broader policy level inconsistencies identified should be considered as part of the Governance review;
- specific identified operational prescription within the MDBA that demonstrably hinders achievement of NWI or TLM IGA should be reviewed and amended expeditiously.

However, there is disagreement about whether such amendments should be presented ahead of any more fundamental amendments to the MDBA that might be pursued as a result of the Governance review⁸;

- the Governance review is a critical exercise, and one whose July 2007 deadline represents a significant challenge; and
- the Systems review is likely to be difficult and also time-consuming, with a timeframe of around 4 to 5 years considered realistic. Identified constraints on the systems review include the availability and consistency of modelling data across the jurisdictions, and the complex layering of operational protocols and modelling that have grown over the years.

One jurisdiction noted that if any changes were required to its water plans to accommodate, for example, implementation of TLM IGA, such change may trigger statutory requirements for the Government of that jurisdiction to pay compensation to affected water rights-holders.

Disagreement over priority – Some participants feel strongly that fundamental revision of the MDBA should commence immediately and be progressed through the Governance review, and that the context and guidance for change should be the agreed principles and objectives of the NWI. Others see such a review as too ambitious and insufficiently urgent; the priority for change being to address the operational matters.

3.3 Water sharing

Part X of the MDBA sets the way the resources of the southern connected Basin are shared and accounted for.

There was disagreement over whether there is any pressing need to change the water sharing provisions of Part X, but all participants are of the view that it needs to be considered by the Governance review.

⁸ The view of some participants was that only a single set of amendments to the MDBA, incorporating all changes, should be presented to the party Governments. These participants felt that policy positions in key areas (primarily management of environmental flows) would be likely to affect operational rules in any case, and that to attempt to consolidate amendments for operational rules ahead of policy agreement on key areas would be pre-emptive.

3.3.1 The expression of water entitlements

The entitlements of NSW, Victoria and South Australia are specified in the MDBA and cannot be altered by either the Council or Commission without amending the MDBA. South Australia's entitlement is volumetric and fixed. The entitlement of the upper States is variable and subject to delivery of South Australia's entitlement.

Bulk sharing provision essential – Participants agree that there is a need for a 'bulk sharing' provision such as Part X in an inter-jurisdictional agreement such as the MDBA.

Sharing provisions inconsistent with the NWI in the broad sense – However, many participants feel that the way the resources are shared is broadly inconsistent with the NWI.

Various reasons were expressed, including that the statement of entitlements:

- ***Does not proceed within a planning framework*** – One jurisdiction is strongly of the view that a planned approach should be adopted for water sharing, considering the needs and expectations of all users. This should be done by setting the environmental needs as the highest priority, then determining the consumptive pool, and how to share them. However, another jurisdiction is of the equally strong view that the absence of a planned approach is of no relevance to the NWI principles. Participants of another jurisdiction think that because Part X does not state that the shares are for consumptive use, and TLM IGA and the Cap superimpose environmental objectives over the stated shares, there was no broad inconsistency.
- ***Does not allocate risk amongst all Parties*** – the shares to South Australia are fixed rather than being based on available water⁹, as is the case for the other two States. A number of participants think that it is inconsistent with NWI principles to have one State in a guaranteed position rather than sharing risk.
- ***Is not adaptive to change*** – that might occur as between States because of interstate water trade, or to changes to inflow because of processes such as climate change.
- ***Does not account for all influences on the shared resources*** – such as use of groundwater and overland flows.

⁹ Except in the case of periods of 'special accounting'.

3.3.2 Sharing water for e-outcomes

MDBA does not identify water for the ‘environmental pool’ – Some participants feel that the absence in Part X of provisions identifying, sharing or otherwise accounting for water for environmental purposes is inconsistent with NWI in a broad sense. These participants noted that NWI clause 35 requires that water identified (within State plans) for environmental and other public benefit outcomes is given statutory recognition (whether the water is rules based or held as an entitlement), at least to the same degree of security as water for consumptive use, and is fully accounted for.

The participants also noted that the absence of such provisions compounds the effects of the absence of MDBA provisions concerning the management of water for environmental outcomes. While water recovered under TLM IGA as an entitlement will have security on par with consumptive entitlements, and its level of reliability specified, there is a need for MDBA to provide for specification of other e-water so that it is also ‘secure’ in the sense that it maintains its specified characteristics over time.

There is disagreement amongst other jurisdictions’ participants over whether Part X should be a priority for change for this reason, but general agreement that the identification and management of water for environmental purposes should be further considered in the Governance review.

3.3.3 Sharing storage capacity

South Australia has no explicit right to a share of storages – The MDBA has provided for costs of the construction and ongoing maintenance and operation of the major storages to be shared by the jurisdictions. The storages facilitate the delivery of South Australia’s fixed annual entitlement. However, South Australia does not have control over a defined share of the storages such that it could for example, hold over part of its entitlement, or water gained through interstate trade, for delivery in a subsequent year¹⁰.

The fact that South Australia does not have a direct access ‘right’ to a share of the Basin’s storage capacity was raised by participants of three jurisdictions. All feel that the Parties should consider sharing storage capacity as a means of allowing South Australia to better manage its water share as well as water for environmental purposes, and for improved management of interstate water markets, as access to storage capacity could enable South

¹⁰ There is provision for variation in monthly entitlements requiring a decision of the Commission but it is limited and does not meet SA needs.

Australia to allow ‘carry over’. Many participants see the sharing of storages as a necessary element to address current inequity in risk-based sharing.

3.3.4 Accounting for impacts of groundwater use

Absence of groundwater accounting is contrary to integrated management of water resources – Part X of the MDBA does not share water in groundwater systems nor include such water in Cap accounting. Participants of one jurisdiction noted that the absence of groundwater use accounting under the MDBA does not support an integrated approach to management of water for environmental (or any other) outcomes and is therefore broadly inconsistent with the NWI, and may also undermine the integrity of the Cap.

3.3.5 Accounting for tributaries – ‘end-of-valley’ flows

The MDBA gives NSW and Victoria rights to their tributary flows, subject to provision of South Australia’s fixed entitlement. Tributary flows affect flows in the Basin’s main river systems. Use of water within the catchments affects tributary flows and flows to the Murray and lower Darling Rivers.

Although the role of the Cap in accounting for and limiting diversions from tributaries is recognised, participants of one jurisdiction feel that inclusion of ‘end-of-valley’ flows targets in the MDBA and/or State water plans would facilitate the provision and management of environmental water throughout the Basin.

3.4 Management of water for environmental purposes

Participants raised a number of significant issues relating to the management of e-water, namely:

- absence of e-water management provisions in the MDBA;
- powers of the Commission;
- management of unregulated flows;
- the role and function of the Cap;
- institutional arrangements for e-water including environmental managers; and
- funding management of e-water.

3.4.1 Absence of e-water management provisions in MDBA

It is generally agreed by participants that the absence of specific provisions in the MDBA that provide for the management of water for environmental outcomes – fails to assist in (and might actively hinder) delivery of environmental objectives and implementation of TLM IGA, and is also likely to be, in a broad sense, inconsistent with NWI provisions for managing water for environmental and other public benefit outcomes.

There is disagreement over the urgency with which these shortcomings needed to be addressed, but agreement that the management of water for environmental purposes should be further considered by the Governance review.

Views expressed included:

MDBA silence on e-water is clearly incompatible with NWI – Participants of one jurisdiction noted that the silence of Part X on e-water is clearly incompatible with NWI objectives, which require that e-water has a level of security¹¹ at least on par with consumptive water and that it be fully accounted for¹². A comprehensive Part X would not be silent about these matters, and this is a matter of priority for that jurisdiction.

Collaboration can deliver outcomes without change to MDBA – Participants of one jurisdiction acknowledge the absence of MDBA provisions for management of e-water, but are of the view that this does not present any real obstacle to delivery of TLM IGA or the NWI objectives, which they feel would be overcome through negotiation and collaboration amongst the jurisdictions within existing provisions of the MDBA.

Specific aspects of MDBA hinder implementation of TLM IGA – Participants of two Southern Basin jurisdictions identified specific aspects of Part X dealing with sharing of water and accounting for shared water, Schedule C and the Commission’s standing provisions and operating protocols, which are likely to present difficulties in delivering TLM IGA. These matters are set out in Section 3.5 below.

Determine policy about e-water recovery and management first – Participants of one jurisdiction, while agreeing that there should be more explicit provisions for e-water management so that the MDBA would promote, or at least not hinder this objective, feel that a lot more work is needed to develop agreed policy positions around the detail of recovering,

¹¹ Note that the NWI uses the term ‘security’ to refer to the security of the property right itself, not the reliability with which allocations under the entitlement might be delivered.

¹² NWI Clause 35 requires that water for environmental and other public benefit outcomes is given statutory recognition (whether the water is rules based on held as an entitlement), at least the same degree of security as water for consumptive use, and is fully accounted for.

holding and delivering water for environmental purposes before coming to any conclusions about the nature of such changes.

MDBA should coordinate management of all forms of e-water – Most participants acknowledge that water that can be managed for environmental purposes comes in a range of forms¹³, and that different types of e-water are managed in each jurisdiction under different legal and administrative arrangements. The MDBA must allow the TLM IGA to be implemented according to its terms, but should also provide for the ongoing management of environmental water generally (not just TLM IGA water), consistently with NWI objectives for management of environmental water for shared resources.

TLM IGA does not remove the need for e-water management within the MDBA – TLM IGA is a significant instrument for recovery and management of a specific bundle of water, but it is not seen by participants as removing the need for the MDBA to include specific provisions about e-water management.

3.4.2 Power of the Commission to direct releases of water

Clause 95 of the MDBA empowers the Commission to give directions about the release of water from upper River Murray storages, and to make standing procedures for that purpose. The MDBA specifies that in giving directions, the Commission must have regard to maintaining supply to South Australia, maintaining a minimum reserve in storage, and facilitating the exercise by NSW and Victorian of their respective rights to use water. As a secondary consideration, the Commission may have regard to improving or maintaining water quality and other water management and environmental objectives consistent with the MDBA.

There is general agreement that the provisions of clause 95 are either or both broadly inconsistent with NWI, or a hindrance to implementing TLM IGA. Participants of one jurisdiction disagree that change is required to the MDBA to correct this.

Views expressed on the issue can be summarised as follows:

Clause 95 is broadly inconsistent with either/both NWI and TLM IGA – Participants of most jurisdictions agree that the way the Commission's powers in clause 95 are expressed, and the operation of standing procedures, are 'out of step' with what is required to allow the

13 E-water includes 'recovered' TLM water, environmental entitlements already held within a State prior to or outside of TLM IGA, water available for environmental purposes as a result of States' water management plans, unregulated water, and water held in the consumptive pool, whose delivery and/or use can have environmental outcomes.

management of water for environmental or other public benefit outcomes, including the potential to manage consumptive water so that it also achieves environmental outcomes.

Collaboration can deliver outcomes without change to MDBA – Participants of one jurisdiction disagree that any change was needed in order to implement TLM IGA and any NWI requirements about integrated e-water management, feeling that it would be possible for the Parties to collaboratively “work within” the existing provisions of the MDBA, particularly as the Parties are also party to the TLM IGA and NWI.

3.4.3 Unregulated flows

There is no agreement that the management of unregulated flows is relevant to consistency with the NWI, nor that it needs to be considered as part of the Governance review, given recent resolutions of the Council in relation to unregulated flows¹⁴. There is some recognition that the variety of terminology used has contributed to a lack of understanding about the nature of the flows.

Views expressed included:

MDBA provisions about unregulated flows do not support Basin scale outcomes – Participants of three jurisdictions agree that the way Part X shares and accounts for unregulated flows is broadly inconsistent with NWI provisions about the recognition of, accounting for and management of e-water because it does not support the management of unregulated flows for Basin scale outcomes. Some participants noted recent resolutions of the Council. For one jurisdiction, change in management of unregulated flows is a high priority, and should be considered in the context of the sharing of all water under the MDBA.

Unregulated flow management is not relevant to NWI consistency – Participants of two other jurisdictions do not agree that the management of unregulated flows is a question of consistency with the NWI, nor do they agree that the management of the flows is necessarily in need of resolution, especially where those flows occur within the tributaries.

¹⁴ At meeting 38 (September 2005), the Council directed the Commission to “investigate compatible Basin-wide water accounting processes which provide open and transparent measurement of all water sharing arrangements including surplus flows”.

At meeting 40 (May 2006), the Council:

- Noted that the MDBC will be reporting to the Council on unregulated flows in September 2006;
- Directed the MDBC to include in this report advice on how unregulated flow within the M-D Basin might be clearly defined, quantified, managed, monitored and reported on in the Living Murray Initiative; and
- Directed the Commission to include certain documents with the report.

The Council also noted “the management of all environmental flows for the River Murray, including unregulated flows, requires a ‘One River’ approach. In this respect, the appropriate vehicle is an agreed Living Murray Watering Plan, as amended from time to time.”

3.4.4 Role and function of the Cap

There is general agreement that the Cap (Schedule F) is an historical marker – a benchmark to halt further growth – and a tool for compliance management of extractions, not a reflection of sustainable levels of extraction based on a determination of sustainable diversion limit. However, there is disagreement over whether the Cap is, by that definition, therefore inconsistent with the NWI and in need of change.

Views expressed included:

The Cap does not limit consumption on the basis of ‘sustainable diversion’ – Participants of one jurisdiction see the Cap as being inconsistent with the NWI because it limits consumptive use of the shared waters, yet it does not do so on the basis of a determination of sustainable diversion limit.

The Cap is not a ‘water plan’ – Contrary to the above view, the majority of participants agree that the Cap is not inconsistent with the NWI, because the Cap is not a ‘water plan’ within the meaning of the NWI and is not itself a tool for addressing overallocation, and because States are obliged to ensure sustainable diversion of their resources regardless of provisions within the MDBA or Schedule F.

Water sharing changes and e-water will drive Cap changes – One jurisdiction noted that if there is any significant change to water sharing provisions and environmental water provisions, there should be resultant change in the role of the Cap.

The Cap will evolve – Most participants, regardless of whether they think there is an NWI consistency issue, think that the Cap will evolve over time. Participants hold various views on evolution of the Cap:

- it should over time be amended so that it reflects sustainable levels of diversion (and perhaps this could happen after all States have brought over-allocated systems into balance, as required by the NCP water reforms¹⁵);
- it could be broadened to indicate limits to consumption of significantly connected surface and groundwater resources; and
- recovery of water under TLM IGA will result in Cap reductions, progressively bringing the Cap closer to reflecting sustainable diversion levels.

¹⁵ The CoAG water reforms of 1994, commitment to which was restated in NWI clauses 6 and 41 to 45.

The Cap should remain unaltered – Participants of one jurisdiction reject any change to the Cap, which in their view should remain unaltered, as a benchmark for progress rather than an environmental management tool.

Unresolved Caps – Participants from Queensland and the ACT noted that the Cap for those systems, including systems within the NSW-Queensland Border Rivers, will in fact be set at a sustainable level of diversion, due to the fact that the Cap will be finalised *after* the completion of NWI-compliant water sharing planning in those jurisdictions, highlighting the difference in what the Cap represents in different jurisdictions.

The nature of the Cap is of primary importance for ACT and its intention is to resolve its position over the next 6 to 12 months.

3.4.5 Institutional arrangements for management of e-water

The NWI includes provisions¹⁶ about arrangements to achieve environmental and other public benefit outcomes where resources are shared by jurisdictions. Jurisdictions are expected to provide for environmental managers, which are accountable for achieving those objectives.

Lack of an institutional framework for environmental manager – Participants discussed whether the MDBA is consistent with the NWI in not providing for the Commission (or other body) to fulfill the role of environmental manager for shared resources. Participants hold varying views, but the majority feels that the issue is not one of consistency with the NWI, as Parties have not yet agreed on the allocation of roles and responsibilities for environmental water management for shared resources.

Commission as an environmental manager – Participants do not agree on whether the Commission should fulfill a role as environmental manager for any water.

A range of bodies are involved – Participants noted that roles and responsibilities in the management of e-water are dispersed as appropriate to the water or environmental asset being managed. A range of bodies is involved, with local bodies (such as Catchment Management Authorities) increasingly playing a hands-on role. It was also noted that the Council has recently agreed that both the Commonwealth and the Commission may invest in water recovery measures, with the result that those bodies may also hold e-water entitlements.

¹⁶ Clauses 78 and 79.

3.4.6 Funding the management of e-water

MDBA should apportion costs of holding and delivering e-water – Participants of some jurisdictions feel that on a broad level, consistency with NWI best practice water pricing requirements requires the Parties to address the issue of apportioning costs of holding and delivering e-water. Other participants are of the view that the issue is not one of NWI consistency, but nevertheless is a priority to resolve as a matter of good practice, with any resolution being ‘informed’ by NWI principles, rather than driven by any consistency requirement.

Specific matters identified by the Parties in respect of funding the management of e-water, including TLM IGA water, include:

- whether TLM recovered water, the SEAs and/or works constructed in relation to delivering TLM recovered water under the Basin e-water plan, should be considered works or measures under the MDBA;
- whether ongoing funding in relation to the recovered water and associated works should be apportioned under MDBA clause 65;
- whether the holder of an e-water entitlement (eg, the Commonwealth or Commission) will be viewed as a ‘user’ of water, and therefore pay costs, or alternately whether the receiving environment will be considered a beneficiary, and that costs be paid by the State in which the e-water is applied at any particular time; and
- whether consumptive users should pay for e-water management: this already occurs in some States through application of an environment levy.

3.5 Lack of flexibility within MDBA provisions

3.5.1 Prescription of water shares and accounting rules

Part X comprises the basic statement of distribution of entitlements to water, and a number of complex and interrelated accounting rules by which the shares are tracked and managed. The provisions do not acknowledge e-water, nor do they envisage the type of initiative provided for in TLM IGA.

Most participants agree that the rules may be considered broadly inconsistent with NWI in that they do not specifically consider integrated management of water for environmental and other public benefit outcomes, and do not take account of the need for adaptive management.

Views expressed included:

Excessive prescription reduces ability for opportunistic management – A number of participants identified excessive prescription in some of the sharing provisions and operational rules as a direct hindrance to implementing TLM IGA. Participants of several jurisdictions noted that environmental management needs to be opportunistic, and that this means that delivery rules need to be adaptive and responsive to opportunity.

Specific examples raised by some participants of Southern Basin jurisdictions are:

- *Salinity takes precedence over other environmental considerations* – the absence of recognition of environmental considerations apart from salinity, for releases from storages. Schedule C demands certain operational protocols under clause 60.
- *Fixed entitlement and lack of carry-over for SA* – South Australia’s fixed monthly entitlement pattern was designed entirely for consumptive usage patterns. Even though only one third of that entitlement is actually used for consumptive purposes, the water cannot be ‘saved’ for later strategic release under the current Part X. This inability of South Australia annually to ‘carry over’ water limits its ability to best manage the water available to it. There was general agreement that South Australia should have a share of storages, and a right to manage its share of the storages.
- *Reserve in Lake Victoria* – MDBA clause 100(4) requires the first 250,000 ML of minimum reserve to be held in Lake Victoria ‘unless the Commission determines otherwise’. An alternative might be to replace the sub-clause with a positive obligation on the Commission to determine from time to time the appropriate proportion of reserve to be held in the Lake, in light of decisions made about managing channel capacity and Lake Menindee, as well as other issues.
- *Menindee Lakes management* – the 480,000/640,000 ML reserve rule hinders management of the Lakes for good environmental outcomes.
- *Static dilution flow:*
 - o *ADF releases* – Water is released under Additional Dilution Flow standing procedures at a fixed rate, irrespective of environmental requirements or the ambient or forecast salinity that it purports to address, nor is there any recognition in the MDBA of outcomes other than improved salinity.
 - o *Fixed monthly dilution flow* – A monthly dilution flow of 58 GL entitlement is supplied to South Australia year round. This fixed amount (a standing rule under MDBA clause 95), again does not allow for the benefits of fluctuations in flow, nor is it based on actual salinity at the time of release, or seasonality of flow. The dilution

flows are standing procedures for releases from the storages under clause 95(2), and a unanimous vote of the Commission is required to alter them.

Default procedures coupled with unanimous voting requirements create inertia – Participants of two jurisdictions noted that having established default positions (eg, in the standing procedures long established under clause 95, or in a prescribed default position such as clause 100(4) in relation to Lake Victoria) that allow less than optimum results, and which require a unanimous vote to alter, is preventing water being used to provide the best outcomes. The situation reflects the difficulty of Commission to reach agreement over prioritisation of environmental outcomes.

3.5.2 Schedule C – Salinity and Drainage

Salinity takes priority, limiting other outcomes – Participants of three jurisdictions feel that Schedule C has the potential significantly to hinder delivery of TLM IGA. It was noted by these participants that Schedule C treats salinity as an environmental priority above others. Schedule C, and operational rules made under MDBA clause 60 as required to implement Schedule C, prevent flexibility to manage flows for other environmental purposes. (It was pointed out for example that release of Menindee water to achieve a winter watering at Chowilla cannot happen unless salt credits are available to South Australia.)

3.5.3 Prescription in infrastructure management

There are a number of provisions in the MDBA that prescribe the management of infrastructure, or allow the Commission to do so. Participants of the three Southern jurisdictions generally agreed that the provisions are excessively prescriptive. Participants of the other jurisdictions did not express a view.

Excessive prescription hinders implementation of TLM IGA – Participants of two of the jurisdictions feel that the excessive prescription will present a hindrance to effective delivery of TLM IGA. The other jurisdictions disagree that this will result, feeling that the Parties can manage adequately under existing provisions.

Specific provisions raised by participants as examples are:

- *Obligation of a State to operate works in accordance with standing procedures* – as noted above, the unanimous voting requirements and use of established standing procedures have been identified by some participants as preventing flexibility in delivering e-water requirements.

- *Provisions that hinge on the need to maintain paddle steamer depth* (ie, clause 62(b)) – greater flexibility should be provided to enable the Parties to balance a range of public benefits, (including recreation and navigation), and environmental demands on the river.
- *Commission’s powers to require the submission by the States of proposals for certain works and measures* – were noted by one jurisdiction to have caused delays in that State in constructing works necessary for e-water management. It is felt that a more streamlined process is needed in the MDBA to balance the Commission’s interests with a flexible approach to delivering e-water outcomes.

3.6 Financial management

The NWI includes provisions about ‘best practice’ water pricing, which include giving effect to principles of user pays, and achieving pricing transparency in respect of water storage and delivery, and cost recovery for water planning and management¹⁷.

NWI consistent cost-recovery principles should be embedded in MDBA – Most participants agree that although recent amendments to the financial provisions of the MDBA have improved transparency of cost sharing, the MDBA should explicitly embed NWI-consistent cost recovery principles as a matter of good business practice.

This is seen as a reasonably high priority, and one that should be dealt with by the Governance review. It is noted that financial arrangements are earmarked for consideration in the Governance review.

Requirement for Commission to apportion costs should be explicit – It is a high priority for participants of two jurisdictions that the MDBA should include an explicit requirement for the Commission to identify and apportion costs across its operations (including separating supply and environmental and water planning and management costs) and amongst the Parties, rather than just allowing the Commission to do so. Provisions should include a requirement for Parties explicitly to identify their costs, using a consistent accounting protocol.

Menindee Lakes – Participants of two jurisdictions feel that the MDBA should explicitly require proper cost recovery for operation of Menindee Lakes.

Range of significant concerns – Issues raised by various participants in discussion on financial management indicate the depth of concern over this aspect of the MDBA. Matters raised by the Parties include:

¹⁷ See NWI clauses 64 – 77.

- Lack of consistency in the States’ asset management financial policies (i.e., valuation techniques; depreciation; lack of independency of cost setting audits; asset insurance; etc) which affect the way States set their budget for capital expenditure for MDBA activities;
- Tariff structures used by the States to set consumptive user prices and whether the MDBA should contain provisions for consistent approaches to setting of prices for water delivery;
- Cost recovery of natural resource management and water planning activities associated with applications of Commission policies – including processes for separate identification of costs and apportionment of costs of Commission water supply and environmental operations amongst the jurisdictions;
- Use of an independent body to oversee cost setting and recovery procedures;
- Policies for recovery of a share of the costs for e-water management from consumptive water users;
- Jurisdictional policies on the level of contributions for environmental water management and public benefit related activities including management of the TLM IGA ‘icon sites’;
- Resolution of tariff arrangements for application of State charges to recovered water;
- Whether tariff structures applied by the States to set user prices may introduce anomalies in water markets;
- Independence in policy setting for determining costs apportioned to the jurisdictions, and appropriateness of the Commission ‘in house’ discretion on cost setting (in line with NWI pricing requirements); and
- Resolution of the adequacy of cost recovery for operation of Menindee Lakes.

3.7 Lower priority issues

3.7.1 Institutional separation

The NWI requires that as far as possible, the roles of water resource management, standard setting and regulatory enforcement, and service provision, be separated. The Commission presently undertakes aspects of each of those roles.

There is generally a low level of support for separation. Most participants do not think that institutional separation of the Commission is a high priority.

Various views were expressed, including:

Effort of separation not worth the benefits – Most participants feel that institutional separation would ‘not be worth the effort’, for reasons including:

- *The scale of RMW's business is small* – and its main roles are the giving of directions and coordination;
- *'Environmental' water cannot always be separated from 'consumptive water'* – as consumptive water can be managed for environmental benefits;
- *Requirements for e-water management would need to be codified* – it would be difficult to specify and regulate the environmental requirements, and the benefits of institutional separation are not worth the effort required to achieve a workable outcome;
- *The ring-fencing of RMW is adequate* – what matters is that there is certainty and accountability – clarity of responsibilities, including for managing e-water, and clear commercial financial drivers for the RMW business.

Not averse to separation if others wish to pursue – Participants of one of the jurisdictions which agreed that separation would not be worth the effort, nevertheless indicated that it jurisdiction would not oppose separation if others wish to pursue it.

Institutional separation should be pursued – Participants of two jurisdictions believe that institutional separation should be further considered:

- one group feel that there is a conflict in roles within the Commission, in that the Commission undertakes price fixing, managing water and delivering water;
- the other group noted that the current RMW arrangements give no clear accountability or responsibility for delivering the environmental flow requirements¹⁸, or other requirements to supply water and have inadequate financial drivers.

Queensland indicated the separation and corporatisation of SunWater is delivering considerable improvements in accountability for delivery of consumptive and environmental requirements, and a greater commercial ethic in customer service.

One jurisdiction reported on its own experience that going through the process of institutional separation both intellectually and practically addresses many of the higher NWI priority issues or provides a framework to address many of the higher priority issues listed in this report.

¹⁸ This could present a problem if third party consequences, for example, the flooding of private land, were to result from RMW operations.

Ensure best practice – Some participants noted that if separation were not pursued, it will be nevertheless necessary for the Parties to ensure that RMW’s management and operational practices meet ‘best practice’ principles¹⁹.

Remove modelling responsibility – One jurisdiction feels that RMW should not retain responsibility for modelling, as modelling drives resource management policies, suggesting the function should be undertaken by the Natural Resources Management Division of the Commission.

3.7.2 Status of TLM IGA

TLM IGA is an intergovernmental agreement that is not supported by statute. Relevant parts of the TLM IGA (including the requirement to prepare a Business Plan) have been adopted by the Council by resolution.

Participants generally agree that there is no need, for either consistency with NWI or implementation of TLM IGA, to amend the MDBA formally to incorporate TLM IGA.

Views expressed include:

TLM IGA is a first step only – Participants of one jurisdiction noted that TLM IGA is a fixed investment to recover a fixed volume of water in a fixed period of time, which is progressing with the cooperation of all jurisdictions. While it is not necessary to tie the TLM first-step decision to the MDBA, there may be merit in looking to incorporate the framework within the MDBA for future e-water initiatives.

Comparison with Schedule G requirements – Participants of one jurisdiction which did feel that TLM IGA should have a higher status (albeit this was not a high priority for that jurisdiction) compared TLM IGA with the Snowy arrangements. The Council is required by Schedule G to prepare a Strategy for River Murray Increased Flows. It was suggested that the MDBA could require the Commission and States to prepare e-watering plan and asset plans. Such an arrangement is not supported by those jurisdictions that commented on it.

State laws need to support TLM IGA implementation – A number of participants feel that the main issue relevant to the status of TLM IGA is the extent to which State laws will support implementation. Some participants feel that State laws should refer to TLM IGA and its implementation, but there is not overall general support for this suggestion, given that the

19 Relevant principles include certainty and clarity of powers, accountabilities, roles, rights and obligations; clear identification and application of commercial financial drivers; consistency in policies applied by the States in management of their service delivery functions (but not necessarily in their institutional mechanisms); consistency in financial management (such as in approaches to asset valuation; depreciation; independent audits of cost structures etc); and effective audits of RMW’s service delivery performance.

Parties are still in the very early days of implementing TLM IGA. Some participants noted that if TLM water is owned by the jurisdiction in which it was recovered, there should be no impediment to delivering water within that State in accordance with TLM requirements.

3.7.3 Integrated water resources management in the Basin – joint arrangements and a ‘One River’ approach

NWI clause 79 requires the parties to establish effective arrangements to ensure achievement of environmental and other public benefit outcomes, including by joint arrangements where resources are shared between jurisdictions.

The Council (May 2006) resolved to recognise that:

‘the management of all environmental flows for the River Murray, including unregulated flows, requires a ‘One River’ approach. In this respect, the appropriate vehicle is an agreed Living Murray Watering Plan, as amended from time to time.’

What is a ‘one river’ approach?

Not seeking Basin-scale management of all water resources – While there is some disagreement about what a ‘One River’ approach might mean, there is general agreement amongst participants that no party was seeking Basin-scale management of all water resources, and there was no intention that a ‘One River’ approach should cut across jurisdictions’ responsibilities for resources other than shared resources.

Common high-level goals are appropriate – Participants agree that it was appropriate to have a forum for agreeing and implementing, to an appropriate extent, common high-level goals for management of shared resources.

‘End-of-valley’ outcomes – Most participants agree that ‘end-of-valley’ outcomes would satisfy a ‘One River’ approach. Establishing end-of-valley outcomes, would mean accounting for the management of quantity and quality of overland flows²⁰, interception activities and connected groundwater sources, and may also improve coordination between States’ water plans in respect of these policies. Several jurisdictions indicated that the implications of such a policy would have to be assessed.

Competing interests

Managing potentially competing State vs Basin interests – Participants of one jurisdiction noted that the NWI emphasizes the requirement for States for provide for e-water within the

²⁰ All surface runoff.

State, but does not give equal weight to providing for e-water on a Basin scale. The NWI requires the States to adopt joint arrangements for e-water management of shared resources, but is not explicit about dealing with possible needs for trade-off against internal State NWI e-water provision. Participants of this jurisdiction feel that it would be possible for States to provide for e-water in a way that would satisfy State needs but not necessarily Basin-scale requirements. In contrast, if NWI principles were applied at a whole-of-Basin scale, the result would be the best for the Basin.

Inter-jurisdictional tensions are unavoidable – Participants of other jurisdictions who commented on the issue of State vs Basin interests noted the apparent tension, but felt that the tension is unavoidable, a necessary result of having States, and a matter properly debated and outcomes negotiated through the forums provided by the MDBA.

3.8 Other matters raised

Other matters were raised by participants, which do not relate directly to the consistency of the MDBA with NWI, or implementation of TLM IGA. They are recorded here to reflect the range of issues raised.

3.8.1 Requirement to use Constructing Authorities for works under the MDBA

It was raised by participants of one jurisdiction the requirements for works to be managed by nominated Contracting Governments and their Constructing Authorities (clauses 50 to 55) is unnecessarily inflexible and constrains the ability of the Governments efficiently to get work done. This could be a competition policy issue rather than an NWI issue and should be considered by the Parties during the Governance review.

3.8.2 Status of the MDBA itself

MDBA does not change the States' sovereign rights to water – Participants of one jurisdiction commented that in their view, the Australian Constitution 'vests' water in the States, and the MDBA does not share water between States or change the States' sovereign rights to water. Rather, the MDBA is an overlying agreement between States, which by agreement sets accounting rules for water. For these participants, the MDBA is and should be subject to other State laws.

It is noted that this view was not specifically examined with the other jurisdictions' participants. However, water legislation in both SA and Victoria is expressed to be 'subject to the MDBA, rather than the reverse.

Transparency of and accountability for MDBA revisions – One jurisdiction noted that the use of Schedules to specify and implement new policies reduces the ‘transparency’ of the MDBA.

Schedules are not developed in the public arena, and do not require Parliamentary debate before coming into operation. Schedules may be tabled before Parliaments of the Parties at different times, leading to confusion over which version of the MDBA is current at any given time. Some Parties’ keep all Schedules as agreed by the Council available for public access as part of the State’s publication of legislation, while others do not. The Commission website also contains a version of the MDBA and Schedules.

3.8.3 Schedule G

The potential for consistency issues arising from Schedule G is a matter recommended in the preliminary review report for further consideration by the Parties. No participant feels that Schedule G presents any consistency issue, nor any issue for implementation of TLM IGA.

Participants of one jurisdiction noted that as Schedule G is intrinsically linked to the Snowy Hydro Agreement, which is not under review for consistency with the NWI, Schedule G should not be under scrutiny at this time in any case.

3.8.4 Compliance with MDBA

Participants from two jurisdictions noted that the MDBA lacks provisions for compliance. It was noted that non-compliance with the Cap, or with notification requirements under clause 46, has no implications under the MDBA itself (albeit there may be varying political implications for non-compliance). Some of those participants raising the issue suggest that the MDBA could provide for the application of financial penalties in the case of non-compliance.

Participants of one jurisdiction feel that the lack of compliance provisions highlights the fact that there is nothing in the MDBA that binds the Parties to collaborative management of e-water.

3.8.5 Capability of works and the River to deliver e-water

Channel capacity sharing – There are views from some participants that limitations on channel capacity may hinder the ability to deliver flow rates for servicing both e-water and consumptive needs. It is suggested by these participants that the sharing of channel capacity, including through allocating delivery priorities, may be required in future.

Capabilities of works to deliver flows – Participants in one jurisdiction raised the inadequacy of some works to allow the flexibility of flow that may be required.

Some participants feel that there is merit in the Parties investigating the possibility of capacity sharing of the channel and works' outlets.

3.9 Elements of a new Murray-Darling Basin compact

Many participants volunteered ideas for possible elements for a new Agreement, should the Parties proceed to consider significant changes in the framework and function of the MDBA to ensure that it better meets the challenges that face it, as well as better reflecting principles within the NWI.

3.9.1 Framework for a model

Suggestions included:

Establish principles then work to detail, but only as much detail as required – The starting point for any new arrangement should be agreement on central NRM principles (many of them contained in the NWI), then moving down to governance and arrangements for sharing water, storages and costs.

Divide powers and responsibility, following a Constitutional-style model – the Agreement should broadly specify where powers and functions will reside, and allow for addressing things in the future that may be unforeseen at the time of drafting. Parties would need to determine the level at which various powers and functions should lie (ie, Parliaments, Council or Commission).

An overarching Agreement – leave Regulations and other subordinate arrangements to set out all operational details.

Address only River Murray water delivery through an inter-jurisdictional agreement – leave agreements such as NWI to guide the delivery of broader water and natural resources reforms by the States.

Compatible approaches amongst all jurisdictions – any cross-jurisdictional arrangement will work best if the Parties have compatible approaches to water allocation, water markets and pricing.

Integrate Border Rivers Agreement into MDBA – include the NSW/Qld Border Rivers Agreement as part of the MDBA, possibly basing a new MDBA on the principles used in that Agreement.

3.9.2 Sharing water and other assets

Suggestions included:

Share available water and storage capacity – a share-based system could be used, with States sharing available water and capacity shares of storages. Starting points could be to share the consumptive pool on the basis of each State’s Cap, or as equal third shares.

All entitlement holders should share storage capacity (not just the upstream States) – this would require a clearer definition of rights and responsibilities under the MDBA.

Share water through a planning framework – A model that could be considered is that used in the *New South Wales-Queensland Border Rivers Act 1946*, presently under review to ensure a whole-of-catchment approach to sharing the resources of the Border Rivers.

4 CONCLUSIONS

In Conclusions, the views of the jurisdictions' nominees are referred to as views of jurisdictions. However, it is noted that jurisdictions have not formally endorsed the views of their nominees as necessarily being the views of the jurisdiction.

The following conclusions are those of the consultants drawn from Part 3 of the issues analysis.

4.1 Key conclusions of a general nature

The general key conclusions, drawn from the Consistency review issues analysis, are:

(1) Jurisdictions express their views on the meaning of 'consistency' for the purposes of the NWI review requirement in different ways. It is the view of the consultants that there is no significant disagreement amongst the jurisdictions about what is meant by consistency.

(2) The views that the MDBA is outdated represents a very broad inconsistency with NWI and TLM IGA, but is not seen as the type of inconsistency to be pursued in the context of the Consistency review. The Governance review should explore those issues further.

(3) Jurisdictions hold a variety of views about consistency, but most agree that:

(i) on a narrow interpretation of 'consistency', there is probably no direct inconsistency between the MDBA and the NWI to obstruct implementation but may influence effectiveness of delivery. The recent adoption of the new Schedule E has delivered the Murray-Darling Basin Agreement's direct role in relation to interstate trade matters in the NWI;

(ii) on a broader interpretation the MDBA is not entirely compatible with NWI policies and TLM IGA objectives; and

(iii) the broader level inconsistency occurs at two levels: in terms of policy and framework of the MDBA (for example, in water sharing and e-water management) as well as operationally (for example, in the way the works must be managed under the MDBA).

(4) Individual jurisdictions hold strong positions on the adequacy of the MDBA in areas of (a) water sharing; (b) e-water rights management including Cap implications; (c) financial arrangements; and (d) over prescription of operating rules; to effectively deliver the NWI and TLM outcomes. Under the consistency theme there are contrary positions of either supporting change or seeing no change. Priorities also vary but most regarded these issues as having high priority.

(5) Because of such variances, it is considered the Governance review could benefit from the Commission providing this report and additional background information on a number of the key issues. Appendix 4 contains some indications of such additional background information.

(6) In the key areas where inconsistency is seen, covering policy and operational matters, it is our view the Governance review is the appropriate forum for the broader level consistency considerations.

(7) In the course of the Governance review, the Parties should take into account all prior resolutions of the Council, and possibly also the Commission, that shed light on previous agreements reached, and decisions made, on policy related issues²¹. The decision registers should be examined for this purpose.

4.2 Conclusions on high priority areas

4.2.1 Water sharing

(1) As the issue analysis has confirmed Part X of the MDBA, which sets the way the resources of the southern connected Basin are shared and accounted, as a key focus area, it is considered the MDBA might address:

(i) potential partitioning of States bulk shares between a consumptive pool or e-water. It is not seen as a consistency issue, nor is it favoured by most jurisdictions, but it is an option, which the Governance review might examine, especially if the Commission were assigned an environmental manager's role;

(ii) improvement in the effectiveness of delivering NWI objectives, especially in areas of e-water management and connectivity in sharing of all water sources, which has Cap accounting implications;

(iii) storage capacity sharing between the three southern States which may provide a means to address risk inequity, provide greater flexibility in delivery e-water outcomes and support interstate water trading, but it needs to be assessed. The current Commission model would require revisions to enable storage capacity sharing (by 3 States) option to be studied. Indications from the Commission of the extent of such work would be useful to the Governance review; and

²¹ Policy issues relating to operational matters no doubt will be raised but care needs to be taken to avoid duplication of actions between the Governance review and the System review.

(iv) wider application of adaptive management provisions, since those in the MDBA are limited and require unanimous agreement of the Commission before modifying fixed entitlements for South Australia.

4.2.2 E-Water management, including the Cap issues

(1) It is considered the MDBA might address for e-water management:

(i) specific new provisions for e-water management, as collaborative management is unlikely to effectively deliver NWI and TLM objectives, especially as the issues analysis has indicated significant variations in views on issues and on priorities; and

(ii) identification of all forms of environmental water rights not just for TLM IGA recovered water. Because of the scope and complexity in e-water rights management, a structured rights management framework may assist in development of policies. Appendix 6 outlines an e-water rights management framework based on a Productivity Commission's²² rights management concept.

(2) Clause 95 should be examined under an adaptive management objective to improve operational flexibility and thus more opportunistic management of e-water, as currently the Commission's powers to act are discretionary, the voting has to be unanimous and the resultant standing procedures tend to be over prescriptive.

(3) As there are differences in jurisdictions' understanding of the key role and function of the Cap²³, a common view should be adopted to reduce uncertainty, especially in the public arena, if such views were being publicly expressed. The significant question is whether the Cap should be modified as NWI and TLM outcomes occur, or efforts be directed to better definition of sustainability limits and introduction of those limits as a 'new Cap'.

(4) Actions on implementation of the environmental managers is a management issue and not a consistency one, unless the Commission were assigned a role as 'environmental manager'. If the Commission were to be assigned that role and RMW were given responsibility for delivery of e-water:

(i) consideration might be given to vesting a share of storages and inflows to RMW;
and

22 Reference – "Productivity Commission 2003, Water Rights Arrangements in Australia and Overseas, Commission Research Paper, Productivity Commission, Melbourne".

23 . It is seen as both inconsistent and consistent with the NWI, depending on what view is held on its fundamental purpose. It is an inconsistency issue, if related to sustainability objectives or it is consistent, if it were defined as a historical marker to define limits on water rights management and/or to manage compliance.

(ii) the roles of RMW and the States' service providers would need to be clearly defined as e-water management decisions can impact on the States' service providers' business outcomes which should also be assessed.

(5) Funding of the management of e-water has to be resolved within clause 65 of the MDBA to better align NWI's 'best practice' financial principles and where appropriate Community Service Obligations' applications.

4.2.3 Prescription of water shares and accounting rules

(1) Over-prescriptions in sharing, accounting and operational rules in the heart of the MDBA, Schedules and clause 95 standing procedures reduce operational flexibility and constrain opportunistic management of delivering environmental.

(2) For example, Schedule C treats salinity as an environmental priority above others and limit actions on refurbishment of infrastructure.

(3) To give operators flexibility to more opportunistically address pressing NWI issues Clause 95 should be used to introduce new standing procedures or review existing ones. In all cases the standing provisions might contain a sunset provision for short-term interim measures (3 to 5 years), as experience in the e-water management areas is limited.

(4) If clause 95 standing procedures are to be applied, their rules must be clearly defined, quantified, managed, monitored and reported.

(5) A more streamlined process is needed in obtaining approval for State proposals for construction of works required to deliver NWI or TLM IGA.

(6) Whilst the jurisdictions see the System review as the forum for considering the pressing issues relating to over-prescription, it may not deliver. Indications from the RMW are that the System review is to be a comprehensive and not simply an audit of current arrangements and may take 3 to 4 years to complete. Alternative mechanisms²⁴ need consideration. The

²⁴ A Commission managed panel, linked to the Governance review, comprising representatives from the Contracting governments and RMW with experience in operational management of the system could be an appropriate forum for dealing with the operational issues in the short term. The panel could be tasked to:

- identify operational provisions within the MDBA, which would prevent decisions to give effect to the NWI and TLM on the Murray River and lower Darling River systems. These would represent the main those areas, which in the review were described as being too prescriptive.
- prepare draft protocols to remedy those situations
- prepare standing procedures under clause 95 to introduce those protocols on an interim basis with due consideration of a 'sunset' arrangement for continuance decisions; and
- report regularly on progress to the Governance review.

mechanisms established for either the TLM IGA Business Plan review or the TLM IGA 3-year review could be options.

(7) Approval for any change to operational procedures to address over-prescription should be subject to meeting a principle of not hindering e water management objectives.

4.2.4 Financial management

(1) Consideration needs to be given, as a matter of priority:

(i) to include the NWI financial principles in the MDBA;

(ii) to attempt to achieve a more uniform application of financial inputs²⁵ into the Commission's budgetary process. Many of the issues involve Treasury policies not specific to Commission activities and thus movement from current arrangements may prove difficult but that should not stop dialogue. A consultancy on the financial issues, managed by RMW, would seem a good approach;

(iii) to modify the MDBA provisions for sharing costs among contracting governments to explicitly require the Commission to identify and apportion costs across its operations (including separating supply and environmental and water planning and management costs) rather than relying on an administrative decision by the Commission to do so from time to time; and

(iv) to examine whether the current cost apportionments policy, which is based primarily sharing the southern States' contributions primarily on consumptive use ratios, with specified costs to ACT and Queensland is applicable to activities involving environmental matters.

(2) The NWI has indicated that '*water may be viewed as part of Australia's natural capital*'. The River Murray itself is recognised in the NWI as one of the significant environmental assets. If there is agreement among jurisdictions that the River is a major 'natural asset', it introduces an extra consideration into the apportionment of asset management costs (States' and Australian governments' capital and operational cost sharing) between the jurisdictions for works and measures to maintain the longer-term sustainability of 'assets'.

25 Financial management areas (asset valuation; depreciation; independent audits of cost structures etc); and effective 'regulatory audits' of RMW's service delivery performance

4.3 Conclusions on lower priority areas

4.3.1 Institutional separation

(1) In our view, the Governance review could benefit from briefings on separation experiences in Queensland and NSW and also from RMW on its prior assessments of its separation potential.

(2) There is an opportunity for the Governance review to possibly revisit the rationalisation of assigned asset ownerships and the roles of the Contracting governments in managing the Scheduled works.

4.3.2 Status of TLM IGA

(1) While it is not necessary to tie TLM IGA to the MDBA itself, it is considered there might be merit in incorporating a management framework into the MDBA for future e-water initiatives Basin wide.

4.3.3 Integrated water resources management in the Basin

(1) The meaning of the Council's 'One River' concept within an integrated water resources management framework in the Basin is not clear among the jurisdictions and requires an agreed definition.

(2) The hydrologic, hydro-geological and physical characteristics of the rivers and groundwater network in the Basin need to be recognised, as upstream impacts may not necessarily translate to significant environmental outcomes to the River Murray itself.

(3) The 'One River' concept produced varied responses and will create an issue for the Governance review. Jurisdictions agreed the 'One River' concept:

- (i) should apply to only 'shared' water resources in Basin scale management; and
- (ii) common high-level policies goals for management of those 'shared' resources, administered under an agreed forum should apply

(4) Formal confirmation from the jurisdictions is essential, as application of a NWI connectivity policy would appear to capture all water sources in the Basin as being 'shared'.

(5) To implement the NWI at a Basin scale, it is considered there is a need for a new mechanism to measure Basin scale outcomes, as the Cap management²⁶ at present does not provide Basin scale outcomes. As the Commission's Sustainable Rivers Audit (SRA) is attempting to look at river health on a Basin scale and States' water plans are well advanced both may prove useful in developing a mechanism for better coordination of Murray Basin management.

(6) Inclusion of an 'end-of-valley' outcomes²⁷ policy within State water plans could satisfy a 'One River' approach. It may mean accounting²⁸ for management of quantity and quality of all overland flows, interception activities and connected groundwater sources.

(7) The implications of such a policy would have to be assessed before its endorsement, as the outcomes may raise political questions.

(8) The prospect of inter-jurisdictional tensions in State vs Basin is seen as unavoidable but manageable if properly handled through the forums provided by the MDBA. There is a level of ambient tension evident in relation to e-water management priorities for tributary versus Murray River mainstream. The extent of any tensions will depend on regional v basin trade-off implications of the 'One river' policies. In the past agreement for trade-offs on major issues have taken between 3 to 7 years. Unless institutional change occurs or attitudes change markedly, expectations of rapid change will only be driven by strong leadership and funding.

4.3.4 Other Matters

Of the issues analysed in Part 3 under 'Other Matters', only those indicated below are regarded to be of sufficient consequence for reference in the conclusions.

Status of the MDBA itself – There is an underlying and significant difference in the status given to the MDBA by the laws of different jurisdictions, and the attitudes held by jurisdictions about the role of the MDBA in relation to other State laws. One jurisdiction maintains that the Australian Constitution 'vests' water in the States; that the MDBA does not share water between States or change the States' sovereign rights to water, and that therefore the MDBA is and should be subject to other State laws. Although the matter was not

26 NSW's Cap requirements apply to each individual major tributary of the Barwon-Darling and in the Murrumbidgee-Lachlan systems. Victoria's Cap arrangements have groupings of tributaries. There are no MDBC Cap provisions applying to groundwater

27 Establishing end-of-valley outcomes would mean application for overland flows, interception activities and connected groundwater sources policies in setting targets or other objectives for both quantity and quality. Definition, development and implementation of 'end-of-valley' targets and translation to the Murray will be complex and time consuming. The System review will no doubt examine 'end-of-valley' inputs but its timing is an issue.

28 Implication of agencies capabilities to deliver factual assessments should also be raised.

specifically canvassed in interviews with other jurisdictions, in both South Australia and Victoria, the relevant water legislation is expressed to be ‘subject to’ the MDBA, rather than the reverse.

The differing views on the status of the MDBA reveal a significant difference of opinion about States’ rights to the use and management of shared waters, and the effect of the MDBA on those rights. The differences will no doubt influence any discussions about changing the water sharing provisions of Part X of the MDBA, one of the key areas highlighted in this issues analysis. The Governance review should raise and further explore the differences of opinion about this underlying issue, and attempt to reach a resolution about it. The Parties should note any relevant resolutions of the Council that may indicate prior agreement of the Parties about the intended status of the MDBA.

Compliance with MDBA – For NWI to be effectively implemented, the adequacy of the powers of the Commission in some of the MDBA functional areas to enforce compliance from jurisdictions to meet their obligations (eg-the Cap; clause 46) requires consideration.

Capability of works and the River to deliver e-water – The capacity of river channel and outlet works now limits the ability to deliver flow rates for consumptive needs and with the introduction of NWI and TLM, the limit situations will become greater. Assignment of delivery priorities and a capacity share market for the river channel and outlet works may assist. This is an issue for the System review and RMW has full knowledge of such situations.

4.3.5 Elements of a new Murray-Darling Basin Compact

Whilst a paradigm change to the MDBA was not proposed, an opportunity exists to have the Governance review team at least consider its potential and advise on the pros and cons of moving in that direction, as its one of its first tasks.

4.4 Supporting the Governance review

During the review it became obvious that many of the issues have been or are now subject to Commission attention and in some cases detailed investigations. In our view the Commission should assist the Governance review by providing as a minimum documentation and briefings as indicated in Appendix 4.

5 RECOMMENDATIONS

It is recommended the Commission:

- (1) notes the issues raised and conclusions reached from the Issues Analyses;
- (2) notes the Commission's involvement may be required, including in the following areas:
 - (i) assessment of options for storage capacity sharing between the three southern States;
 - (ii) identification, using RMW's experience, of the operational issues in the MDBA where prescription creates inflexibility, and to assess whether either System review, or the TLM IGA Business Plan Review or an alternative mechanism might be the appropriate forum for considering the more immediate and obvious identified operational changes within desirable timeframes;
 - (iii) consideration of interim measures using clause 95 to address those operational areas, which are likely to cause difficulties in delivering NWI and TLM IGA because of over prescription, including potential application of a 'sunset' clause aimed at testing effectiveness of standing procedures;
 - (iv) consolidation of information on the capacity limits in Scheduled works and in the river systems and assignment of capacity access shares and priorities between jurisdictions and between competitive uses for delivery of TLM and NWI outcomes;
 - (v) examination of concerns raised on the lack of explicit cost sharing provisions in the MDBA;
 - (vi) examination of Council and Commission decision registers to identify relevant policy determinations that may have already been made in relation to the issues identified and proposed to be progressed through the Governance review;
 - (vii) support for the Governance review, including by providing information detailed in Appendix 4; and
- (3) refers this Consistency Review Issues Analysis final report to the Governance review.

APPENDIX 1 Consultants' Brief

MURRAY-DARLING BASIN AGREEMENT CONSISTENCY REVIEW – ISSUES ANALYSIS PROJECT BRIEF

A BACKGROUND

The Murray-Darling Basin Agreement was initially signed by the governments of the Commonwealth, New South Wales, Victoria and South Australia in 1987, and revised in 1992. Queensland became a signatory in 1996. The Australian Capital Territory was added in 1998 under the terms of an MOU, and agreed to become a full member in 2006. The purpose of the Agreement is 'to promote and coordinate effective planning and management for the equitable, efficient and sustainable use of the water, land and other environmental resources of the Murray-Darling Basin'.

The Commission Strategy Committee (a high level Advisory Committee made up of senior jurisdictional representatives) recently established a jurisdictional taskforce (the Murray-Darling Basin Agreement Consistency Review Taskforce) to progress the review of the MDB Agreement as required under:

- the COAG Intergovernmental Agreement on a National Water Initiative (NWI) (Clause 14); and
- the COAG Intergovernmental Agreement on addressing water overallocation and achieving environmental objectives in the Murray-Darling Basin (TLM IGA) (clause 56).

An initial preliminary review of the MDB Agreement for consistency with the NWI was undertaken by Megan Dyson. The review was then expanded to include recommendations on those changes required to allow full implementation of TLM IGA.

It should be noted that a number of other processes of relevance to both the Consistency Review and the Issues Analysis are underway, or soon to commence, including:

a review of the governance and financing of the Commission and Basin water sharing and natural resource management arrangements (the Governance Review) to be undertaken separately by the parties to the Murray-Darling Basin Agreement, by mid 2007 (as agreed by the Council in May 2006):

- actions underway to amend to the MDBA;
- the cost efficiency and effectiveness review;
- a three-year review of TLM IGA required in June 2007 (clause 81 of TLM IGA);
- a review of TLM Business Plan, agreed by TLM Board at Meeting 26; and

- a major review of river system operating rules for the Lower Murray and Lower Darling Rivers. In May 2006, the River Murray Water Committee requested that a process be developed for this review, and referred back to the RMWC, NRMC and TLMC for consideration.

B MDB Agreement Consistency Review Issues Analysis

The focus of this Issues Analysis is to further explore and document the jurisdictional perspectives regarding issues of inconsistency between the MDB Agreement and both the NWI and TLM IGA's, that were noted for consideration in the Megan Dyson report.

This Issues Analysis will be completed in consultation with the Commission's jurisdictional partners and others as agreed, will be coordinated by the MDB Agreement Consistency Review Taskforce, and will report to the Commission and Council via the Commission Strategy Committee.

C SERVICES REQUIRED

Two consultants will be contracted on a time-based fees arrangement to work together to undertake the Issues Analysis, drawing on the preliminary review of the MDB Agreement for consistency with the NWI and TLM IGA's. The consultants will do this by:

- reviewing relevant documents and literature that may influence the MDB Agreement Review, including the current Strategic & Business Plans and other relevant information;
- considering existing relevant policies, processes and activities, including those identified in the Background information;
- consulting with jurisdictional partners (including via the MDBA Consistency Review Taskforce and the Commission Strategy Committee) and others to identify all of the potential issues and views relating to the review of the MDB Agreement for consistency with the NWI and TLM IGA*;
- drawing out areas of close agreement amongst jurisdictions, and areas of disagreement, and suggesting a process to address any inconsistencies, which may include a review of the MDB Agreement; and
- preparing a report to the Commission with recommendations from this Issues Analysis for its consideration.

*Secretarial support will be provided by the Commission Office for this component.

D TIMEFRAMES

The following timeframe is to apply:

- Initial project meeting – late June 2006;
- Consultation with jurisdictions and others and review and consideration of relevant information –July 2006;
- Draft Issues Analysis report submitted to the office of the Commission – end July 2006;
- Present the findings of the consultancy to MDB Agreement Consistency Review Taskforce, Commission Strategy Committee and Commission – August 2006.

The availability of jurisdictional partners for consultation may pose a risk to completion of this project within the above timeframe. If this outcome occurs, the MDB Agreement Consistency Review Taskforce shall determine necessary milestones following input from the consultants.

MDBC Contact

Julianne Martin

Acting Manager, Water Policy Liaison and Development

Murray-Darling Basin Commission

GPO Box 409, Canberra City 2601

APPENDIX 2 Interviews and Participants

Australian Capital Territory Canberra, 20 July 2006

1-Office of Sustainability

Stewart Chapman ACT Murray-Darling Basin Commission Coordinator

Australian Government Canberra, 20 July 2006

1-Department of the Environment and Heritage

Tony Slatyer First Assistant Secretary, Land, Water and Coasts Division,

2-Department of the Agriculture, Fisheries and Forestry

Simon Smalley General Manager, Water Policy and Murray Darling Basin

Ian Neave Assistant Manager, Murray-Darling Basin Section

Angela Robinson Manager, National Water Policy

Deranie Jackson Manager, Murray-Darling Basin Section

3-National Water Commission

Volker Aeuckens Principle Advisor, Water Reform Group

Amanda Gordon Water Reform Group

Queensland

Brisbane, 4 August 2006

1-Department of Natural Resources, Mines and Water

Greg Claydon General Manager Water Planning, Integrated Resource Management

Elizabeth Dann Director of Strategic Policy

Seamus Parker Director South East Queensland Water Management, Natural Resources and Water – Part attendance

New South Wales

Sydney, 19 July 2006

1-Department of Natural Resources

Kim Alvarez Manager, Strategic Projects

Dugald Black Manager Resource Processes

Paul Pendlebury Manger, Surface and Groundwater Processes

Victoria

Melbourne, 10 August 2006

1-Department of Sustainability and Environment

David Downie Deputy Secretary, Water Sector Group (WSG), MDBC Deputy Commissioner

Campbell Fitzpatrick Executive Director, Water Resource Policy

Jane Doolan Executive Director, Environmental Water Reserve and River Health, WSG

David Lewis Manager, Entitlements & Trading, Water Resource Policy, WSG,

Mike Vanderzee Director, Strategy & Policy, Governance and Intergovernmental, WSG

Phil Heaphy Manager, Intergovernmental Programs, Governance and Intergovernmental, WSG, and MDBC Contact Officer

South Australia

Adelaide, 26 July 2006 & Sydney, 19 July 2006*

1-Murray Darling Basin Commissioner

John Scanlon* Independent South Australian Commissioner

2-Department of Water Land and Biodiversity Conservation

Rob Freeman Chief Executive and Commissioner, MDBC

Peter Hoey Executive Director River Murray

Andrew Johnson Strategic Policy Division

Mike Smith Deputy Director

Paul Harvey Program Leader, Murray-Darling Initiative

Adam West MDBC Contact Officer

APPENDIX 3 Interview Format and Indicative Questions

MURRAY-DARLING BASIN AGREEMENT – CONSISTENCY REVIEW ISSUES ANALYSIS

Interview format

The interviews will be conducted by consultants Warren Martin and Megan Dyson. Julianne Martin of the Commission Office will also be in attendance.

The information provided at the interviews will form the basis for the consultants' report to the Commission Strategy Committee. The report will explore and document the jurisdictional perspectives regarding issues of inconsistency between the MDB Agreement (MDBA) and both the NWI and TLM IGA, as noted for consideration in Megan Dyson's preliminary review report (the preliminary review report). Specifically, the report will draw out areas of close agreement amongst jurisdictions, and areas of disagreement, and suggest a process to address identified inconsistencies.

Interviews will focus on the words of the MDBA itself, while accepting that there are likely to be many areas of administration and operation that may be perceived as requiring change in order to achieve closer consistency with the NWI and TLM IGA.

Main areas of questioning

'Consistency' could be considered in a number of ways, i.e.:

- legal perspective
- policy perspective
- outcomes/objectives
- principles
- process

- (1) Which do you think is most appropriate for a review of the MDBA for consistency with the NWI and TLM IGA?
- (2) Has your Government made an assessment of the implications of the NWI and TLM IGA for the MDBA? If so, how have you gone about this and what do you think the main policy-based issues are? (There may also be a number of operational issues, which are within the scope of this review where the Agreement itself mandates a particular mode of operation, as it does with the Water Accounting rules in Part X of the MDBA).

- (3) What is your response to the matters raised in preliminary review report (in particular, the matters included in the Executive Summary)? (The interviewers will attempt to gauge each jurisdiction's perception of how significant various inconsistencies are, and how strongly jurisdictional views are held.)
- (4) Depending on your view on the interpretation of 'consistency', you may wish to discuss in greater detail matters including:
 - (i) The extent to which the MDBA does, or could, reflect NWI goals for a system of water resources management that "optimises economic, social and environmental outcomes";
 - (ii) Whether, and how, a 'one system' approach might be taken for managing water within the Basin;
 - (iii) The potential role of Part X of the MDBA in water sharing and accounting;
 - (iv) Management of 'unallocated' water (all water outside of the Cap, including minimum and surplus flows) and water recovered for the environment. [These questions relate mainly to relevance of clauses 91 – 95 of Part X to the NWI and TLM IGA];
 - (v) Relationship between environmental outcome provisions of the NWI and Part X of the MDBA, the Commission's role in managing the SEAs under the TLM IGA, and the MDBA schedules (eg BSMS, Salinity and drainage credits etc);
 - (vi) Whether TLM Environmental Watering Plan should have statutory status, especially considering its relationship with the States' water management Acts and water sharing plans; and
 - (vii) Funding provisions of TLM IGA and how they relate to MDBA clause 65 funding provisions.
- (5) Are there other matters related to consistency of the Agreement with the NWI and TLM IGA that haven't been raised in the preliminary review report?
- (6) What are your Government's priorities for change to the MDBA for the Consistency review? What is your assessment of the implications/significance of such changes to the MDB Agreement?
- (7) What do you think are the key linkages between the Consistency review and other reviews, strategies and processes (eg the recent Council determination relating to the Governance Review)?

APPENDIX 4 Documents and Briefings

During the review it became obvious that many of the issues have been or are now subject to Commission attention and in some cases detailed investigations. It would be prudent to provide the Governance review with a schedule of the Commission's reviews, audits or major studies, which have some relevance to the NWI and TLM. Briefing of the Governance review may be also beneficial.

Some of the key issues involved and for which documentation might be worthwhile include:

- (1) System review progress and an outline of the scope of the review;
- (2) Risk management policies options in sharing water between NSW; Victoria and South Australia, including capacity sharing of storages and river channel delivery;
- (3) An updated glossary of terms;
- (4) Water supply service provision within NSW, Queensland, South Australia and Victoria with emphasis on implications from separation of the service provider from the resource manager on e-water management;
- (5) A structured framework for e-water rights management as a basis for development of a Business Plan for the future management of e-water;
- (6) Adequacy of models and data to handle the connectivity policies;
- (7) The extent of investigations required to assess connectivity implications on the valleys and translation to the Murray River; and
- (8) Commission reports on unregulated flow, due in September 2006.

Briefings to the Governance review may be worthwhile on:

- (1) The corporatisation experiences in Queensland, NSW and South Australia;
- (2) The salient outcomes of RMW's prior institutional separation investigations; and
- (3) RMW's current asset management programmes and capacity constraints in the Commission's scheduled works and the river system.

APPENDIX 5 An e-Water Rights Management Framework

It is apparent, from the level of debate in the Consistency review issues analysis meetings with the jurisdictions, there is a need to develop the e-water policies in a structured manner.

There are issues of relativity to consumptive pool water re security, reliability and priority. NSW's and Victoria's allocate water to their users under different levels of risk. NSW applies higher levels of risk while Victoria more conservative. South Australia's fixed entitlements further complicate consumptive pool security and reliability comparisons. There will be issues of security, reliability and priority of 'recovered' water when used for e-water servicing, as that water represents a transfer of rights from the consumptive pool linked to the origin water source.

Specific issues raised in the Review, which could be handled through structured approach are:

- A rights management framework could provide a consistent foundation for dealing with prioritisation of rights;
- There is a risk position if third party challenges have potential for success for decisions taken by the Commission to direct operational decisions outside a legal protection. Proper application of a rights management structure should address this outcome; and
- Management of e-water is complex and not confined to TLM provisions for 'recovered' water but embraces the full spectrum of environmental water forms, which are assigned in States' water plans specifically for environmental purposes

The Productivity Commission Concept

The Productivity Commission in its report, "*Productivity Commission 2003, Water Rights Arrangements in Australia and Overseas*", Productivity Commission Research Paper, Productivity Commission, Melbourne" articulated a water rights management framework.

The Productivity Commission's introduction to the rights management issues clearly enunciates the need for a rights framework.

'The system of defining, monitoring and enforcing the right to use water is critically important in a country like Australia, where rainfall is low or highly variable. Water rights play a pivotal role in facilitating the efficient use of water, including the ongoing transfer of water... A well-defined system of rights is also the key to achieving a balance between the economic, social and environmental interests of the nation in managing water resources.'

A framework option

The following structure has been developed from the Productivity Commission basic concepts to provide an example of an e-water rights framework.

Definition and Creation of e-water rights includes the legislative basis for defining rights and establishes the overall quantity of water available to assigned uses within the sustainability limits of a water source. Basin planning and development of water conservancy projects provide the mechanisms for creation of rights with designed securities. The planning processes establish the sustainability limits of water sources and thus identify limits.

Assignment of e-water rights involves the administrative policies and procedures to authorize use of a water source and to establish rules and conditions for use

Modification of e-water rights there must be processes to modify rights through actions initiated either by the holder of rights or by the authorization agency. These processes would cover renewal, suspension, cancellation, surrender, expiry, transfer etc or reshaping rights by changes in approved conditions.

Protection of e-water rights such policies are required to protect the holders of rights to use water, to protect river systems' health and for third parties, whose rights or property may be adversely impacted by the introduction of new rights or changes to existing rights.

Delivery of e-water rights this criterion details how rights are to be met. Rights holders have a right to access, exploit and use water, either by operation of their own works or from cooperative, company or government works. Water licensing approval processes must include authorization for such works and its use and the arrangements for supply of water must be also clearly defined.

Compliance management these policies are important to ensure the statutory, regulatory and administrative obligations are met. Compliance management involves audits, surveillance, monitoring and reporting and application of sanctions as required.

This framework can also form the foundation for cost sharing by assignment of costs to activities related to each rights management area. An example is maintaining the integrity and capabilities of the works and the delivery systems protects the longer-term security and reliability of all use rights.