

**THE**  
**RIVER MURRAY ACT 2003**  
**USERS' FIRST GUIDE**

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RIVER MURRAY ACT 2003**

**USERS' FIRST GUIDE**

**CONTENTS**

<b>INTRODUCTION</b>	<b>iv</b>
<b>PART 1 – PRELIMINARY – SECTIONS 1 - 5</b>	
1.1 SCOPE OF THE RIVER MURRAY ACT .....	1
1.2 SOME KEY DEFINITIONS .....	1
1.3 ABILITY OF THE MINISTER TO MAKE “ASSUMPTIONS” ABOUT THE COSTS OF DAMAGE TO THE RIVER .....	2 3
1.4 RIVER MURRAY PROTECTION AREAS .....	3
1.5 INTERACTION WITH OTHER ACTS (THE “RELATED OPERATIONAL ACTS”) .....	3
<b>PART 2 – OBJECTS AND OBJECTIVES – SECTIONS 6 - 8</b>	
2.1 OBJECTS OF THE ACT .....	5
2.1.1 <i>What are they?</i> .....	6
2.1.2 <i>History of the provision</i> .....	6
2.2 OBJECTIVES FOR A HEALTHY RIVER MURRAY .....	7
2.2.1 <i>What are they?</i> .....	7
2.2.2 <i>Background and history</i> .....	7
2.3 INTERPRETING THE OBJECTS AND THE ORMs .....	7
2.3.1 <i>What is their status?</i> .....	7
2.3.2 <i>Are the ORMs ‘weighted’ in favour of River health to the exclusion of     other issues?</i> .....	7
2.3.3 <i>Duties of persons other than the Minister to act consistently with and     seek to further the objects and ORMs</i> .....	7
2.3.4 <i>The relationship between objects and Objectives – why have both?</i> .....	8

2.4	INDIGENOUS ISSUES .....	9
2.4.1	<i>Overview of provisions</i> .....	9
2.4.2	<i>Relationship with the Aboriginal Heritage Act</i> .....	9
2.4.3	<i>Powers and duties of authorised officers under the River Murray Act</i> .....	10
2.4.4	<i>Taking account of indigenous cultural heritage – assessment of referred applications</i> .....	11
2.4.5	<i>Native title implications</i> .....	11

### **PART 3 – ADMINISTRATION – SECTIONS 9 - 16**

3.1	FUNCTIONS AND POWERS OF THE MINISTER .....	12
3.1.1	<i>Interpretation of section 9</i> .....	12
3.1.2	<i>An obligation to consult</i> .....	12
3.1.3	<i>Minister to administer the Murray-Darling Basin Act</i> .....	13
3.2	ANNUAL REPORT .....	13
3.3	THREE-YEARLY REPORTS .....	14
3.4	MINISTER’S POWER OF DELEGATION .....	14
3.5	AUTHORISED OFFICERS .....	15
3.5.1	<i>Appointment of officers</i> .....	15
3.5.2	<i>Powers of authorised officers</i> .....	15
3.5.3	<i>Hindering etc officers or other persons involved in administering the Act</i> .....	17
3.5.4	<i>Self-incrimination</i> .....	17
3.5.5	<i>Comparison of powers of authorised officers</i> .....	17

### **PART 4 – MINISTERIAL ACTIVITIES AND ARRANGEMENTS – SECTIONS 17 - 20**

4.1	MINISTER’S WORKS .....	19
4.2	MANAGEMENT AGREEMENTS .....	20
4.2.1	<i>Potential scope of management agreements</i> .....	20
4.2.2	<i>Providing financial, technical or other professional advice or assistance</i> .....	20
4.2.3	<i>Remitting rates and taxes</i> .....	21
4.2.4	<i>Extent of exemptions available under management agreements</i> .....	21
4.2.5	<i>Enforcement of management agreements</i> .....	21
4.3	POWERS OF ENTRY ONTO LAND .....	22
4.4	COMPULSORY ACQUISITION .....	22

## **PART 5 – IMPLEMENTATION STRATEGY – SECTION 21**

5.1	ROLE OF THE STRATEGY .....	23
5.2	STATUS OF THE STRATEGY – WHEN AND HOW MAY IT BE USED? .....	23
5.2.1	<i>How will the Implementation Strategy relate to Natural Resources Management Plans?</i> .....	23
5.2.2	<i>How does the Strategy relate to the State Planning Strategy, and to Councils’ development plans?</i> .....	23
5.3	PROCESS FOR PREPARING THE STRATEGY .....	24

## **PART 6 - DEVELOPMENT OF RELATED POLICIES AND CONSIDERATION OF ACTIVITIES – SECTION 22**

6.1	INTRODUCTION .....	25
6.2	REFERRAL OF STATUTORY INSTRUMENTS .....	25
6.2.1	<i>Duty of the Minister in considering statutory instrument</i> .....	25
6.2.2	<i>The power of the Minister and the role of the Governor</i> .....	26
6.3	REFERRAL OF STATUTORY APPLICATIONS .....	26
6.3.1	<i>Duty of Minister when acting in respect of a referred application</i> .....	26
6.3.2	<i>‘Stopping the clock’ on assessments</i> .....	27
6.3.3	<i>Imposition of conditions on referred applications</i> .....	27
6.3.4	<i>Requiring other persons to provide information</i> .....	28
6.3.5	<i>Ministerial policies</i> .....	28
6.3.6	<i>Minister as party to any appeal against directed conditions</i> .....	29
6.3.7	<i>Exempting the need for applications to be referred</i> .....	29
6.3.8	<i>Does the referral process disturb the development system’s ‘one-stop-shop’?</i> .....	29
6.4	TABLE OF REFERABLE MATTERS UNDER RELATED OPERATIONAL ACTS .....	30

## **PART 7 – GENERAL DUTY OF CARE – SECTION 23**

7.1	DUTY NOT TO HARM THE RIVER .....	31
7.2	SCOPE OF THE DUTY - CAUSING ‘HARM’ .....	31
7.3	THE EXEMPTION – PRESCRIBED CIRCUMSTANCES .....	31

**PART 8 – PROTECTION AND OTHER ORDERS – SECTIONS 24 - 33**

8.1	DIVISION 1 – ORDERS .....	32
	8.1.1 <i>River Murray Protection Orders</i> .....	32
	8.1.2 <i>Reparation orders</i> .....	32
	8.1.3 <i>Reparation authorisations</i> .....	33
	8.1.4 <i>Interim restraining orders</i> .....	33
	8.1.5 <i>Consultation before issuing enforcement</i> .....	33
	8.1.6 <i>No right of compensation in respect of order</i> .....	34
	8.1.7 <i>Common questions about the enforcement provisions</i> .....	34
8.2	DIVISION 2 – REGISTRATION OF ORDERS AND EFFECT OF CHARGES .....	35
8.3	APPEALS .....	35

**PART 9 – MISCELLANEOUS – SECTIONS 34 - 42**

9.1	NATIVE TITLE .....	36
9.2	IMMUNITY PROVISION .....	36
	9.2.1 <i>Overview of the immunity provision</i> .....	36
	9.2.2 <i>The immunity provision in detail</i> .....	37
9.3	ENFORCEMENT ISSUES .....	37
	9.3.1 <i>Continuing offences</i> .....	37
	9.3.2 <i>Liability of directors</i> .....	38
	9.3.3 <i>Criminal jurisdiction of Environment, Resources and Development Court</i> .....	38
	9.3.3 <i>Service of notices</i> .....	38
9.4	CODES AND STANDARDS .....	38
9.5	REGULATION MAKING POWER .....	38
	9.5.1 <i>Controlling activities through regulations</i> .....	39
	9.5.2 <i>Native title implications</i> .....	39
	9.5.3 <i>The process for making regulations</i> .....	39

**PART 10 - SCHEDULE – A GENERAL OVERVIEW**

10.1	INTRODUCTION .....	41
	10.1.1 <i>Related operational Acts</i> .....	41
	10.1.2 <i>General effect of amendments</i> .....	42
	10.1.3 <i>Water Resources Act</i> .....	42

10.2	SUMMARY OF AMENDMENTS .....	42
	10.2.1 <i>Animal and Plant Control</i>	
	(Agricultural Protection and Other Purposes) Act 1986 .....	43
	10.2.2 <i>Aquaculture Act 2001</i> .....	43
	10.2.3 <i>Coast Protection Act 1972</i> .....	43
	10.2.4 <i>Crown Lands Act 1929</i> .....	44
	10.2.5 <i>Development Act 1993</i> .....	44
	10.2.6 <i>Environment Protection Act 1993</i> .....	45
	10.2.7 <i>Fisheries Act 1982</i> .....	45
	10.2.8 <i>Harbors and Navigation Act 1993</i> .....	45
	10.2.9 <i>Heritage Act 1993</i> .....	45
	10.2.10 <i>Historic Shipwrecks Act 1993</i> .....	46
	10.2.11 <i>Irrigation Act 1994</i> .....	46
	10.2.12 <i>Mining Act 1971</i> .....	46
	10.2.13 <i>Murray-Darling Basin Act 1993</i> .....	47
	10.2.14 <i>National Parks and Wildlife Act 1972</i> .....	47
	10.2.15 <i>Native Vegetation Act 1991</i> .....	48
	10.2.16 <i>Opal Mining Act 1995</i> .....	48
	10.2.17 <i>Parliamentary Committees Act 1991</i> .....	48
	10.2.18 <i>Parliamentary Remuneration Act 1991</i> .....	48
	10.2.19 <i>Petroleum Act 2000</i> .....	49
	10.2.20 <i>Soil Conservation and Land Care Act 1989</i> .....	49
	10.2.21 <i>South Eastern Water Conservation and Drainage Act 1992</i> .....	49
	10.2.22 <i>Water Resources Act 1997</i> .....	50
10.3	TRANSITIONAL PROVISIONS .....	52
<b>11.</b>	<b>SCHEDULE – MURRAY-DARLING BASIN ACT</b>	
11.1	NAVIGATION ON THE RIVER .....	54
11.2	POWER OF DELEGATION –	
	RELEVANCE TO <i>MURRAY-DARLING BASIN ACT</i> .....	54
<b>12.</b>	<b>SCHEDULE - WATER RESOURCES ACT 1997</b>	
12.1	INCORPORATING OBJECTS OF THE RIVER MURRAY ACT .....	56

12.1	<i>Objects of the Act</i> .....	56
12.2	<i>Minister required to ‘integrate’ administration</i> .....	56
12.2	PERMITS FOR WATER AFFECTING ACTIVITIES .....	56
12.2.1	<i>Referrals to Minister for the River Murray</i> .....	56
12.2.2	<i>Restricting exemptions under section 12</i> .....	56
12.2.3	<i>Farm dam controls – capping and trading farm dam capacity</i> .....	57
12.3	WATER LICENSING PROVISIONS .....	57
12.3.1	<i>Managing and altering licence conditions</i> .....	57
12.3.2	<i>Dealings in water entitlements</i> .....	58
12.4	SCHEMES TO PROMOTE THE TRANSFER OR SURRENDER OF ALLOCATIONS .....	59
12.5	ASSIGNING INFRASTRUCTURE OWNED BY THE CATCHMENT BOARD .....	59
12.6	WATER MANAGEMENT PLANS .....	59
12.6.1	<i>Promoting River Murray legislation</i> .....	59
12.6.2	<i>Amendment of catchment plan by the Minister</i> .....	60
12.6.3	<i>Severing invalid portion of plan</i> .....	60
12.7	LEVIES .....	60
12.7.1	<i>Salinity levy</i> .....	60
12.7.2	<i>Refunds of levies</i> .....	61
12.8	APPLYING ‘ASSUMPTIONS’ .....	61
12.9	WHEN SHOULD THE RIVER MURRAY ACT BE USED INSTEAD OF THE WATER RESOURCES ACT? .....	62
12.9.1	<i>How to choose between the available mechanisms?</i> .....	62
12.9.2	<i>Referrals of licences apply only to water used within the Basin</i> .....	62

## **PREFACE**

The *River Murray Act 2003 – Users’ first guide* is intended as an introduction to the *River Murray Act 2003*. It explains each of the sections, including information about the history of the provision, where relevant.

The guide should be read in conjunction with the Act, for no guide to interpretation can substitute for careful reading of the text of the legislation.

The guide is dedicated to those public servants who worked to bring the legislation into effect, and who will be entrusted with its implementation.

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Views expressed herein are those of the author only, and do not necessarily represent the views or policy of the Department of Water, Land and Biodiversity Conservation nor of the Minister for the River Murray or the South Australian Government.



## INTRODUCTION

The *River Murray Act 2003* was passed in July 2003 as part of the South Australian Government's election commitment to improve the state of the River Murray. The Act commenced on 24 November 2003.

The *River Murray Act* is a two-part legislative package. It comprises the Act itself (short – just 42 sections), and the Schedule to the Act, which amends 22 other South Australian Acts.

The main features of the *River Murray Act* are:

- a new 'duty of care' – a duty not to harm the River through one's actions. The duty is enforceable through River Murray Protection Orders and associated instruments;
- various powers of the Minister to undertake activities and carry out works and measures;
- the ability for the Minister to register management agreements with landowners, assisting projects like wetlands management on private land and other conservation efforts;
- the establishment of a new Joint House Standing Committee of the South Australian Parliament - the Natural Resources Parliamentary Committee. The Committee is composed of sitting Members of both Houses of Parliament;
- a regulation making power that will enable the future regulation or prohibition of any identified activity deemed to harm the River; and
- the ability of the Minister to impose conditions on activity authorisations, through the operation of the new 'referral' mechanism. The referral mechanism requires:
  - the referral of certain applications for statutory authorisations (for example, licences or permits) made under other Acts to the Minister for the River Murray; and
  - the referral of certain statutory planning instruments (for example, council Development Plans as well as other natural resources management instruments such as native vegetation guidelines and district soil plans) to the Minister for the River Murray.

The Schedule to the Act amends a number of other Acts including the so-called 'related operational Acts'. The related operational Acts are primarily those Acts whose administration has the potential to have a significant impact on the River – Acts for town planning and development, for harbors and navigation, for mining and petroleum activities, for the management of national parks, the protection of native vegetation, management of water resources and pollution control<sup>1</sup>.

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<sup>1</sup> The related operational Acts are: the *Animal and Pest Plant Control (Agricultural Protection and Other Purposes) Act 1986*, *Aquaculture Act 2001*, *Coast Protection Act 1972*, *Crown Lands Act 1929*, *Development Act 1993*, *Environment Protection Act 1993*, *Fisheries Act 1982*, *Harbors and Navigation Act 1993*, *Heritage Act 1993*, *Historic Shipwrecks Act 1981*, *Mining Act 1971*, *National Parks and Wildlife Act 1972*, *Native Vegetation Act 1991*,

The majority of the amendments to the related operational Acts are directed to requiring administrators of each Act to:

- consider the needs of the River, and seek to further the objects of the *River Murray Act* and the statutory Objectives for a Healthy River Murray (“ORMs”), when carrying out functions that may affect the River; and
- implement the referral mechanism mentioned above, by:
  - referring specified statutory planning instruments that may have an impact on the River to the Minister for the River Murray (this will cover for example Plan Amendment Reports under the *Development Act 1993*); and
  - referring prescribed statutory applications to the Minister for the River Murray for that Minister’s direction as to the approval (or refusal) of the application, and the conditions to which the resultant authorisation will be subject in order to adequately protect the River from any adverse impact of the activity.

Recognising the significance of existing water management legislation to successful outcomes for the River, additional amendments to the *Water Resources Act 1997* enhance the ability to implement the River Murray Water Allocation Plan.

**PART 1 – PRELIMINARY**  
**Sections 1 - 5**

**1.1 SCOPE OF THE RIVER MURRAY ACT**

The *River Murray Act* applies within the Murray-Darling Basin as defined for the purposes of the *Murray-Darling Basin Act* and Agreement.

However, the *River Murray Act* is not a catchment Act. It provides for the regulation of activities as required to protect the River Murray. The definition of the River Murray is broad. This is intentional, reflecting the complex nature of the River, and what it means to South Australians.

(In spite of the breadth of the definition, a reasonably proportionate link will still need to be drawn between the subject matter of regulation and the health of the River as defined. For example, it is unlikely that many activities taking place in a Mallee area remote from the River would be capable of control through (for example), prescribing a “River Murray Protection Area” and controlling activities.)

**1.2 SOME KEY DEFINITIONS – Section 3**

**activity**

‘Activity’ is defined to include the storage or possession of anything (including something in liquid or gaseous form) – this definition is significant for the interpretation of section 23, the general duty of care.

**Murray-Darling Basin**

The ‘Murray-Darling Basin’ has the same meaning as in the *Murray-Darling Basin Act* (that is, Schedule B to the Agreement).

**natural resources of the River Murray**

**River Murray**

**River Murray system**

The intention of the Act is to recognise the need to protect a complex set of characteristics and features. The River Murray is more than a watercourse, and more than the water that flows in that watercourse. The definition of the River Murray is set out in three parts (**natural resources of the River Murray, River Murray and River Murray system**) that make it clear that the River is:

- (a) the main stem of the River Murray; and
- (b) the natural resources of the River Murray, being:

- the River Murray system – defined as the River itself and all anabranches, tributaries, floodplains, wetlands and estuaries in any way connected or associated with the River, and related beds, banks and shores;
- soil, ground water and surface water, air, vegetation, animals and ecosystems connected or associated with the River Murray system; and
- cultural heritage and natural heritage, and amenity and geological values, connected or associated with the River Murray system; and
- minerals and other substances and facilities subject to the operation of a Mining Act and such that activities undertaken in relation to them may have an impact on the River.

### **statutory authorisation**

A ‘statutory authorisation’ for the purposes of the Act is an “approval, consent, licence, permit or other authorisation granted or required under a related operational Act”. It is relevant to section 22 (administration of referral system).

### **statutory instrument**

A ‘statutory instrument’ for the purposes of the Act is a plan, program or policy, or any other instrument of a prescribed kind (i.e., prescribed by regulation), prepared pursuant to the provisions of another Act. This definition is also relevant to section 22.

### **vehicle**

‘Vehicle’ includes vessel or craft, as well as “plant or equipment designed to be moved or operated by a driver”. It is particularly relevant to the powers of authorised officers, set out in section 14.

## **1.3 ABILITY OF THE MINISTER TO MAKE “ASSUMPTIONS” ABOUT THE COSTS OF DAMAGE TO THE RIVER – Subsection 3(5)**

Subsection 3(5) states that any reference in the Act to “the costs of any damage” to the River will include costs of minimising or remediating any damage.

The phrase ‘costs of any damage’ is used in the Act only in the context of the use of bonds as a licence condition or condition of compliance with a regulation – if the Minister chooses to use the bonding mechanism (see section 22(8)).

Sub-section 3(6) allows the Minister, for the purposes of this or any other Act, to apply any reasonable ‘assumptions’ in assessing the costs or extent of damage to the River<sup>2</sup>.

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<sup>2</sup> Note that Section 148A of the *Water Resources Act* also contains provisions about Ministerial assumptions for the purposes of that Act. Discussed below in section 12.8.

In order to estimate an appropriate amount of a bond that will be used to offset any future costs of damage to the River, the Minister may therefore apply ‘assumptions’ – for instance, a judgement about what it costs to remediate damage, or about the expected likelihood, or risk, of that damage occurring.

#### **1.4 RIVER MURRAY PROTECTION AREAS – Section 4**

River Murray Protection Areas (RMPAs) are an essential part of the scaffolding for the referral regime under the Act<sup>3</sup>, and also for any subsequent regulations made under section 42 of the Act that may seek to regulate activities within RMPAs.

Section 4 allows the Governor to “designate areas as River Murray Protection Areas” for the purposes of this or any other Act. The Governor may “designate different areas for different purposes or different Acts (and accordingly areas designated for one purpose or Act may overlap with other areas designated for another purpose or Act)”.

This means, for example, that there could be a RMPA for the purposes of referrals under the *Native Vegetation Act*, and a different RMPA for referrals under the *Development Act*, or for control of activities by regulation under section 42.

RMPAs have been established under the *River Murray Regulations 2003*. Maps may be viewed on the DWLBC website ([http://www.dwlbc.sa.gov.au/water/rm\\_bill/index.html](http://www.dwlbc.sa.gov.au/water/rm_bill/index.html)).

#### **1.5 INTERACTION WITH OTHER ACTS (THE “RELATED OPERATIONAL ACTS”) – Section 5**

Subsection 5(2) lists the so-called ‘related operational Acts’. The list may be extended by regulation: subsection 5(2)(s).

Subsection 5(1) specifies that the *River Murray Act* is in addition to, and does not derogate from, any other Act (except where the contrary intention is expressed in this or another Act).

This means that the *River Murray Act* does not override any other Act, *except* where specified. Examples of where the contrary is specified include:

- section 22(6) of the *River Murray Act*, which allows the Minister for the River Murray to ‘stop the clock’ for assessment time on a referred application;

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<sup>3</sup> Amendments to the related operational Acts to set up the referral of certain applications require the referral of prescribed classes of application proposed to occur within a relevant RMPA. That is, Regulations made under the related operational Acts will specify the type of activities within all or particular of the RMPAs that will be referred to the Minister for the River Murray for the purposes of section 22 of the *River Murray Act*.

- amendments made to the related operational Acts to require an authority to comply with a direction of the Minister for the River Murray – see for example the new section 25(9a) of the *Native Vegetation Act*.

The practical effect of the ‘non-derogation’ includes, for example:

- the Minister for the River Murray will still need to gain any development or other consent (for example, to clear native vegetation) that might be needed to carry out the Minister’s powers;
- a person who holds a development consent will not be excused from complying with obligations under the *River Murray Act* (for example, compliance with the duty of care, or relevant River Murray Regulations).

Acts of Parliament need to be read together, and, so far as possible, all requirements complied with. Rules of statutory interpretation apply to resolve real inconsistency between Acts.

## **PART 2 – OBJECTS AND OBJECTIVES**

### **Sections 6 - 8**

#### **2.1 OBJECTS OF THE ACT – Section 6**

##### **2.1.1 What are they?**

Section 6 sets out the objects of the Act. They are detailed and worth reading very carefully.

Summarised very generally, the objects are to:

- ensure all reasonable measures are taken to protect the River:
  - recognizing its critical importance to the community and its unique value from environmental, economic and social perspectives, and
  - giving special acknowledgement to ensure that use of the River sustains the wellbeing of the people of the State and facilitates the State’s economic development;
- provide mechanisms so that development affecting the River provides the greatest benefit to the River, while providing for the well-being of the community;
- provide mechanisms to ensure that activities that are unacceptable in terms of impacts on the River, do not proceed;
- promote the principles of ecologically sustainable development in relation to use and management of the River;
- ensure proper weight is given to the interests of the River when developing or implementing legislative plans and strategies;
- respect the interests and aspirations of indigenous people and others within the community; and
- ensure the future health, and to recognize the importance, of the River.

##### **2.1.2 History of the provision**

The objects were developed to reflect what the Act sets out to do, particularly in its ‘operational’ provisions. They are not to be interpreted merely as statements of aspiration.

The objects were generally well supported throughout development of the Bill and in Parliament. They were amended in the House of Assembly<sup>4</sup>, to emphasise the need to ensure that river management facilitates State development, and to include a provision aiming to respect the interests and views of ‘other’ people within the community (that is, in addition to indigenous people)<sup>5</sup>.

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<sup>4</sup> Moved by the Member for Newland (Mrs Kotz).

<sup>5</sup> Moved by the Member for Chaffey (Mrs Maywald).

## **2.2 OBJECTIVES FOR A HEALTHY RIVER MURRAY – Section 7**

### **2.2.1 What are they?**

Section 7 sets out the objectives (to be referred to collectively as the Objectives for a Healthy River Murray (ORMs)) that will apply in relation to the operation of the Act. There are fifteen ORM, gathered under four themes. In brief, these objectives are:

- **river health**
  - including the protection and restoration of habitat, floodplains and wetlands of the River Murray System and the prevention of extinction of native animals, fish and vegetation;
- **environmental flow**
  - including the reinstatement and maintenance of the natural flow regime of the river, keeping the Murray mouth open and improving the connectivity between the environments of the River Murray system;
- **water quality**
  - including improvement of water quality, minimising the impact of salinity, reducing algal blooms and the impact of sediment and pesticides on the River Murray system;
- **human dimension**
  - including taking a flexible approach to river management to take account of community interests, knowledge and understanding of the River Murray system, recognising indigenous and other cultural and historical relationships with the river and the importance of a healthy river to the economic, social and cultural prosperity of communities.

### **2.2.2 Background and history**

The Objectives were well supported. They were drawn from the Objectives for a Healthy Working River Murray developed by the Community Advisory Committee of the Murray-Darling Basin Ministerial Council through comprehensive consultation. They were endorsed by the Council in March 2001.

The section was amended during debate in the House of Assembly to remove the ability of the Governor to alter the ORMs in future through regulations<sup>6</sup>. The section was also amended by the Government in a few places to improve the sense of the wording.

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<sup>6</sup> Moved by the Member for Unley (Mr Brindal).



## **2.3 INTERPRETING THE OBJECTS AND THE ORMs – Sections 6 and 7**

### **2.3.1 What is their status?**

All persons administering the Act are obliged to act consistently with and seek to further both the objects and the ORMs (see section 8 and further discussion below under 2.3.3). For the Department administering the Act, this means that policies that underpin administration will need to have considered how the objects and ORMs are ‘furthered’ (promoted) by the policies. Policies must be consistent with the objects or ORMs. This does not mean that every policy must necessarily seek to further each and every object and ORM – no doubt there will be some policies developed for very specific purposes. However, no policy may be inconsistent with an ORM or object.

The objects and ORMs also help to define the extent of both the Minister’s powers (see, for example the powers set out in section 17) and the Minister’s obligations (see, for example, the obligations that constrain the Minister’s functions in subsection 22(4)).

Both objects and ORMs are referred to in a number of places in the Act itself, and also in the amendments to the related operational Acts. The terms are usually used conjunctively with one another, to describe the desired outcomes for the River. In a sense, the ORMs give ‘flesh’ to the bones of the objects.

### **2.3.2 Are the ORMs ‘weighted’ in favour of River health to the exclusion of other issues?**

During debate in the House of Assembly, it was asked whether the ORMs may be interpreted by the Minister (and Court), to mean ‘healthy river first, healthy communities second’.

The objects guide the interpretation of the Objectives. The objects set out the balance that is sought. Paragraph 6(1)(a) in particular includes a specific reference to the need to ensure that the use and management of the River sustains the people of the State and facilitates the economic development of the State.

It is most unlikely, given the clear provisions in the objects section, that the ORMs could lead to the Act being interpreted to mean that a ‘healthy river’ will be pursued, regardless of social and economic costs – quite the contrary. The obligation is to find a balance that does not prejudice the long term future of the State.

### **2.3.3 Duties of persons other than the Minister to act consistently with and seek to further the objects and ORMs – Section 8**

Section 8 requires all persons responsible for administering the Act to act consistently with, and seek to further the objects of the Act and the Objectives for a Healthy River Murray. Thus *any* person required by statute to consider the application of the *River Murray Act* will be required to act consistently with and seek to further the *River Murray Act*, in so far as that Act is relevant to the matter at hand.

### *2.3.3.1 Persons acting under the River Murray Act, including authorised officers*

Section 8 guides the manner in which bodies acting directly under the Act carry out their functions – for example, authorised officers, persons acting on the Minister’s behalf, and the Environment, Resources and Development Court.

### *2.3.3.2 Persons administering related operational Acts*

Section 8 also imposes a duty on persons administering the related operational Acts, including a Court hearing an appeal under one of those Acts. It requires that “any other person or body required to consider the operation or application of this Act (whether acting under this Act or another Act), must act consistently with, and seek to further” the objects and ORMs.

Amendments to the related operational Acts generally require the relevant authorities under those Acts to “take into account and seek to further” the objects and ORMs in the development of statutory instruments that apply within the Murray-Darling Basin, and in the determination of authorisations that may affect the River (whether or not the application must also be referred directly to the Minister for the River Murray).

It should be noted that each related operational Act has not been amended in exactly the same way. Subtle differences in wording and framework exist as Parliamentary Counsel attempted to ensure that the wording and scheme fit not only the *River Murray Act*, but also fit properly within the framework and language of the related operational Act.

### *2.3.3.3 Other Courts*

The duty in section 8 extends to a Court hearing an appeal under a related operational Act that applies to a condition that has been imposed upon direction of the Minister for the River Murray. (For example, the District Court hearing an appeal from the ERD Court on a ‘directed’ condition imposed on a development consent will be bound by this duty).

## **2.3.4 The relationship between objects and Objectives – why have both?**

What is the distinction between objects and ORMs? What different functions do they serve?

The Objects in section 6 are the objects of the Act – they set out what it is that the Act is intended to do. The Objects section talks about establishing mechanisms or measures to protect the River.

The ORMs, on the other hand, set out the Objectives for River Health. They are not ‘Objectives’ of the Act in any general sense. These Objectives for a Healthy River Murray (ORMs) are the detailed and quite specific criteria which determine what a ‘healthy’ river is, and what it is that should be pursued as ‘good river health’.

The ORMs were developed over a period of at least a year, by the Community Advisory Committee of the Murray Darling Ministerial Council. They were adopted by the Ministerial Council as Basin-wide Objectives in 2001. Some minor adaptations to the wording were made by Parliamentary Counsel during drafting to make them suitable as statutory criteria.

## 2.4 INDIGENOUS ISSUES

### 2.4.1 Overview of provisions

Indigenous matters are an important theme that recur in the objects and Objectives, and are reflected in various substantive provisions of the Act.

The following discussion deals with a number of related issues:

- administration of the *River Murray Act* in a manner consistent with the objects (particularly section 6(1)(f)), and relationship with the *Aboriginal Heritage Act*;
- fulfilling aspects of the Act that relate to indigenous culture as part of the River Murray for the purposes of assessing referred applications; and
- legal requirements relating to native title under the *Native Title Act*.

The interests of traditional owners of the River Murray are reflected in a number of places in the Act:

- the definition of the River Murray (see section 3, “natural resources of the River Murray means ... cultural heritage ...”). This clearly includes both indigenous and non-indigenous cultural heritage);
- the objects (see paragraph 6(1)(f));
- the Objectives (see subsection 7(5));
- the Minister’s functions (see paragraph 9(1)(d) – consultation with communities, including indigenous peoples with an association with the River, over outcomes to be pursued; see also section 22, which requires the Minister to seek to further the objects and ORMs when responding to any statutory instrument or application);
- the requirement for an authorised officer to take into account a request not to enter a particular place (see subsection 14(9)).

### 2.4.2 Relationship with the Aboriginal Heritage Act

Subsection 5(1) of the *River Murray Act* provides that “except where the contrary intention is expressed in this or any other Act, this Act is in addition to and does not limit or derogate from the provisions of any other Act”.

What this means is that the *River Murray Act* applies in addition to the *Aboriginal Heritage Act 1988*. In practical terms this means that the Minister, exercising his or her power to build things or undertake other works under section 17 of the *River Murray Act*, will still be required to abide by any direction of the Minister for Aboriginal Affairs under section 23 of the *Aboriginal Heritage Act*, and may still therefore need a ‘site clearance’ before undertaking work (just as the Minister may also need development consent or an Environment Protection authorisation).

## **2.4.3 Powers and duties of authorised officers under the River Murray Act**

### *2.4.3.1 Power to require a person to answer questions*

Section 15 of the *River Murray Act* makes it an offence to fail to answer a question put by an authorised officer. During consultation, the question was asked whether such an offence provision is an improper obligation to be imposed on an indigenous person, given their obligation not to divulge information relating to heritage sites, which is imposed under the *Aboriginal Heritage Act*.

The *Aboriginal Heritage Act* contains the following provision in section 18:

A person must not, without reasonable excuse

- (a) hinder or obstruct an inspector, or any person assisting an inspector, in the exercise of a power conferred by this Act;
- (b) refuse or fail to comply with a requirement of an inspector under this Act;
- (c) refuse or fail to comply with the reasonable instructions of an inspector under this Act.

Penalty: \$2 000 or imprisonment for 3 months.

Section 35 of that Act however contains the following obligation:

### **DIVISION 5 - PROTECTION OF TRADITIONS**

Divulging information contrary to Aboriginal tradition

35. (1) Except as authorised or required by this Act, a person must not, in contravention of Aboriginal tradition, divulge information relating to

- (a) an Aboriginal site, object or remains; or
- (b) Aboriginal tradition.

Penalty: \$10 000 or imprisonment for 6 months.

(2) Such information may be divulged with the authority of the Minister.

It was proposed during consultation that the *River Murray Act* should contain a provision similar to section 35.

Section 35 is not a defence to prosecution for an offence under section 18 of the *Aboriginal Heritage Act* (although it may in part be relevant to a claim that there was a ‘reasonable excuse’ for failure to answer a question). Section 35 is in that Act in the context of protecting indigenous culture from being divulged improperly. The proscription applies to any person, and will apply equally in the context of any question asked by an officer under the *River Murray Act*. Section 35 applies irrespective of the *River Murray Act*.

#### 2.4.3.2 Obligations of authorised officers – Subsection 14(9)

Section 14(9) of the *River Murray Act* requires an authorised officer to take account of a request by an Aboriginal person not to enter a particular site. (The provision does not prevent an officer from entering in spite of such a request having been made, however.)

Authorised officers are also obliged by section 8 of the Act to act consistently with and seek to further the objects and ORMs.

#### 2.4.4 Taking account of indigenous cultural heritage - assessment of referred applications

The Minister will need to obtain advice about cultural heritage (where applicable) in order to comment on both referred statutory documents (eg, development plans) and referred applications.

#### 2.4.5 Native title implications

The *River Murray Act* may be understood to proceed on the basis that:

- The Act itself may be a ‘future act’, but its passage was valid due to falling within either of subdivisions H or M of the Commonwealth *Native Title Act 1993*;
- The amendments to other Acts made by the Schedule do not alter those Acts in any way that may restrict their operation from the point of view of obligations imposed under the *Native Title Act*;
- Activities associated with implementation of the *River Murray Act* (eg, through the exercise of certain powers by authorised officers and the Minister) may constitute ‘future acts’.

The latter will be an ongoing consideration for implementation of the legislation. Requirements under the *Native Title Act* for undertaking activities that may affect native title are procedural requirements, including notification. Such activities may include, in certain circumstances, the exercise of certain powers by authorised officers (eg, section 14(e) and (f) - taking samples and measurements), and the making of regulations.

Section 34 of the Act probably adds nothing in a legal sense: it simply states the current law. It is identical to section 241 of the *Local Government Act 1999*.

**PART 3 – ADMINISTRATION**  
**Sections 9 - 16**

**3.1 FUNCTIONS AND POWERS OF THE MINISTER – Section 9**

**3.1.1 Interpretation of section 9**

Section 9 sets out the powers of the Minister. The section has a number of subsections setting out the Minister’s powers and functions.

Subsection 9(1) in particular is essentially an introductory, or ‘scene-setting’ provision. It outlines the Minister’s functions, rather than grants them, or sets out how they are to be exercised. The ‘special’ powers - for example, to impose conditions on licences, or to compulsorily acquire land - are set out in other places in the Act.

For example, although subsection 9(1) states that one of the Minister’s powers is to advise on the approval of statutory authorisations, it is section 22 that sets out which activities the Minister will have a say over, and specifically what the Minister’s power is, and how far it extends. Section 22 says that it is only those activity applications that are referred to the Minister under certain other Acts that trigger the Minister’s power of direction under this section. Those other Acts are as listed in the Schedule to the *River Murray Act*. Exactly which activities applications will be referred to the Minister will in turn be set out in the regulations made under those other Acts.

Subsection 9(5) is a further example of section 9 as a general provision. This subsection provides that the Minister “has the power to do anything necessary, expedient or incidental to ...” the administration of the *River Murray Act*. The provision needs to be understood as setting out the general powers of the Minister. It does not give the Minister any particular powers that any other person has not. This role of section 9 is reinforced by subsection 9(6), which provides the Minister with powers like the power to enter contracts, and to acquire and dispose of real and personal property. Although those powers are specific powers, they are not ‘special’ powers – any person can do these things.

Section 5 is also relevant to interpretation of section 9 – the provisions of the *River Murray Act* are in addition to, and do not derogate from, other legislation. The Minister will still need, for example, to obtain development consent in order to carry out the Minister’s powers.

**3.1.2 An obligation to consult – Subsection 9(2)**

Subsection 9(2) requires the Minister to consult prescribed persons, in prescribed circumstances.

The Minister agreed during debate in the House of Assembly to prescribe at least the Local Government Association and the Murray and Mallee LGA, as well as other relevant stakeholders in the regulations for the purposes of consultation.

The circumstances prescribed under the *River Murray Regulations 2003* for consultation relate to:

- the Implementation Strategy;
- any future changes to, or new, River Murray Protection Areas; and
- any future changes to the referral regulations.

Subsection 9(2) also requires that the Minister should:

- when consulting indigenous persons, give “special consideration to their particular needs”; and
- when consulting other persons, give consideration to “any special needs that they may have in the circumstances.”

The intention of this subsection is to ensure that the manner and timing of consultation gives special consideration to the needs of indigenous people (for instance, a process that is culturally sensitive, considers timing of consultation, provides adequate time for response, and takes into account difficulties for representatives to reach persons living in remote communities).

The needs of other persons should also be considered in undertaking consultation. This may include consulting farming communities at a time other than harvest or other peak times.

### **3.1.3 Minister to administer the Murray-Darling Basin Act – Subsection 9(3)**

Subsection 9(3) states that the Minister administering the *River Murray Act* shall also administer the *Murray-Darling Basin Act*.

It should be noted that the *Murray-Darling Basin Act* itself does not prescribe who shall be the ‘lead Minister’ amongst South Australia’s Ministers who are appointed members of the Murray-Darling Basin Ministerial Council. The Agreement itself says that the Premier may select one of the Ministers to be the State’s ‘responsible’ Minister.

## **3.2 ANNUAL REPORT – Section 10**

Section 10 obliges the Minister to prepare an annual report on the operation of the *River Murray Act*. The section requires the report to include:

- information on implementation of the Act and the extent to which the objects and ORMs are being achieved; as well as
- reports on the referral of matters under the related operational Acts, enforcement of the general duty and enforcement action taken under Part 8.

The report must be prepared before 30 September in the relevant year, and must be tabled within 6 sitting days. These timelines correspond with timelines for annual reports required under the *Public Sector Management Act*, and ideally the reports will be tabled together.

### **3.3 THREE-YEARLY REPORTS – Section 11**

Section 11 obliges the Minister to undertake a triennial review of the Act. The review must include:

- an assessment of the interaction between the *River Murray Act*, the related operational Acts, and any other relevant Act; and
- an assessment of the state of the River.

The review should be undertaken so as to coincide with the end of a financial year, and the outcomes of the review are to be included in the annual report for that year.

The Transitional Provisions (clause 23 of the *River Murray Act* Schedule) state that the first three yearly report shall be undertaken by the end of the 2004/2005 financial year and the outcome of the review must be reported as part of the Minister's annual review for that year<sup>7</sup>.

### **3.4 MINISTER'S POWER OF DELEGATION – Section 12**

The Minister has unrestricted powers of delegation in section 12, including the ability to provide that a delegation may be further delegated (i.e., sub-delegated).

It was asked during debate in the House of Assembly whether the section allows the Minister to override a decision of a delegate, and if so, what the point of delegating was.

Section 12 is entirely a standard provision. It allows the Minister to delegate any of the Minister's functions by instrument in writing, to revoke that delegation at any time, and to act personally notwithstanding that a delegation has been made.

The section does not allow the delegate to be 'overridden'; this is a misunderstanding of the function of delegation. Once a delegate has made a decision, then that power has been validly exercised. The Minister cannot 'override' the decision made. If there is in fact a serious problem with the decision made, the Minister may be able to revoke the decision by further decision, and make a different decision. That would depend on the nature of the decision made.

What the section does is ensure that just because the Minister has delegated a power to another person (for example, the power to issue an enforcement order may be delegated to an officer within the Department), the Minister may also exercise that power him or herself (that is, the Minister could still personally issue an enforcement order in appropriate circumstances, even though that power was also held by delegation by another person or persons).

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<sup>7</sup> The requirement was inserted by amendment moved by Mr Cameron in the Legislative Council.



### **3.5 AUTHORISED OFFICERS – Sections 13 and 14**

#### **3.5.1 Appointment of officers – Section 13**

While the River Murray Bill prepared for consultation included the automatic appointment of officers under a number of the related operational Acts as officers for the purposes of the *River Murray Act*, this provision was removed before the Bill was tabled. The Minister will appoint officers as required.

Subsection 13(2) allows officers to be appointed subject to conditions or limitations specified in the instrument. For example, officers may be appointed for certain regions, or, if appointing persons who are authorised officers for the purpose of a related operational Act, it may be appropriate to limit the authorisation to matters within the expertise of the officer (e.g., native vegetation, or water quality issues).

#### **3.5.2 Powers of authorised officers – Section 14**

##### *3.5.2.1 Range of powers*

Section 14 sets out the powers of authorized officers. They are generally comparable with powers of officers under the *Water Resources*, *Native Vegetation*, and *Environment Protection Acts*.

It should be noted that there are important constraints on powers of authorized officers (modeled on similar provisions in the *Native Vegetation Act*), including:

- there is no ability for an officer to demand production of documents without a warrant (see section 14(1)(i));
- there is no ability for an officer to exercise powers in respect of residential premises except for vessels – for example houseboats (see section 14(3)).

##### *3.5.2.2 Information sheet*

Subsections 14(10) and (11) were inserted by the Government during debate in the Legislative Council<sup>8</sup>, to require that an officer “must, before exercising powers under this section in relation to a person, in so far as is reasonably practicable, provide to the person a copy of an information sheet that sets out information about the source and extent of the authorized officer’s powers under this section, and about the action that may be taken against the person if he or she fails to comply with a requirement or direction of an authorized officer under this section.”

An ‘information sheet’ for the purposes of the section is a document approved by the Minister for the purposes of the subsection.

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<sup>8</sup> The amendment was prepared at the request of the Member for Heysen (Ms Redmond) in the House of Assembly.

### 3.5.2.3 Houseboats

Amendments were made to subsections 14(1) and (3) by the Government in the House of Assembly to allow officers to board and enter houseboats in order to exercise their enforcement powers. Enforcement provisions that were contained in the Bill as tabled did not give sufficient power in relation to vessels on the River, including houseboats. The amendments allow the Minister to exert effective control over use of houseboats and other river vessels (for example, to control mooring practices and waste disposal).

### 3.5.2.4 Power to enter vehicles or premises

Subsection 14(5) allows an authorised officer to enter a vehicle or premises. However, this power may only be exercised with the co-operation of the owner or occupier of the vehicle or place.

The authorised officer may use force to enter the vehicle or place only:

- with a warrant; or
- if the circumstances require immediate action to be taken.

An authorised officer has no power to enter residential premises (except vessels – for example houseboats).

Circumstances that might require immediate action could include illegal pumping from the River, or direct discharge to the River or floodplain of overflow from a septic tank, or excavation of the cliff face.

A power to enter in an emergency without warrant exists in many other Acts, including for example:

- *Development Act 1993* (s19)
- *Environment Protection Act 1993* (section 87)
- *Fisheries Act 1982* (s28)
- *National Parks and Wildlife Act 1972* (s22)
- *Water Resources Act 1997* (s67).

### 3.5.2.5 Expanding powers by regulation

Paragraph 14(1)(q) allows the powers of officers to be expanded by regulation. Section 53 of the *Passenger Transport Act*, among others, contains this provision. The purpose is to allow maximum flexibility to enforce the legislation, which will be necessary for example for the enforcement of regulations that may in future be made under section 42.

### 3.5.2.6 Native title implications

It is possible that the exercise of certain powers by authorised officers (eg, section 14(e) and (f) - taking samples and measurements) could in certain circumstances be taken to affect native title

rights and therefore be a ‘future act’ for the purposes of the native title legislation<sup>9</sup>. If this is the case, then the effect of the native title legislation is a requirement to give notice (in the prescribed form) before undertaking the act.

### 3.5.4 Hindering officers or other persons involved in administering the Act – Section 15

The maximum penalty for hindering an authorised officer is relatively high: \$20,000. This compares with around \$5000 under the *Environment Protection Act*, *Water Resources Act* and *Native Vegetation Act*). The reason is to emphasise the intention to treat river protection very seriously.

The offence of ‘hindering an officer’ is made up of things like producing documents known to be false.

It also an offence for an authorised officer to use abusive language to any person (section 15(3)).

### 3.5.4 Self-incrimination – Section 16

The power of an authorised officer to require a person to answer questions<sup>10</sup> does not override the common law right for a person not to answer a question that may incriminate him or her. However, section 16 (inserted in the House of Assembly) clarifies this.

### 3.5.5 Comparison of powers of authorised officers

<b>14(1)</b>	<b><i>River Murray Act</i></b>	<b><i>Native Vegetation Act (NVA) and/or Water Resources Act (WRA)</i></b>
<b>(a)</b>	Enter any place	NVA
<b>(b)</b>	Inspect any place	NVA
<b>(c)</b>	Enter and inspect any vehicle	WRA (88(1)(d))
<b>(d)</b>	Give directions re stopping a vehicle or thing	NVA, WRA
<b>(e)</b>	Require person to facilitate boarding of vessel	The provision was inserted in the <i>River Murray Act</i> in the House of Assembly – similar provisions are contained in the WRA and <i>Harbors and Navigation Act</i>
<b>(f)</b>	Take measurements	WRA
<b>(g)</b>	Place pegs and markers for environmental monitoring	Not in either NVA or WRA
<b>(h)</b>	Take samples	NVA, WRA

<sup>9</sup> *Native Title Act 1991 (Commonwealth)*

<sup>10</sup> Section 14(1)(o) – an offence if not complied with – see section 15.

<b>(i)</b>	With warrant, require production of documents	NVA
<b>(j)</b>	Examine and take copies of documents so produced	NVA
<b>(k)</b>	Take photographic or other recordings	NVA, WRA
<b>(l)</b>	Examine or test a vehicle, plant fitting etc, or seize for testing	WRA
<b>(m)</b>	Seize and retain a thing used in, or evidence of, a contravention of the Act	NVA, WRA
<b>(n)</b>	Require person suspected of contravention to state name and address	NVA, WRA
<b>(o)</b>	Require a person to answer questions	NVA (restricted to 'reasonableness'), WRA
<b>(p)</b>	Give directions reasonably required in connection with above or in connection of the administration of the Act	NVA, WRA
<b>(q)</b>	Other powers as prescribed	<i>Passenger Transport Act</i>

**PART 4 – MINISTERIAL ACTIVITIES AND ARRANGEMENTS**  
**Sections 17 - 20**

**4.1 MINISTER’S WORKS – Section 17**

Section 17 allows the Minister to undertake activities to perform the Minister’s functions under the Act. Subsections 17(2) and (3) list the types of works that may be included in this power (the list is not exclusive):

- infrastructure or other devices for altering or managing the flow of water, water levels or water quality (17(2)(a) and (b)). Such works may include, for example:
  - regulating structures on wetlands adjacent to the River Murray to provide for localised wetting and drying;
  - banks, culverts, pumps, pipelines and channels to divert water from the River to rejuvenate floodplains and wetlands;
  - small weirs, or the raising of existing weirs, varying water levels to mimic natural conditions;
  - groundwater pumps and pipelines and disposal basins to lower groundwater levels below the root zones of native vegetation (getting into the realms of works to be dealt with under the *Murray-Darling Basin Act* and Agreement).
- channels, drains, culverts or bridges (17(2)(c)). Such works may include works to improve the health of wetlands and floodplains through flow regulation.
- storage or workshop facilities (17(2)(d)). Such works are self explanatory, and would provide for a contractor to establish facilities to construct, operate and maintain works of the nature described above. More than likely, these facilities would be temporary. Again, works of major size would more than likely fall within the scope of the *Murray-Darling Basin Act* and Agreement.
- establishing or removing levee banks (17(3)(a)). Works here are focussed on levee banks, which in some cases are beneficial (eg guiding water across a floodplain to a wetland, or temporarily ponding water on a floodplain), and in other cases need to be modified or removed to allow water to flow unimpeded across a floodplain.
- activities associated with environmental testing or evaluation (17(3)(b)). Some works, such as drilling of bores, or the construction of a safe area (eg small jetty) for water quality sampling, will be required for environmental testing and evaluation.

## 4.2 MANAGEMENT AGREEMENTS

### 4.2.1 Potential scope of management agreements – Section 18

Section 18 allows the Minister to enter into management agreements with owners of land within the Basin, for example for wetland protection on private property.

Management agreements were widely supported during consultation on the Bill. The provision has the potential to be a very, and is modelled on similar provision in the *Development Act* and some other Acts.

The potential scope for management agreements is very wide. Management agreements may relate to<sup>11</sup>:

- The conservation or management of water;
- The preservation, conservation, management, enhancement or re-establishment of any aspect of the natural resources of the River Murray (see definition of ‘natural resources of the River Murray in section 3);
- Any other matter associated with furthering the objects of the Act or the ORMs.

Without limiting the scope of the section, subsection 18(2) indicates that a management agreement may –

- (a) require or authorise specified work;
- (b) restrict work that may be carried out;
- (c) prohibit or restrict specified activities;
- (d) provide for care, control, management or operation of infrastructure etc;
- (e) provide for management of any matter in accordance with a particular management plan;
- (f) provide for implementation of environment protection measures or environment improvement programs;
- (g) provide for the testing or monitoring of natural resources;
- (h) provide for a remission or exemption in respect of a levy under the *Water Resources Act*;
- (i) provide for remission of rates or taxes in respect of the land;
- (j) provide for the payment of an incentive to enter into the agreement.

### 4.2.2 Providing financial, technical or other professional advice or assistance – subsection 18(2)(f)

Subsection 18(2)(h) is modelled on a similar provision in the *Aboriginal Heritage Act 1988*, and was included at the suggestion of indigenous people during consultation on the Bill.

It should be noted that the assistance provided can relate to “any relevant matter”. Relevant matters are set out in subsection 18(1) (see above). The paragraph could include, for example, provision of advice and assistance about protection of Aboriginal cultural heritage on the land.

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<sup>11</sup> Subsection 18(1)

### **4.2.3 Remitting rates and taxes – Subsections 18(2)(j) and 18(3)**

#### *4.2.3.1 Consultation with relevant local council – subsection 18(3)*

Subsection 18(2)(j) allows management agreements to “provide for the remission of rates or taxes in respect of the land”.

Subsection 18(3)<sup>12</sup> requires the Minister to consult the relevant local council before including any remission of rates. Following further consultation and amendment in the Legislative Council, the subsection is expressed as a requirement that the Minister “should take reasonable steps to consult” (rather than “must consult”, as it was in the Bill as tabled). This clarifies the extent of consultation required of the Minister. It ensures that, provided the Minister has taken reasonable steps to consult, a management agreement would not be able to be invalidated on the strength of an argument by a council that the degree of consultation was less than the council had wished.

(Similar provisions are contained in section 23A of the *Native Vegetation Act*, and section 57 of the *Development Act*. The latter Act however requires the consent of the relevant council before an agreement may remit council rates.)

#### *4.2.3.2 Application of the Rates and Land Tax Remission Act 1986*

The *Rates and Land Tax Remission Act 1986* does not apply to the remission of rates under this provision. (That Act only applies to rates remitted by regulation made under the Act.)

### **4.2.4 Extent of exemptions available under management agreements**

Subsection 18(9) provides that “except to the extent that the agreement provides for a remission or exemption under subsection (2)(i) or (j) [remission or rates and taxes], a management agreement does not affect the obligations of an owner or occupier of land under any other Act.”

This means that an agreement could not exempt the landowner from the provisions of the *Development Act* regarding the need to obtain development consent for development, or from the *Country Fires Act* regarding the lighting of fires and management of land to reduce fire risk.

### **4.2.5 Enforcement of management agreements**

A management agreement may be enforced:

- according to its terms (for instance, a management agreement might set out sanctions, including repayment of monies paid under the agreement);
- through imposition of a River Murray Protection Order (section 24); or
- where harm has occurred due to the breach – through a River Murray Reparation Order (section 26) or Reparation Authorisation (section 28)

It is also possible that a management agreement could be enforceable as a contract.

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<sup>12</sup> Inserted by the Government in the Bill as tabled, following consultation with local government bodies on the draft Bill.

#### **4.3 POWERS OF ENTRY ONTO LAND – Section 19**

Section 19 provides that a person may, for specified purposes, enter or pass over any land that is not vested in the Minister, bring vehicles, plant and equipment onto that land, and temporarily occupy land not vested in the Minister. In doing so, a person must minimise disturbances to any land, and, subject to any alternative arrangement agreed between the Minister and owner of the relevant land, must restore any disturbed land to its previous condition. No compensation is payable with respect to the exercise of a power under this section.

The provision is relatively standard provision: it is included for example in section 67, *Water Resources Act*; section 87, *Environment Protection Act*; section 65, *Animal and Plant Control Act*. The provision ensures the ability of the Minister to enter land for temporary purposes, such as monitoring and data collection.

If the Minister wished to occupy the land permanently (including, for example, by building something there), the Minister would need to come to an arrangement with the land owner, or failing agreement, to compulsorily acquire the land.

#### **4.4 COMPULSORY ACQUISITION – Section 20**

Section 20 allows the Minister, if necessary, to exercise powers of compulsory acquisition in the manner provided for under the *Land Acquisition Act 1969*.

Such a provision is standard in legislation that may require the use or occupation of land by an authority. (See for example section 66 of the *Water Resources Act*.)

The *Land Acquisition Act* sets out a detailed process for negotiation and the payment of fair compensation.



## **PART 5 – IMPLEMENTATION STRATEGY**

### **Section 21**

#### **5.1 ROLE OF THE STRATEGY**

Section 21 requires the Minister to prepare a River Murray Act Implementation Strategy.

The strategy must set out the priorities and strategies of the Minister in order to achieve the objects and implement the ORMs. The strategy must be reviewed every five years and must be published in the Gazette and be available for public inspection.

(The Strategy was originally called the River Murray Plan, which led to confusion over the role of the document. This has been resolved by the current provisions relating to the Strategy).

#### **5.2 STATUS OF THE STRATEGY – WHEN AND HOW MAY IT BE USED?**

The Implementation Strategy is a statement of Ministerial policy, in terms of the objectives and outcomes to be sought. The Strategy has no statutory status apart from that: subsection 21(8) states that the strategy is an expression of policy and does not affect rights or liabilities (whether of a substantive, procedural or other nature).

##### **5.2.1 How will the Implementation Strategy relate to Natural Resources Management Plans?**

The Implementation Strategy is a Government policy statement of the priorities that the Minister will pursue. It is not a document that overrides other statutory plans (such as catchment plans); and it is not a document that is used to measure applications for activities (such as a Development Plan or a Water Allocation Plan). The Implementation Plan will set out what the Minister aims to pursue as priority outcomes for the River over a five-year period, and what strategies and actions the Minister proposes to undertake to deliver those outcomes.

##### **5.2.2 How does the Strategy relate to the State Planning Strategy, and to councils' development plans?**

The *River Murray Act* states that the Implementation Strategy is an expression of policy. Its purpose is to set out the Minister's priorities and strategies for implementation of the new Act. The *Development Act* requires councils' Plan Amendment Reports (PAR) to comply with the State Planning Strategy, and the *River Murray Act* does not alter this. However, one of the amendments made to the *Development Act* by the *River Murray Act* is to incorporate the Objectives for a Healthy River Murray into the Planning Strategy (see the Schedule to the Act).

The Minister for the River Murray will be mindful of his or her priorities and strategies when considering referred PARs during the consultation process. The Minister should make councils aware of those priorities during their preparation of PARs, and Councils should have regard to the Minister's views. There is no duty on a council to comply with the Minister's stated priorities.

### **5.3 PROCESS FOR PREPARING THE STRATEGY**

The Minister undertook, during debate in the House of Assembly, to prescribe by regulation pursuant to section 9(2) that preparation of the Strategy will be a matter in respect of which the Minister will consult, and to prescribe as relevant bodies for that purpose the Local Government Association and Murray and Mallee Local Government Association.

The *River Murray Regulations 2003* reflect this undertaking.

**PART 6**  
**DEVELOPMENT OF RELATED POLICIES AND CONSIDERATION OF ACTIVITIES**  
**Section 22**

**6.1 INTRODUCTION – Section 22**

Part 6 comprises just one provision: section 22.

The section is one of the key provisions to the Act – it establishes the referral mechanism for both statutory instruments (ie statutory plans such as Plan Amendment Reports) and applications for statutory authorisations (ie water licences, development consents).

The section sets out:

- what will be referred to the Minister (the referral of statutory instruments is set out in the operational Acts themselves; the referral of applications will in most cases be detailed in regulations made under the affected related operational Acts);
- what the Minister must take into account when considering the referred matter;
- what happens if the Minister cannot agree with the other relevant authority on the content of a statutory plan;
- what conditions may be imposed on referred applications;
- the making and use of policies to guide the Minister’s decision-making;
- mechanisms for allowing exemptions from the need to refer applications;
- Minister to be party to any appeal involving a directed condition or refusal.

The section proved contentious during debate in both Houses, mainly in so far as it gives the Minister a particular role in relation to statutory plans including Plan Amendment Reports under the *Development Act*.

**6.2 REFERRAL OF STATUTORY INSTRUMENTS**

A statutory instrument is defined in the interpretation provision (section 3) as being a plan or policy prepared under an Act.

Subsection 22(1) applies the provisions of section 22 to any statutory instrument that is to be referred to the Minister either by virtue of amendment made within the relevant Act, or by regulation made under paragraph 22(2).

**6.2.1 Duty of the Minister in considering statutory instruments – Subsection 22(4)**

In considering a referred statutory instrument the Minister must have regard to the objects and the ORMs. The Minister must also take into account the terms or requirements of the *Murray-Darling Basin Agreement* and any decision of the Ministerial Council under that Agreement.

## **6.2.2 The power of the Minister and the role of the Governor – Subsection 22(5)**

Subsection 22(5) provides that if the Minister considers that he or she cannot “endorse or otherwise agree with” a referred statutory instrument, and the authority responsible for that instrument cannot agree with the position taken by the Minister, either the Minister or the responsible authority may refer the matter to the Governor.

During debate on the Bill, there was much discussion over this provision giving the Minister a ‘right of veto’ over statutory plans. Although section 22 gives the Minister considerable strength in expressing views about statutory instruments, the provision does not give the Minister any ‘right of veto’. It does ensure that the River Murray will be given high priority within Government, while subsection 22(5) provides that disagreements between Ministers over the appropriate direction of development within the River Murray will be resolved by Government (that is, by the Governor in Council (Cabinet)). The Governor plays a similar role in some other Acts, including in the *Development Act* in relation to Mining (see section 75), and the *Water Resources Act* in relation to catchment plans that may affect SA Water’s functions (section 116).

As a result of debate in both Houses, provisions relating to processes for preparing Plan Amendment Reports (PARs) were amended in the Legislative Council (see amendments to the *Development Act*, section 24(3)). An amendment was also inserted into subsection 22(3) of the *River Murray Act*, preventing the referral of PARs by operation of the regulations<sup>13</sup>.

In addition to these amendments, the Parliamentary Committee will be required to report after two years on the operation of the provisions as they relate to PARs.

## **6.3 REFERRAL OF STATUTORY APPLICATIONS**

A statutory authorisation includes such things as an approval, consent, licence or permit granted under a related operational Act.

The referral scheme in section 22 applies to any application for a statutory authorisation that is to be referred to the Minister:

- under or pursuant to a related operational Act<sup>14</sup>; or
- under or pursuant to a condition imposed by the Minister under this section<sup>15</sup>.

### **6.3.1 Duty of Minister when acting in respect of a referred application – Subsection 22(4)**

Subsection 22(3) requires that when considering a referred application, the Minister must:

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<sup>13</sup> That is, the referral only takes place by virtue of section 24(3) of the *Development Act*, and cannot be called into the more stringent scheme by future regulations under the *River Murray Act*.

<sup>14</sup> Amendments establishing the referral mechanism are made in most of the related operational Acts – see Schedule. ‘Under’ an Act in this context means by regulation made under an Act. Exactly which applications will be referred to the Minister is in most cases set out in regulations under the related operational Acts.

<sup>15</sup> Subsection 22(8)(f) allows the Minister to impose a condition that any future application for a renewal or extension of the authorisation must also be referred to the Minister.

- take into account and seek to further the objects of this Act as well as the ORMs;
- take into account the possible effects of the proposed activity on the River Murray and the extent to which similar activities undertaken may have a cumulative effect on the River;
- take into account the views of other relevant persons and bodies where relevant;
- take into account the terms of the Agreement under the *Murray-Darling Basin Act 1993*;
- take into account any relevant policy, whether a policy published by the Minister under section 22(11) or some other policy.

### **6.3.2 ‘Stopping the clock’ on assessments – Subsection 22(6)**

Subsection 22(6) allows the Minister to extend the time within which to respond if further information is required to assess a referred application.

This provision is not uncommon in legislation setting up application and approval systems. A relevant authority cannot properly assess an application without all relevant information. The section does not give an open-ended delay, but requires the Minister to ‘extend the period’ within which the Minister must respond to the application.

The likely use of this subsection will be reduced for Development applications at least, through using Schedule 5 of the Development Regulations to set out the type of information the Minister will require, reducing any potential delays.

### **6.3.3 Imposition of conditions on referred applications – Subsections 22(7) and (8)**

Subsections 22(7) and (8) allow the Minister to direct that an authorisation not be granted without the imposition of specified conditions. Conditions available to the Minister are very wide (provided that they are directed to the considerations listed in subsection 22(4)).

Conditions may include that the person who is to hold the authorisation:

- enter into a bond to cover the cost of any damage to the River Murray caused by a breach of a condition (see subsection 3(5) for a definition of “the costs of any damage to the River”);
- undertake specified steps to off-set or protect against adverse impact on the River, including by payment of a sum or sums of monies into an approved account;
- develop an environmental improvement program, or participate in a specified environment improvement program;
- participate in any other scheme, including by the payment of money into an approved account;
- comply with a specified code or standard;
- refer any future application for renewal or extension to the Minister.

During consultation, one respondent raised a concern that bonds might be used inappropriately. Ministerial policies may be used to indicate the likely use of the various condition types (see below, subsections 22(11) ff).

### **6.3.4 Requiring other persons to provide information – Subsection 22(10)**

Subsection 22(10) allows the Minister, by notice in writing, to require any other person or body to provide information in relation to an application. The section will assist the Minister in ensuring that all relevant information is before the Minister. It will also help ensure a consistent approach across relevant Government agencies which may be involved in assessing a particular application.

During consultation on the Bill, a concern was expressed that the provision might result in commercially confidential information being published. As a matter of administrative law and application of the Government's privacy principles, information provided to a Government agency may only be used for the purposes for which it was provided, unless the *Freedom of Information Act* applies to the release of information.

### **6.3.5 Ministerial policies – Subsections 22(11) – (16)**

Subsection 22(11) provides for the Minister to publish policies in connection with the Minister's function of assessing referred statutory authorisations. Policies will help provide certainty to developers who will know in advance the type of things the Minister will be taking into account in making decisions on referred applications. Application of the policy to a particular instance can be appealed against by the affected person (unless appeal rights are excluded by regulation – see below).

Policies may set out matters the Minister may take into account or conditions that may be imposed in relation to specified classes of authorisations, or set out circumstances where the Minister may oppose the grant of a class of authorisation.

Subsections 22(12) to (16) provide that a published policy may state that the Minister may impose particular conditions on particular applications, or may oppose certain application types outright. Regulations may provide that no appeal will lie against a decision of the Minister made pursuant to such a policy. Examples of the use of such a policy include:

- to enforce a particular set of conditions for high salinity risk areas, such as is presently used in Victoria; or
- to enable the Minister to ensure that activities that may be controlled by regulations made under the *River Murray Act* are consistently dealt with if they appear before the Minister as referred applications under the *Development Act*.

There are precedents for the removal of appeal rights in this way under the *Development Act*:

- section 35(4) allows a development plan to directly remove appeal rights for non-complying development;
- section 37(5) allows regulations to remove appeal rights.

Allowing the Minister to give an 'early no' (ie, outright opposition to an application) also has precedent in the power of the Governor in respect of 'major projects' under the *Development Act*.

### **6.3.6 Minister as party to any appeal against directed conditions – Subsection 22(17)**

There is no direct right of appeal under the *River Murray Act* against any directed condition or directed refusal of a statutory authorisation. The appeal rights are as set out in the primary legislation under which the authorisation is granted. Subsection 22(17) provides that the Minister will be party to an appeal under the relevant operational Act where the appeal relates to a condition or refusal directed by the Minister.

Appeals under related operational Acts will be heard by the court relevant to that Act, not necessarily by the ERD Court. However, any Court hearing such an appeal will be required, when considering the Minister's directed conditions, to act consistently with and seek to further the objects and ORMs (see section 8).

### **6.3.7 Exempting the need for applications to be referred – Subsections 22(18) – (21)**

Subsections 22(18) to (21) allow the Minister to exempt certain classes of application from the need to be referred; such exemptions may be subject to conditions. It is an offence to contravene or fail to comply with a condition of an exemption.

The subsection will enable the Minister to reduce the number of referrals made while still maintaining control over the way in which activities covered by the exemption are undertaken.

### **6.3.8 Does the referral process disturb the development system's 'one-stop-shop'?**

During debate on the Bill, there was some concern expressed that the role of the Minister for the River Murray would disturb the council's (or the Development Assessment Commission's) role as a 'one-stop-shop' for development assessment and approval.

The *River Murray Act* uses the existing mechanism established by the *Development Act* for the referral of particular individual applications to an external body (in this case, the Minister for the River Murray) for direction over the applications.

Amendments to Schedule 8 of the Development Regulations ensure that any development application referred to the Minister for the River Murray will not have to be referred to any other environment agency except the Environment Protection Authority (which will remain an independent authority). Councils have reportedly experienced some difficulties in the past with the need to make multiple referrals to various environmental agencies. Multiple referrals result in the receipt of multiple responses, occasionally some of which will be received outside of the required timeframe, or containing contradictory requirements or advice. The Minister for the River Murray under the referral process established by the *River Murray Act* and amendments to Development Regulations will provide a single response to council, effectively enhancing the one-stop-shop within River Murray Protection Areas.

(Bodies that were formerly referral bodies under Schedule 8 within what will now be RMPAs are the Coast Protection Board, Catchment Board and Heritage Minister for both State Heritage and Historic Shipwrecks.)

#### 6.4 TABLE OF REFERABLE MATTERS UNDER RELATED OPERATIONAL ACTS

The Table below sets out the instruments and authorisations affected by amendments to related operational Acts for the purposes of section 22.

##### STATUTORY INSTRUMENTS

<i>Aquaculture Act</i>	Aquaculture policies
<i>Coast Protection Act</i>	Management plan
<i>Development Act</i>	Plan Amendment Reports
<i>National Parks and Wildlife Act</i>	Reserve management plans
<i>Native Vegetation Act</i>	Native vegetation guidelines
<i>Petroleum Act</i>	Statements of Environmental Objectives
<i>Soil Conservation and Land Care Act</i>	District plans
<i>South Eastern Water Conservation and Drainage Act</i>	Management plan
<i>Water Resources Act</i>	Water plans

##### STATUTORY AUTHORISATIONS<sup>16</sup>

<i>Animal and Plant Control Act</i>	Permits to keep animals/plants
<i>Crown Lands Act</i>	Permits to use land
<i>Development Act</i>	Development consents
<i>Fisheries Act</i>	Licences, permits (to release exotic fish), exemption
<i>Harbors and Navigation Act</i>	Permits for events (for closing the River)
<i>Heritage Act</i>	Permits (to excavate or disturb site)
<i>Historic Shipwrecks</i>	Permits (to damage or destroy, interfere with, remove or dispose of wreck or relic)
<i>Mining Act</i>	Mining tenements
<i>National Parks and Wildlife Act</i>	Leases, licences (i.e., to occupy land), permits
<i>Native Vegetation Act</i>	Clearance consents
<i>Petroleum Act</i>	Statements of Environmental Objectives
<i>Soil Conservation and Land Care Act</i>	Soil orders
<i>S-E Water Conservation and Drainage Act</i>	Licences for works
<i>Water Resources Act</i>	Water licences, permits for activities

<sup>16</sup> The class of referable applications will in most cases be set out in regulations under each relevant Act.



**PART 7 – GENERAL DUTY OF CARE**  
**Section 23**

**7.1 DUTY NOT TO HARM THE RIVER**

Under section 23, a person has a general duty of care to “take all reasonable measures to prevent or minimise any harm to the River Murray” through the person’s actions or activities. Harm includes the risk of harm and future harm. ‘Actions’ and ‘activities’ do not include omissions.

There are certain things to be considered in determining what measures are ‘reasonable’. These include the nature of the harm and the sensitivity of the environment, financial implications of alternative action and the level of risk involved. Whether a person held a licence or other authorisation, and whether that authorisation contained conditions directed at protecting the River, will all be relevant matters. However, simply undertaking an activity in accordance with an existing authorisation is not of itself a right to act in breach of the duty in section 23.

A breach of the duty does not constitute an offence but compliance may be enforced by the issuing of a protection order or reparation order under the Act (see Part 8 – Protection and other orders).

The duty was modelled on the general environmental duty in section 25 of the *Environment Protection Act*. It provides broader protection to the River than the existing duty in the *Environment Protection Act* because that duty applies only in respect of causing ‘pollution’.

The duty of care was generally supported during consultation on the Bill.

**7.2 SCOPE OF THE DUTY - CAUSING ‘HARM’ – Subsection 23(2)**

There is no definition of “harm”. Regulations made under paragraph 23(2)(a) may define particular things as constituting ‘harm’.

**7.3 THE EXEMPTION – PRESCRIBED CIRCUMSTANCES – Subsection 23(3)**

Subsection 23(3) states a person will be taken not to be in breach of subsection 23(1) (the duty) if the person is “acting in circumstances prescribed by the regulations”.

The provision is intended to be used as an exemption rather than as a method of regulation of activities. However, there seems to be nothing to prevent the provision from being used to regulate activities that may otherwise be taken to harm the River (for example, jet skiing), provided they are undertaken in circumstances set out in the regulations.

Regulations have been made that exempt from the duty a person who is exercising a statutory power in an emergency.

**PART 8 – PROTECTION AND OTHER ORDERS<sup>17</sup>**  
**Sections 24 - 33**

**8.1 DIVISION 1 - ORDERS**

**8.1.1 River Murray Protection Orders – Sections 24 and 25**

*8.1.1.1 Issuing an order*

Section 24 allows the Minister to issue a River Murray Protection Order (RMPO) to secure compliance with the general duty of care, a condition of an authorisation, or an exemption operating under the Act. It is an offence not to comply with a protection order.

The provisions of this Part generally are modelled on protection orders and authorisations under the *Environment Protection Act*.

One difference between RMPOs and orders under the *Environment Protection Act* is that an RMPO may include a requirement that the person pay a bond, or meet other financial impositions relating to offsetting possible future damage caused by their actions.

An authorised officer may issue an emergency RMPO. If the order is issued orally, the officer must advise the person of his or her appeal rights, and must confirm the emergency RMPO in writing at the earliest opportunity. An emergency RMPO ceases to have effect after 72 hours unless confirmed by a written RMPO issued by the Minister.

*8.1.1.2 Action on non-compliance with an order*

Section 25 provides that if a protection order is not complied with, the Minister may take any action required and recover any reasonable costs and expenses as a debt due.

**8.1.2 Reparation orders – Sections 26 and 27**

*8.1.2.1 Issuing a reparation order*

Section 26 allows the Minister to issue a reparation order if satisfied that a person has caused harm to the River Murray by contravening the general duty of care, a condition of a statutory authorisation or any other requirement under the Act.

A reparation order may require a person to take action or make payments to enable necessary action to be taken, and also include other requirements to prevent or mitigate further harm to the River.

An authorised officer may issue an emergency reparation order. If the order is issued orally, the officer must advise the person of his or her appeal rights, and must confirm the emergency order in

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<sup>17</sup> Detailed discussion of the operation of Part 8 is contained in the DWLBC *Guidelines for Compliance and Enforcement of the River Murray Act*.

writing at the earliest opportunity. An emergency order ceases to have effect after 72 hours unless confirmed by a written order issued by the Minister.

It is an offence to fail to comply with a reparation order.

#### *8.1.2.2 Action on non-compliance with an order*

Section 27 provides that if a reparation order is not complied with, the Minister may take any action required and recover reasonable costs and expenses as a debt due.

### **8.1.3 Reparation authorisations – Section 28**

Section 28 provides for the issue of a reparation authorisation if the Minister is satisfied that a person has caused harm to the River Murray by contravening the general duty of care, a condition of a statutory authorisation or any other requirement under the Act.

A reparation authorisation may be issued whether or not a reparation order has first been issued. An authorisation allows authorised officers (or other specified person authorised by the Minister for that purpose) to take action to make good any damage to the River Murray. The Minister may recover reasonable costs incurred by the action, as a debt.

### **8.1.4 Interim restraining orders – Section 29**

Section 29 allows the Minister, if of the opinion that a particular activity may cause harm to the River Murray, or there is insufficient information to assess the likelihood of harm or it is necessary to ensure the protection of the River, to issue an interim restraining order requiring a person to cease or not start a particular activity.

It is an offence to contravene an order.

The provision ensures that the Minister will be able to intervene, in the case of likely but not certain damage to the River, where the Minister does not have enough information to issue a River Murray Protection Order.

The order may be appealed against. It cannot last more than 28 days.

If the Minister wishes to take the matter further, he or she must issue a RMPO (which requires the harm and required action to be particularised).

There is a precedent in section 30 of the *Upper South East Dryland Salinity and Flood Management Act*.

### **8.1.5 Consultation before issuing enforcement – Subsections 30(1) and (2)**

Before issuing a protection order, reparation order or reparation authority, section 30(1) requires the Minister to consult with any relevant public authority, so far as practicable, and unless it is a matter of urgency.

### **8.1.6 No right of compensation in respect of order – Subsection 30(3)**

Subsection 30(3) provides that no compensation may be claimed by a person in respect of a requirement imposed by an enforcement order issued under the Division to enforce the general duty of care, or a provision of the regulations, or on account of any act undertaken in the exercise of a power under this Division.

This provision ensures that reasonable requirements necessary to prevent damage to the River will not be compensated for. It complements the immunity provision in section 35, and supports the power for regulations to regulate or prohibit certain activities in the future<sup>18</sup>.

### **8.1.7 Common questions about the enforcement provisions**

*8.1.7.1 Do the enforcement provisions double up on Environment Protection Orders (EPOs) or other enforcement powers?*

An EPO can only extend to the prevention of pollution. Harm to the River may be a wider matter than ‘pollution’ as defined in the *Environment Protection Act*, particularly given the scope of the definition of the River in the *River Murray Act*, and the objects and ORMs.

Section 30 of the *River Murray Act* is aimed at preventing doubling up, either with *Environment Protection Act* enforcement or enforcement under any other Act. That section requires the Minister to consult any other relevant authority before commencing enforcement.

However, enforcement powers under the *River Murray Act* are in many instances likely to be more effective for river protection than powers under other Acts.

*8.1.7.2 What if an RMPO was issued for petty matters, or the order is out of proportion to the potential for harm?*

Orders must be as reasonably required to achieve the object of the order. Where the order is issued to enforce the general duty of care, the officer must take into account factors including extent of harm, and cost and feasibility of alternatives.

There are appeal rights to the ERD Court.

#### *8.1.7.3 Penalties*

Penalties for breach of Orders are relatively high – to \$120,000 for an order arising out of a non-domestic activity. (It should be noted that penalties for water resources offences under the *Water Resources Act* for the River Murray are also increased by the *River Murray Act* Schedule.)

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<sup>18</sup> For example, if regulations were to prevent the grazing of hard-hoofed animals within certain River Murray Protection Areas, any ability to claim compensation for any order issued to enforce the regulations could defeat the purpose of the regulations.

## **8.2 DIVISION 2 – REGISTRATION OF ORDERS AND EFFECT OF CHARGES**

### **Sections 31 and 32**

If an order or authorisation relates to an activity carried out on land or requires action to be taken on or in relation to land, the Minister may apply to have the order or authorisation registered in relation to that land<sup>19</sup>. A registered order or authorisation is binding on each owner and occupier of the land from time to time.

Registration will allow enforcement orders to run with the land, improving the likelihood of effective enforcement. Similar provisions exist in the *Environment Protection Act*, sections 94 and 101.

A charge imposed over land due to registration of a order or authorisation in relation to which a debt to the Minister has arisen<sup>20</sup> has priority over other prior charges in favour of any associate of the landowner (whether registered or not)<sup>21</sup>.

The section prevents an associate of the offender (see definitions in section 3) from benefiting from being secured as a creditor in a better position than the Minister. (Normally, registered charges take priority in the order in which they were registered.)

## **8.3 APPEALS – Section 33**

A person is entitled to appeal to the Environment, Resources and Development Court against the issue of a protection order, reparation order, or interim restraining order, or any variation to these.

Section 33 requires that any appeal must be lodged within 14 days. This is the same period as presently in the *Environment Protection Act* for appealing against Environment Protection Orders (on which the RMPOs have been modelled)<sup>22</sup>.

There is no automatic stay of an order pending the appeal, although the ERD Court may order a stay. Again, this is the same as in respect of Environment Protection Orders under the *Environment Protection Act* (section 107) and orders issued under the *Water Resources Act* (section 142).

Section 39 of the Act provides that offences constituted by the Act lie within the criminal jurisdiction of the Court.

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<sup>19</sup> Section 31

<sup>20</sup> The Minister's costs in carrying out action required or authorised by an order or authorisation is a debt due to the Minister, and a charge on the land once registered.

<sup>21</sup> Section 32

<sup>22</sup> *Environment Protection Act*, section 106(3)(a).

## **PART 9 – MISCELLANEOUS**

### **Sections 34 - 42**

#### **9.1 NATIVE TITLE – Section 34**

Section 34 provides that nothing done under the Act affects native title in any land or waters.

Some indigenous representatives asked during consultation why the section does not say that the Act does not “extinguish” native title. ‘Extinguish’ is considered to be too narrow a word. ‘Affect’ is wider, ensuring that the Act will not be construed to affect native title in any way (including through extinguishment).

The Government moved an amendment in the House of Assembly to bring the wording of the provision into line with that used in section 241 of the *Local Government Act*.

#### **9.2 IMMUNITY PROVISION – Section 35**

##### **9.2.1 Overview of the immunity provision**

Section 35 is a significant immunity provision which protects the Minister and others administering the Act, or acting under the authority of the Minister from liability for any acts or omissions.

Section 35 provides that no act or omission of the Minister or other person administering the Act, or other person acting under the Minister’s authority in order to protect, restore or enhance the River Murray or further the ORMs, gives rise to any liability against the Minister, person or body or the Crown to liability (even if in doing so, damage is caused to land or the use and enjoyment of land is affected). The section applies not only to acts or omissions with a view to exercising or performing a power or function under this Act; but also with a view to protecting restoring or enhancing any aspect of the River, including by exercising or performing any power or function under another Act (such as the *Murray-Darling Basin Act*).

The purpose of the section is to ensure that whatever needs to be done by the Minister in order to fulfill the Minister’s functions, and which is within the powers set out in this or another Act, can be done. (The other Acts under which the Minister has any power are the *Murray-Darling Basin Act*, and the related operational Acts, in so far as the Minister may impose conditions on licences). The wide and inclusive list of Minister’s powers in section 17 both support, and are supported by, this immunity provision.

The provision was the subject of specific discussion during Focus Group Sessions on the consultation draft Bill, and was widely supported. The provision is drafted at a similarly comprehensive level to that of the *Upper South East Dryland Salinity and Flood Management Act 2002*.

## 9.2.2 The immunity provision in detail

The section protects:

- the Minister (including a delegate of the Minister);
- any other person engaged in the administration of the Act (an authorised officer appointed under section 13, or other person authorised);
- any other person acting under the authority of the Minister (given the scope of the immunity, this would be likely to require a very clear authorisation by the Minister).

The section applies to any act or omission taken or made “with a view to”:

- exercising a power or function under the *River Murray Act*; or
- protecting, restoring or enhancing the River or furthering the ORMs;
- protecting, restoring or enhancing the River or furthering the ORMs by exercising a power under another Act.

The provision prevents any liability from arising, whether based on statutory or common law rights, against the Minister, the person, or the Crown.

There are four areas of limitation of the immunity:

- the act or omission would have to be lawful (ie, within the power granted by the Act);
- the act would have to be undertaken by the Minister or by a person authorised by the Minister;
- the act or omission would need to be done or made bona fide for the purposes of the Act; and
- the immunity would probably not apply where the Act sets out a specific process for doing something, and the Minister has purported to do that thing in some other way, without following the specified process.

## 9.3 ENFORCEMENT ISSUES

### 9.3.1 Continuing offences – Section 37

Section 37 provides that a person convicted of offence relating to a continuing act or omission is liable for penalty for each day that the act or omission continued, or continues after conviction.

The provision is modelled on section 123 of the *Environment Protection Act*.

The provision reflects that where offences have caused harm to the environment (in this case, to the River), the extent of the damage caused is likely to reflect the period over which the offence occurred, where it is a continuing (not one-off) offence. That is, the longer the offence continues, the greater the damage to the environment.

For example, pollution of the River through discharge of sewage to the floodplain would be likely to continue to cause greater damage to the River the longer it continued.

### **9.3.2 Liability of directors – Section 38**

Section 38 provides that if a corporation commits an offence, each director is guilty of an offence and liable to the same penalty as the corporation. A company director may be prosecuted regardless of whether the corporation has been prosecuted or convicted.

The provision is to be found in both the *Environment Protection Act* (ss 124 and 129) and the *Water Resources Act* (ss 150 and 151), and also in the *Upper South East Dryland Salinity and Flood Management Act*.

### **9.3.3 Criminal jurisdiction of Environment, Resources and Development Court – Section 39**

Section 39 provides that an offence against the *River Murray Act* will lie within the jurisdiction of the South Australian Environment, Resources and Development Court established under the *Environment, Resources and Development Court Act*.

The ERD Court is the most appropriate Court to deal with the environmental issues that will be raised in any prosecution under this Act. Offences against the *Environment Protection Act* are heard by the ERD Court.

### **9.3.3 Service of notices – Section 40**

Section 40 sets out the manner of service of documents.

The section contains standard provisions for service, including deeming service of a document by fixing it to or leaving it on a vessel that a person is in charge of, or expected to board at some stage.

## **9.4 CODES AND STANDARDS – Section 41**

Section 41 facilitates the adoption of appropriate codes, standards and related documents. Any such document will be required to be kept available for inspection by members of the public without payment of a fee.

It is a standard provision, also found for example in the *Water Resources Act* section 158 and *Development Act* section 108.

## **9.5 REGULATION MAKING POWER – Section 42**

Section 42 sets out the power to make regulations for the purposes of the Act. These include regulations to prohibit or restrict activities within a River Murray Protection Area, or set



requirements or conditions in relation to such an activity, or prohibit or restrict access to a River Murray Protection Area.

### **9.5.1 Controlling activities through regulations – Subsections 42(2) and (3)**

Subsections 42(2)(b) and (3) allow regulations to restrict:

- activities or classes of activities;
- in any RMPA or part of an RMPA; and
- comprehensively or subject to conditions;
- conditions may include that a person:
  - enter a bond or other prescribed financial arrangement;
  - take other steps to offset adverse impacts on the river;
  - develop and comply with an environment improvement program;
  - comply with a code of practice, standard, policy or other document prepared by a prescribed body.

Regulations may be enforced either by the issue of a protection order (see section 23) and also (where the regulation provides that breach is an offence), by commencement of proceedings for an offence under the Act.

Regulations under section 42 require the specification of the area within which the activity or class of activities by designation of a River Murray Protection Area: section 42(2)(a), (b) and (c). RMPAs are designated by regulation under section 4.

### **9.5.2 Native title implications**

Advice should be sought from the Crown Solicitor's Native Title Section before making regulations under the *River Murray Act* to control activities. Where regulations would operate in the same way in respect of native and freehold title interests, it is likely that Part 2, Division 3, Subdivision M of the *Native Title Act 1991 (Commonwealth)* would validate the regulations.

### **9.5.3 The process for making regulations**

The process for the making of regulations is, subject to any special processes set out in the legislation, governed by the *Subordinate Legislation Act 1978*.

The *River Murray Regulations 2003* require future regulations to vary or make new River Murray Protection Areas to be the subject of consultation with the bodies listed in those Regulations.

The process required by the *Subordinate Legislation Act* (as at September 2003) is:

### Making a regulation

A regulation must be laid before each House within 6 sitting days after it was made. Either House may disallow the regulation. (Disallowance may only occur if the notice for disallowance was given within 14 sitting days after the regulation was tabled.)

### The Legislative Review Committee

The regulation (and any notice under section 10AA – see below) will be referred to the Legislative Review Committee on the same day it is tabled. The Committee must review every regulation that comes before it, and must do so as soon as practicable. The Committee may report to Parliament that it recommends disallowance. (But Parliament may also disallow in the absence of any such report.)

### Date on which a regulation comes into effect

A regulation comes into effect four months after it was made (or such later date specified in the regulation).

However, section 10AA allows a regulation to come into effect on the day it was made (or such later date specified in the regulation) “if the Minister responsible for the administration of the Act under which the regulation is made certifies that, in his or her opinion, it is necessary or appropriate that the regulation come into operation on an earlier date”. Notices under section 10AA are frequently issued, so it is quite common for regulations come into effect on the day they were made.

### Effect of disallowance

If the situation arises, advice from the Crown Solicitor should be sought on the consequences of regulation having come into operation and subsequently been disallowed.

## SCHEDULE – A GENERAL OVERVIEW

### 10.1 INTRODUCTION

#### 10.1.1 Related operational Acts

The Schedule to the *River Murray Act* contains the amendments made to each of the following Acts:

- *Animal and Pest Plant Control (Agricultural Protection and Other Purposes) Act 1986*
- *Aquaculture Act 2001*
- *Coast Protection Act 1972*
- *Crown Lands Act 1929*
- *Development Act 1993*
- *Environment Protection Act 1993*
- *Fisheries Act 1982*
- *Harbors and Navigation Act 1993*
- *Heritage Act 1993*
- *Historic Shipwrecks Act 1981*
- *Irrigation Act 1994*
- *Mining Act 1971*
- *Murray-Darling Basin Act 1993*
- *National Parks and Wildlife Act 1972*
- *Native Vegetation Act 1991*
- *Opal Mining Act 1995*
- *Parliamentary Committees Act 1991*
- *Parliamentary Remuneration Act 1990*
- *Petroleum Act 2000*
- *Soil Conservation and Land Care Act 1989*
- *South Eastern Water Conservation and Drainage Act 1982*
- *Water Resources Act 1997*

These Acts, with the exception of the *Parliamentary Committees Act* and the *Parliamentary Remuneration Act*, are collectively referred to in the *River Murray Act* as the “related operational Acts”.

It should be noted that some of the related operational Acts, including at least the *Water Resources Act*, *Soil Conservation and Land Care Act* and *Animal and Plant Control Act*, are proposed to be amended as part of the Government’s integrated Natural Resources Management initiative. However, the amendments made by the *River Murray Act* Schedule will be reflected in the new legislation.

### 10.1.2 General effect of amendments

In general terms:

- In relation to statutory instruments (for example, plans and other management policies described in the related operational Acts), the amendments:
  - require the statutory instrument to seek to further the object of the *River Murray Act* and the Objectives for the River Murray (‘ORMs’); and, in some cases,
  - require consultation with the Minister for the River Murray before being finalised.
- In relation to applications for statutory authorisations (for example, certain water licences and development authorisations), the amendments provide for regulations to specify the types of applications that must be referred to the Minister for the River Murray for his or her consideration.

Section 22 of the *River Murray Act* sets out how the Minister may act in relation to statutory instruments and applications for statutory authorisations referred to the Minister by operation of one of the related operational Acts.

### 10.1.3 Water Resources Act

The *Water Resources Act* is a key piece of legislation for controlling the impact of water use (irrigation practices, in particular) on the health of the River Murray. The proposed amendments to the *Water Resources Act* will make a number of changes additional to the general changes set out above.

## 10.2 SUMMARY OF AMENDMENTS

The amendments are now incorporated into each of the relevant Acts, where they are much easier to follow, as they appear in context!

References in the summary below to:

- “the ORM’s”, are references to the Objectives for a Healthy River Murray, set out in section 7 of the *River Murray Act*;
- “the River Murray”, are references to the River as defined in section 3 of the *River Murray Act*, and include the Lakes and Coorong;
- “River Murray Protection Areas”, are references to Areas defined by Regulations made under the *River Murray Act* (see section 4);
- “prescribed classes” of activities, are references to classes of activities that will be identified by regulations made under the relevant Act.

The following explanation of clauses has in many places been adapted from the Second Reading of the Bill as tabled in the House of Assembly on 5 December 2002.

### 10.2.1 Animal and Plant Control (Agricultural Protection and Other Purposes) Act 1986

(a),(b)	Insert relevant new definitions.
(c), (d)	Requires the Commission and local control boards to ensure that their programs undertaken within the Murray-Darling Basin seek to further the objects and ORMs of the <i>River Murray Act</i> .
(e),(g)	Requires the Commission to: <ul style="list-style-type: none"> <li>• seek to further the objects and ORMs of the <i>River Murray Act</i> when issuing permits that will apply within the Murray-Darling Basin; and</li> <li>• refer certain permit applications within River Murray Protection Areas to the Minister for the River Murray (see section 22 of the <i>River Murray Act</i>).</li> </ul>
(f),(h)	Requires that notices to enforce obligations to control pest plants and animals within a River Murray Protection Area are not issued (except in case of emergency for the control of pest animals) without first consulting the Minister for the River Murray.

### 10.2.2 Aquaculture Act 2001

(a),(b)	Insert new definitions.
(c)	Requires aquaculture policies applying within the Murray-Darling Basin to seek to further the objects and ORMs of the <i>River Murray Act</i> , and to contain ‘prescribed criteria’ to this effect (prescribed criteria govern the issuing of aquaculture licences).
(d)	Requires the approval of the Minister for the River Murray for any aquaculture policy applying within a River Murray Protection Area.
NOTE	<i>Aquaculture is “development” for the purposes of the Development Act. The Minister for the River Murray will be a referral agency under the Development Regulations for aquaculture applications relating to the River Murray.</i>

### 10.2.3 Coast Protection Act 1972

(a),(b)	Improves the description of the Coast Protection Board’s activities, which include functions as well as duties, in particular, new functions relating to the protection of the River Murray at its mouth.
(c)	Requires the Coast Protection Board, when undertaking its functions in relation to the River Murray (including when making comment on an application referred to the Board under the <i>Development Regulations</i> ), to seek to further the object and ORMs of the <i>River Murray Act</i> .
(d)	Requires the Board to undertake special consultation with Minister for the River Murray in respect of any management plan for the Murray Mouth.

#### 10.2.4 Crown Lands Act 1929

(a)	Inserts new definition.
(b)	Removes the existing power for the Minister for Crown Lands to acquire land for “closer settlement” within the Murray-Darling Basin.
(c)	Requires all licences for use of Crown lands issued within the Murray-Darling Basin: <ul style="list-style-type: none"> <li>• to seek to further the objects and ORMs of the <i>River Murray Act</i>; and</li> <li>• where the licence application is within a prescribed River Murray Protection Area, to be referred to the Minister for the River Murray (see section 22 of the <i>River Murray Act</i>).</li> </ul>

#### 10.2.5 Development Act 1993

(a)	Inserts new definition.
(b),(c)	Amends the Planning Strategy to include the ORMs under the <i>River Murray Act</i> , and to provide a mechanism for the Planning Minister to alter the Planning Strategy as may be necessary to incorporate those ORMs.
(d)	Allows the Planning Minister to prepare a Plan Amendment Report (amending a Development Plan or Plans) where the purpose of the amendment is to promote the object or ORMs of the <i>River Murray Act</i> .
(e)	Requires the Planning Minister to consult the Minister for the River Murray in relation to the preparation of an amendment by a council or the Minister that relates to any part of the Murray-Darling Basin.
(f)	Allows the Planning Minister to call in a development application to be considered by the Development Assessment Commission, at the request of the Minister for the River Murray where in the opinion of that Minister the activity may have a significant impact on the River Murray.
(g)	Requires the Major Developments Panel to include a member selected by the Minister for the River Murray, where the development or project may have a significant impact on the River Murray.
(h) to (p)	Inserts provisions in each of the assessment processes for major projects or major development (EIS, PER and DR) proposed to be undertaken within the Basin, which will require: <ul style="list-style-type: none"> <li>• proponents to include statements about the consistency of the proposal with the object and ORMs of the <i>River Murray Act</i>, on the River Murray; and</li> <li>• the Planning Minister to refer the assessment documentation to the Minister for the River Murray</li> </ul>
(q)	Requires the Governor, before approving a major project or major development that may have an impact on the River Murray, to have regard to the objects and ORMs of the <i>River Murray Act</i> , the duty of care under that Act, and obligations of the State under the <i>Murray-Darling Basin Act</i> and Agreement.
NOTE	<i>Applications for certain development authorisations within River Murray Protection Areas will be referred to the Minister for the River Murray through amendments to Schedule 8 of the Development Regulations.</i>

### 10.2.6 Environment Protection Act 1993

(a)	Requires the Minister, Environment Protection Authority and any other body administering the Act in relation to the Murray-Darling Basin, to seek to further the objects and ORMs of the <i>River Murray Act</i> .
(b)	Requires the State of the Environment Report to include a specific assessment of the state of the River.
NOTE	<i>Schedule 21 of the Development Regulations has been amended to lower the thresholds at which the EPA receives referred development applications, and to give the EPA a power of direction on all such referrals.</i>

### 10.2.7 Fisheries Act 1982

(a)	Inserts new definition.
(b)	Requires the Fisheries Minister, Director and management committees, in carrying out functions in relation to the River Murray, to seek to further the objects and ORMs of the <i>River Murray Act</i> .
(c)	Requires the Fisheries Minister to consult the Minister for the River Murray over research proposals or other operations relating to the River Murray.
(d),(f)	Requires consultation with the Minister for the River Murray over certain licences and other statutory authorisations (including permits to release exotic or farmed species) relating to the River Murray (see section 22 of the <i>River Murray Act</i> ).
(e)	Requires the Fisheries Minister to make a declaration preventing certain fishing in respect of the River at the request of the Minister for the River Murray.
(g),(h)	Requires consultation with the Minister for the River Murray prior to granting an exemption relating to the River Murray (see section 22 of the <i>River Murray Act</i> ).

### 10.2.8 Harbors and Navigation Act 1993

(a)	Requires the CEO, when considering applications for licences under section 26 [permits for use of the River for events] within the River Murray to refer the application to the Minister for the River Murray (see section 22 of the <i>River Murray Act</i> ).
(b)	Inserts new definition.

### 10.2.9 Heritage Act 1993

(a)	Inserts new definition.
(b)	Requires the State Heritage Authority, when considering applications for permits (in relation, for example, to excavation of sites) within a River Murray Protection Area: <ul style="list-style-type: none"><li>• to seek to further the objects and ORMs of the <i>River Murray Act</i>; and</li><li>• where the application is within a prescribed class of application, to refer the application to the Minister for the River Murray (see section 22, <i>River Murray Act</i>).</li></ul>

### 10.2.10 Historic Shipwrecks Act 1993

(a)	Inserts new definitions.
(b)	Requires the Minister for Historic Shipwrecks, when considering applications for permits relating to historic shipwrecks or relics within the River Murray: <ul style="list-style-type: none"><li>• to seek to further the objects and ORMs of the <i>River Murray Act</i>; and</li><li>• where the application is within a prescribed class of application, to refer the application to the Minister for the River Murray (see section 22 of the <i>River Murray Act</i>).</li></ul>

### 10.2.11 Irrigation Act 1994

(a)	Requires Irrigation Trusts to ensure that conditions of supply: <ul style="list-style-type: none"><li>• will ensure that the Trust is able to meet conditions imposed on the Trust's water licence under the <i>Water Resources Act</i>;</li><li>• will ensure that the Trust is able to meet any obligations under the <i>River Murray Act</i> (including the duty of care and any regulations that may affect the Trust's activities).</li></ul>
(b)	Ensures that an Irrigation Trust is able to reduce allocations if necessary to meet a reduction of its allocation under the <i>Water Resources Act</i> .
(c)	Allows an Irrigation Trust, when making any necessary reduction in allocations: <ul style="list-style-type: none"><li>• to take into account factors such as opportunities for increasing irrigation efficiency, and estimated crop water requirements;</li><li>• to reduce allocations by different amount or proportions.</li></ul>
(d)	Ensures that an Irrigation Trust may take action necessary to meet any obligations under the <i>Water Resources Act</i> or <i>River Murray Act</i> .

### 10.2.12 Mining Act 1971

(a),( b)	Insert new definitions
(c) to (g)	Requires the Minister or Director (as the case may be), in considering an application for an exploration licence, mining lease, retention lease, miscellaneous purpose licence or authorisation to use declared equipment that will apply within the Murray-Darling Basin: <ul style="list-style-type: none"><li>• to take into account the objects and ORMs of the <i>River Murray Act</i>; and</li><li>• where the application relates to an area within a River Murray Protection Area, to refer the application to the Minister for the River Murray (see section 22 of the <i>River Murray Act</i>).</li></ul> <p>Where an application is referred to the Minister for the River Murray and the Ministers cannot agree on the grant or conditions of the grant of the application, the Ministers must refer the matter to the Governor for determination.</p>



<b>NB</b>	<i>Where a mining activity is to be treated as a major project for the purposes of preparation of an EIS or PER under section 75 of the Development Act, consultation and comments of the Minister for the River Murray will be incorporated through proposed amendments to that process, outlined above in relation to the Development Act.</i>
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### 10.2.13 Murray-Darling Basin Act 1993

Section 9(3) of the *River Murray Act* provides that the administration of both the *River Murray Act* and the *Murray-Darling Basin Act* must be committed to the same Minister, while an amendment to section 18 of the *Murray-Darling Basin Act* will confirm that the Minister will be the Constructing Authority for the purposes of that Act. The Constructing Authority is the body responsible for operation and maintenance of the infrastructure associated with the Act and the Murray-Darling Basin Agreement. The Minister intends to continue to delegate day-to-day management to SA Water, which will operate the structures in accordance with directions from the Minister.

Section 22 of the *River Murray Act* and various amendments proposed to the *Water Resources Act* (see below) will ensure that:

- the Minister for the River Murray, when exercising any power in respect of a referral of an activity approval, will be required to take into account any obligations of the State under the MDB Agreement (including, for example, imposing conditions as necessary to implement the Salinity Schedule or the Interstate Trade Schedule); and
- the Minister under the *Water Resources Act* will take account of the *Murray-Darling Basin Act* and Agreement and any decision of the Ministerial Council in exercising powers under the *Water Resources Act*, including in respect of water allocations, transfers, reductions, alterations in the expression of allocations.

### 10.2.14 National Parks and Wildlife Act 1972

(a),(b)	Insert new definitions.
(c),(d)	Require leases, licences or agreements relating to reserves within a River Murray Protection Area: <ul style="list-style-type: none"> <li>• to be consistent with the objects and ORMs of the <i>River Murray Act</i>; and</li> <li>• where the lease, licence or agreement is within a prescribed class, to be referred to the Minister for the River Murray (see section 22 of the <i>River Murray Act</i>).</li> </ul>
(e)	Requires management objectives for reserves within the Murray-Darling Basin to seek to further the objects and ORMs of the <i>River Murray Act</i> .
(f),(g)	Requires the Minister, in preparing and reviewing a management plan for a reserve within the Murray-Darling Basin, to: <ul style="list-style-type: none"> <li>• consult the Minister for the River Murray; and</li> <li>• have regard to the objects and ORMs of the <i>River Murray Act</i>.</li> </ul>
(h)	Requires consultation with the Minister for the River Murray over proposals to establish or alter reserves within the Murray-Darling Basin

(i)	Requires permits for activities to be undertaken within a River Murray Protection Area: <ul style="list-style-type: none"> <li>• to be consistent with the objects and ORMs of the <i>River Murray Act</i>; and</li> <li>• where the permit is within a prescribed class, to be referred to the Minister for the River Murray (see section 22 of the <i>River Murray Act</i>).</li> </ul>
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#### 10.2.15 Native Vegetation Act 1991

(a),(b)	Insert new definitions
(c)	Requires the Native Vegetation Council to obtain the consent of the Minister for the River Murray before delegating any of its power in respect of the Murray-Darling Basin.
(d) to (f)	Require guidelines in respect of management of native vegetation within the Murray-Darling Basin: <ul style="list-style-type: none"> <li>• to be referred to the Minister for the River Murray during consultation;</li> <li>• to seek to further the ORMs of the <i>River Murray Act</i>.</li> </ul> <p>Guidelines will only apply to land within the Basin if specifically stated to do so.</p>
(g)	Requires the Native Vegetation Council to refer applications of a prescribed class within River Murray Protection Areas to the Minister for the River Murray (see section 22 of the <i>River Murray Act</i> ).
(h)	Ensures the validity of the use of guidelines as an adjunct to administration of the exemptions set out in the Native Vegetation Regulations.
(i)	Inserts a new requirement into the Schedule of the <i>Principles of Clearance of Native Vegetation</i> , recognising the importance of the River Murray.

#### 10.2.16 Opal Mining Act 1995

(a)	Inserts new definition.
(b)	Requires the Opal Mining Minister to consult the Minister for the River Murray before declaring an area within a Precious Stones Field to be a ‘designated area’ under the <i>Opal Mining Act</i> .

#### 10.2.17 Parliamentary Committees Act 1991

(a)	Inserts name of new Committee.
(b)	Inserts new Part 5D establishing the Natural Resources Committee, a joint House Committee with a range of powers including specific powers relating to overview of the administration of the <i>River Murray Act</i> .

#### 10.2.18 Parliamentary Remuneration Act 1991

	Provides for remuneration of members of the Natural Resources Committee.
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### 10.2.19 Petroleum Act 2000

(a)	Inserts new definition.
(b)	Requires the Petroleum Minister to obtain the agreement of the Minister for the River Murray before approving any new or revised Statement of Environmental Objectives that relates to the Murray-Darling Basin.  If the Ministers cannot agree on the SEO, it will be referred to the Governor for determination.

### 10.2.20 Soil Conservation and Land Care Act 1989

(a),(b)	Insert new definitions.
(c)	Requires Soil Boards within the Murray-Darling Basin to seek to further the objects and ORMs of the <i>River Murray Act</i> .
(d),(e)	In relation to district soil plans applying within the Murray-Darling Basin: <ul style="list-style-type: none"><li>• requires a Soil Board to consult the Minister for the River Murray during development of the plan;</li><li>• requires the Soil Conservation Council to seek the agreement of the Minister for the River Murray before approving a plan; and</li><li>• requires the plan to seek to further the object and ORMs of the <i>River Murray Act</i>.</li></ul>
(f)	In respect of a soil conservation order applying to land within the Murray-Darling Basin: <ul style="list-style-type: none"><li>• requires that the order seek to further the objects and ORMs of the <i>River Murray Act</i>; and</li><li>• where the land is within a River Murray Protection Area, requires the proposed order to be referred to the Minister for the River Murray (see section 22 of the <i>River Murray Act</i>).</li></ul>

### 10.2.21 South Eastern Water Conservation and Drainage Act 1992

(a)	Inserts new definition.
(b)	Requires every person administering the Act (including the Minister under this Act, the SE Water Conservation and Drainage Board and the Council), when taking action within the Murray-Darling Basin, to seek to further the object and ORMs of the <i>River Murray Act</i> (so far as relevant).
(c)	Requires the Board to consult the Minister for the River Murray over any revision of its management plan, so far as it relates to the River Murray as defined (ie, includes the Coorong).
(d)	Requires the Board to seek the approval of the Minister for the River Murray before carrying out any works that may affect the River Murray and which are not envisaged by the Board's management plan.
(e)	Requires the Board to refer to the Minister for the River Murray applications for works

	licences of a prescribed class, within prescribed River Murray Protection Areas (see section 22 of the <i>River Murray Act</i> ).
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### 10.2.22 Water Resources Act 1997

(a) – (c)	Insert new definitions relevant to the River Murray
(d) and (e)	Provide that insofar as this Act applies to the Murray-Darling Basin, persons involved in its administration must act consistently with and seek to further the objects and ORMs of the <i>River Murray Act</i> .
(f)	Raises penalties for offences occurring within a River Murray Protection Area.  Brings penalties in line with <i>River Murray Act</i> .
(g)	Allows relevant authority for determining a permit for dam construction to require that existing dam capacity in the relevant area is reduced.
(h) and (i)	Establish the Minister administering the <i>Water Resources Act 1997</i> as the relevant authority for issuing permits for prescribed classes of activities within the Murray-Darling Basin.  The relevant authority would otherwise be a catchment board.
(j) and (k)	Provide that an activity required by a protection order, reparation order, or reparation authorisation issued under the <i>River Murray Act</i> will not require a permit under the <i>Water Resources Act</i> .
(l)	Provides that a person undertaking an activity in the Murray-Darling Basin pursuant to a development authorisation under the <i>Development Act 1993</i> , will not be exempt from the requirement to hold a permit under the <i>Water Resources Act</i> unless the development authorisation was referred to the Minister administering the <i>River Murray Act</i> , or the exemption is otherwise excluded by the regulations.
(m)	Allows the Minister to act on his or her own initiative in relation to removal of dams.  (The Minister previously had to await advice of a catchment board.)
(n)	Requires prescribed classes of applications for permits that relate to an area within a River Murray Protection Area to be referred to the Minister administering the <i>River Murray Act</i> , and any directions of the Minister as to the grant of the application, including that the application not be granted or that certain conditions be imposed on the grant, must be complied with. Consideration of an application that relates to an area within the Murray-Darling Basin must take account of the <i>Murray-Darling Basin Agreement</i> if relevant.
(o), (y), (zb) and (zd)	Require prescribed classes of application for a licence or transfer of a licence to be referred to the Minister administering the <i>River Murray Act</i> and any directions of the Minister as to the grant of the application, including that the application not be granted or that certain conditions be imposed on the grant, must be complied with. Consideration of an application that relates to an area within the Murray-Darling Basin must take account of the <i>Murray-Darling Basin Agreement</i> if relevant.
(p),	Provide that a licence condition that relates to a water resource within the Murray-Darling

(q), (r), (t), (u)	Basin may require that a licensee enter into a bond or otherwise make a payment to ensure that money is available to cover costs of any damage to the River Murray due to the taking or use of water under the licence. A condition may also specify that a licensee develop or participate in an environmental improvement program or other scheme to protect, restore or benefit the River Murray. These conditions may be imposed in relation to licences granted or damage caused before these amendments come into operation.
(s) and (zh)	Insert a new Division which allows for the implementation of schemes by the Minister to encourage licensees to transfer or surrender their licences.
(t) and (u)	See (p)
(v), (w), (x), (z), (zc), (ze), (zf)	Provide for interstate trade to occur in water entitlements in accordance with the <i>Murray-Darling Basin Agreement</i> .
(y)	See (o)
(z)	See (v)
(za)	Adds a new subsection to section 38 of the Act.  The new subsection will allow the Minister for Water Resources to refuse the transfer of a licence or allocation where the licensee is in breach of a licence condition. The provision will effectively give the Minister a ‘charge’ over a licence, preventing it from being sold off by a licensee who may be in breach of their licence conditions
(zb)	See (o)
(zc)	See (v)
(zd)	See (o)
(ze) and (zf)	See (v)
(zg)	Allows a water licence to be varied, suspended or cancelled if a licensee contravenes a protection order or a reparation order under the <i>River Murray Act</i> .
(zh)	See (s)
(zi)	Requires the Minister administering the <i>Water Resources Act 1997</i> , insofar as the Act applies within the Murray-Darling Basin and it is reasonably practicable to do so, to integrate the administration of this Act with the <i>River Murray Act</i> and to integrate and co-ordinate policies, programs, plans and projects under both Acts.
(zj)	Clarifies powers of catchment board as delegate
(zk)	Allows a catchment board to assign its responsibility for infrastructure that it has built on private land to a third party, with the consent of the landowner.  Will provide a board greater flexibility in respect of ongoing management of projects by community or other groups (eg wetland management on private property).

(zl), (zm), (zq)	Requires a catchment plan that relates to the Murray-Darling Basin to identify changes and set out how the board will implement the objects and ORMs of the <i>River Murray Act</i> . The plan must seek to further these objects and ORMs and be consistent with the requirements of the Agreement under the <i>Murray-Darling Basin Act 1993</i> .
(zn), (zo) and (zp)	Allows a catchment Board's annual review to include new expenditure on salinity mitigation, without the need for formal consultation
(zq)	See (zl)
(zr)	Allows a catchment or allocation plan to be amended so that it furthers the objects and ORMs of the <i>River Murray Act</i> and has greater consistency with the requirements of the <i>Murray-Darling Basin Agreement</i> , without following the usual procedures for amendment.  The provision cannot be used to reduce water allocations.
(zs)	Adds a new section 118A to the <i>Water Resources Act</i> .  The new provision is a technical one which will ensure that if only part of a plan is found to be invalid (for any reason), that part of the Plan will be struck out, and the remainder of the plan remains.
(zt)	Clarifies that levy proposals may relate to money to be spent in one or more years.
(zu), (zv)	Allow a differential levy to be declared in relation to the River Murray dependent on the effect that the use of the water may have on salinity levels in the River. Monies raised from such a levy must be spent on salinity mitigation.
(zw) – (zzc)	Extends the water usage and land management practices that may result in a refund of a water levy so that these may include establishing or participating in a drainage scheme. The Minister will also be able to grant a refund of, or an exemption from, the whole or part of a levy as a condition of a water licence, through the mechanism of a management agreement under the <i>River Murray Act</i> , or by notice in the <i>Gazette</i> .
(zzd)	Allows the Minister for Water Resources to make assumptions or adopt criteria for determining various matters relating to protecting the River Murray, including appropriate water licence conditions. Regulations may remove the right to appeal against determinations based on such assumptions or criteria.

### 10.3 TRANSITIONAL PROVISIONS

The transitional provisions in clause 23 of the Schedule:

(1) Require statutory plans that are already in place, and have no review provisions in their own Act, to be reviewed within 5 years, to ensure that proper consideration is given to any relevant object of the Act.

(2) Require certain statutory authorisations that are already in place to be referred to the Minister when they come up for renewal or extension. This will ensure that renewed authorisations in River Murray Protection Areas will be treated in the same way as new referable applications.

(3) Renewals or extensions referred under the transitional provisions will be subject to the operation of section 22 of the Act as if they were applications for new authorisations.

(4) The Minister's first three-yearly report under section 11 must be undertaken by the end of the 2004/2005 year, and be included in the Minister's annual report for that year.

## 11. SCHEDULE – MURRAY-DARLING BASIN ACT

### 11.1 NAVIGATION ON THE RIVER

Clause 62 of the *Murray-Darling Basin Agreement* requires the Contracting Governments to maintain a certain depth “immediately downstream of the lock” for the purposes of navigation. However, it is unlikely that clause 60 would have any impact on the ability of the Minister to alter pool levels in the River for environmental purposes, with the agreement of the Commission.

The Agreement itself does not give rights to third parties (ie, in this case, the public), as it is an agreement amongst the Governments of each jurisdiction only.

The *Harbors and Navigation Act* provides, amongst other things, for “the safe navigation of vessels in South Australian waters” and “the safe use of South Australian waters for recreational and other aquatic activities”, and contains various powers in relation to this. It does not extend to the control of levels in the River.

The *River Murray Act* provides in section 9(5) that the Minister may do anything necessary, expedient or incidental to administering the *Murray-Darling Basin Act*. Section 17 sets out the specific powers of the Minister, and they are stated to apply to “carrying out any project in relation to the River Murray”. The powers include provisions specifically relating to operation of the locks and weirs. It probably follows that the Minister’s powers to manipulate weirs will be, as between the parties to the Agreement, subject to clause 62 of the Agreement.

### 11.2 POWER OF DELEGATION – RELEVANCE TO MURRAY-DARLING BASIN ACT

During debate in the House of Assembly, it was asked whether the Minister’s powers of delegation under section 12 of the *River Murray Act* would extend to allow the Minister to delegate functions under the *Murray-Darling Basin Act*.

The Minister’s power to delegate in section 12 is a power to delegate the powers and functions of the Minister administering the *River Murray Act*. The section does not allow the Minister to delegate functions of the Minister administering the *Murray-Darling Basin Act*.

Is there a need for the Minister to be able to delegate powers or functions under the *Murray-Darling Basin Act*? The Minister’s powers under that Act are found in:

- Sections 17 and 20 – powers to compulsorily acquire land, and to dispose of land. These powers are clearly intended and appropriate to be exercised by the Minister personally; no delegation power required.



- Section 18 – powers to construct things, carry out operations and implement the Agreement. These are clearly not powers that the Minister is intended to exercise personally, and therefore the Carltona principle of authorization<sup>23</sup> would apply.
- Section 28 – obligation to table reports in Parliament. This function is clearly intended to be exercised personally; no delegation power required.

Neither the *Murray-Darling Basin Act* nor the Agreement give Ministers any powers: the only powers are given to the Commission and to the Constructing Authority.

Neither the Act nor the Agreement provide for the Constructing Authority to delegate its functions, duties or powers. This does not however prevent the Constructing Authority from contracting the doing of various work to another body (the Carltona principle at work again). It would not be proper in any case for the functions of the Constructing Authority to be delegated. The Act clearly intends that there will be only one Constructing Authority – the Minister from time to time administering the Act. The function of Constructing Authority is not intended to be delegated to another person.

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<sup>23</sup> The Carltona principle (established in the case of *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560), allows that in certain circumstances a person in whom a power is vested may authorise another person to exercise that power for and on his or her behalf. The person so authorised acts as an agent of the person holding the power, not as his or her delegate.

## **12. SCHEDULE - WATER RESOURCES ACT 1997**

### **12.1 INCORPORATING OBJECTS OF THE RIVER MURRAY ACT**

#### **12.1 Objects of the Act**

Section 6 of the *Water Resources Act* is amended to establish as an object, the use and management of water resources within the Murray-Darling Basin in a way that is consistent with the provisions and objects of the *River Murray Act*.

Further, persons administering the *Water Resources Act* are required to act consistently with and seek to further the objects and ORMs under the *River Murray Act*.

#### **12.2 Minister required to ‘integrate’ administration**

The functions of the Minister for Water Resources are also amended (see new section 45(1)(ea)) to require the Minister, as far as reasonably practicable when applying the *Water Resources Act* within the Murray-Darling Basin:

- to act to integrate the administration of the *Water Resources Act* with the administration of the *River Murray Act*; and
- to promote the integration or co-ordination of policies, programs, plans and projects under the *Water Resources Act* with relevant activities undertaken under the *River Murray Act*.

The requirement complement a similar requirement of the Minister for the River Murray, contained in section 9(1)(e) of the *River Murray Act*.

### **12.2 PERMITS FOR WATER AFFECTING ACTIVITIES**

#### **12.2.1 Referrals to Minister for the River Murray**

The Regulations may require the referral of certain permit applications to the Minister for the River Murray for direction under section 22 of the *River Murray Act*.

#### **12.2.2 Restricting exemptions under section 12**

Amendments to section 12(1)(d) of the *Water Resources Act* provide that a person undertaking an activity in the Murray-Darling Basin pursuant to a development authorisation under the *Development Act 1993*, will not be exempt from the requirement to hold a permit under the *Water Resources Act* unless the development authorisation was referred to the Minister administering the *River Murray Act 2003*.

The provision ensures that a person will not get the benefit of the exemption in section 12 of the *Water Resources Act* unless the development authorisation has received the attention of the

Minister for the River Murray. The section complements the potential referral of permit applications that will need to be made where section 12(1) does not apply.

### **12.2.3 Farm dam controls – capping and trading farm dam capacity**

Subsection 9(7) provides that “the relevant authority may, in conjunction with the operation of subsection (3)(d), determine not to grant any more permits for the erection, construction or enlargement of a dam, wall or other structure in a particular area unless or until there has been a reduction, to a level determined by the relevant authority, of the capacity of water capable of being retained by other dams, walls or structures already existing in the relevant area.”

The provision would allow a cap to be placed on farm dam capacity in a particular region, and for the Minister to allow a new dam to be built only if satisfied that an existing dam has been removed or modified sufficiently to ‘free up’ the capacity of the new dam. This would effectively allow farm dam capacity to be traded within the cap.

## **12.3 WATER LICENSING PROVISIONS**

Amendments to the *Water Resources Act* in relation to licensing are significant.

### **12.3.1 Managing and altering licence conditions**

#### *12.3.1.1 Range of condition types available*

Amendments to section 29 allow a greater range of conditions (including conditions relating to offsite activities, joint schemes, and certain financial measures) to apply to a licence that “relates to a water resource within the Murray-Darling Basin”.

In respect of financial requirements, monies must be linked to covering the “costs of damage to the River Murray ... that may occur on account of the taking or use of water”. Section 3(6) of the *River Murray Act* allows the Minister to make assumptions about the costs of damage to the River.

The extent to which the new provisions of section 29 will apply to licences in (for example):

- Barossa Valley;
- Angas Bremer (groundwater);
- Mallee (groundwater);
- some parts of the South East (groundwater).

will be limited by the objects and ORMs of the *River Murray Act*.

#### *12.3.1.2 More flexibility for time of amendment*

Section 30 is amended to allow variation of a licence at any time “if the variation is to impose or vary a condition of a licence that relates to a water resource within the Murray-Darling Basin and

the Minister is of the opinion that the variation is appropriate or desirable to prevent, reduce or address damage to the River Murray”. However, such a variation may not operate so as to reduce a water allocation. Reduction of allocation must take place through other mechanisms (such as review of a plan, or under section 37).

There is a right of appeal against a variation under this new provision. However, that right may be removed by regulation<sup>24</sup>.

### **12.3.2 Dealings in water entitlements**

#### *12.3.2.1 Referral to River Murray Minister*

Only applications for licence dealings (ie, new licences and licence or allocation transfers) may be referred to the Minister for the River Murray. The referral process does not apply to existing licences (unless they are the subject of an application for a referable licence dealing). Applications to vary licences will become referable in water resources provisions of the new *Natural Resources Management Act*, once passed.

Section 22 of the *River Murray Act* (which sets out the powers of the Minister for the River Murray upon referral) includes an ability to limit appeal rights in certain circumstances. Section 22(16) allows a published policy to be applied without recourse to appeal where appeal rights in respect of the application of that policy have been removed by regulation.

#### *12.3.2.2 Interstate trade*

##### The amendments specifically provide for interstate trade

Until the amendments made by the *River Murray Act*, there was very little in the *Water Resources Act* that referred to the transfer of entitlements interstate (only section 34 mentioned trade – allowing the Minister to allocate water without payment where the allocation is a result of a transfer into South Australia). Transfers of allocation out of South Australia were achieved by the licensee applying to the Minister for either:

- variation (ie., reduction) of the licence to reflect the traded allocation, or
- surrender of the whole licence if the entire allocation is being transferred interstate.

Schedule E of the *Murray-Darling Basin Agreement* sets out administrative processes for trade between the States.

Amendments made by the *River Murray Act* ensure that the *Water Resources Act* now explicitly recognizes interstate trade, which is to be administered expressly under an “Interstate Water Entitlements Transfer Scheme”, being “a scheme for the transfer of water entitlements between States under the Agreement approved under the *Murray-Darling Basin Act 1993*”.

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<sup>24</sup> Subsection 30(3).

Section 38(1) of the *Water Resources Act* allows transfers out of the State by providing that a licensee may transfer the whole or part of an allocation to any other person or the Minister under an Interstate Water Entitlements Transfer Scheme. The requirement that an allocation only be transferred “consistent with the relevant water allocation plan”<sup>25</sup> is now subject to the terms or requirements of an Interstate Water Entitlements Transfer Scheme. Section 39 has also been amended to allow the Minister, upon granting a transfer, to vary licence conditions, or “take any other action required or permitted under an Interstate Water Entitlements Transfer Scheme”.

## **12.4 SCHEMES TO PROMOTE THE TRANSFER OR SURRENDER OF ALLOCATIONS**

The amendments add a new section 44AAA to the *Water Resources Act*.

The amendment allows the Minister to establish a scheme that will promote the transfer of allocations, through requiring licensees to participate in a market. Although licensees cannot be forced, through the scheme, to part with their allocation, it does make them ‘go through the motions’, thereby increasing the likelihood of full participation.

The scheme is modelled on a proposal by Mike Young of CSIRO, Adelaide, for a ‘compulsory offer’ or ‘zero revenue’ scheme whereby licensees (some or all) are obliged to put up a proportion of their allocation for auction (periodically, or once-off, as determined by the scheme).

## **12.5 ASSIGNING INFRASTRUCTURE OWNED BY THE CATCHMENT BOARD**

Section 62 of the *Water Resources Act* (Board’s responsibility for infrastructure) has been amended to allow the catchment board to assign its responsibility for infrastructure that it has built on private land to a third party, with the consent of the landowner.

The new provision provides the catchment board greater flexibility in respect of ongoing management of projects by community or other groups (eg wetland management on private property).

## **12.6 WATER MANAGEMENT PLANS**

### **12.6.1 Promoting River Murray legislation**

The new section 117A requires that a management plan (being a catchment plan or a water allocation plan) applying within the Murray-Darling Basin or in relation to the River Murray, should seek to further the objects and ORMs of the *River Murray Act*, and be consistent with the *Murray-Darling Basin Agreement* and any resolution of the Council made under that Agreement.

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<sup>25</sup> Subsection 41(1)(a)(i)

Section 92 (contents of catchment plans) has also been amended to require a catchment plan that relates to the Murray-Darling Basin to identify changes and set out how the board will implement the objects and ORMs of the *River Murray Act*.

### **12.6.2 Amendment of catchment plan by the Minister**

A new subsection has been added to section 118, to allow the Minister to amend a catchment or water allocation plan without following the statutory procedures for amendment:

- in order to further the objects or ORMs of the *River Murray Act*; or
- in order to achieve greater consistency with the Agreement or a resolution of the Council under the Agreement; and
- provided that the Minister certifies that the amendment is not to be used to effect a reduction in existing water allocations of licences affected by the plan.

### **12.6.3 Severing invalid portion of plan**

The new section 118A is a technical provision which will ensure that if only part of a plan is found to be invalid (for any reason), then that part of the plan will be struck out, and the remainder of the plan stands. This will prevent the entire plan from collapsing if it is found that a change made (for example, during an annual review) was outside of the power to make such a change.

## **12.7 LEVIES**

### **12.7.1 Salinity levy**

The water levying provisions of the *Water Resources Act* (Part 8, Division 1) have been amended to allow “different levies” (including components of levies) to be based on “the effect that the use of the water may have on salinity levels in the River”, including by differentiating the location at which the water may be used, and the time at which the allocation was made<sup>26</sup>. (The latter provision was included primarily in order to allow a discrimination based on the commencement of the Salinity and Drainage Strategy in 1988, but may be used for other purposes).

Where a levy includes such a component, money raised from the levy attributable to that component must be applied towards reducing salinity levels in the River, including by transferring such money to another authority for expenditure on such programs. The latter provision would allow the Board to pay a portion of the levy directly to the Murray-Darling Basin Commission in respect of salinity works or measures.

Section 97(3) has been amended to ensure that a salinity levy may be included in the Board’s annual review of its plan.

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<sup>26</sup> It should be noted that the *Natural Resources Management Bill 2004* extends the levying provisions further, allowing components to be based on a variety of environmental issues.

### 12.7.2 Refunds of levies

The refund provisions of the *Water Resources Act* (section 140) have been extended to allow for the payment of refunds of the levy for a greater range of practices, including establishing or participating in a drainage scheme, maintenance of certain infrastructure, or “other initiatives”.

Further, under the new subsection (11), the Minister will be able to grant a refund of, or an exemption from, the whole or part of a levy as a condition of a water licence. This may be done through the mechanism of a management agreement under the *River Murray Act 2003*, or by notice in the *Gazette*.

The provision for exemption means that it will be possible to administer ‘automatic’ reductions in the amount of levy due, rather than (as under the former provisions of section 140) issuing invoices and requiring individual applications to be made in respect of each refund claimed.

## 12.8 APPLYING ‘ASSUMPTIONS’

A new section 148A allows the Minister for Water Resources to make assumptions or adopt criteria for determining various matters relating to protecting the River Murray, including appropriate water licence conditions. Regulations may remove the right to appeal against determinations based on such assumptions or criteria. The section only applies in relation to the River Murray.

The provision allows the Minister to make determinations, for example, about deemed salinity impact of irrigating in certain areas. This might be used for example, in determining differential salinity levies, or appropriate licence conditions, or entitlements to be considered for levy refunds.

Other examples:

*Eg 1.* The Minister may apply information received about a threatened species to determine that a particular species of vegetation in a particular area of the floodplain is special habitat for a particular type of frog. The Minister may use that assumption as grounds for determining that no permit for removal of that type of vegetation will be issued under section 18 of the *Water Resources Act*.

If the regulations provide, there will be no appeal rights against a refusal to issue a permit for removal of such species on the grounds that it forms special habitat for frogs. (An appeal could still be made against the refusal if it was based on other grounds).

If no regulations are made, then a person could appeal on the grounds that the species in question was not of any particular importance, and that the permit should have been issued on its merits.

*Eg 2.* The Minister may make an assumption about salinity impacts of irrigating in a particular area. (For example, the assumption might be that irrigating in area *x* results in

movement of  $y$  quantity of salt to the River.) The Minister may then apply the assumption in determining that certain conditions should be imposed on transfers of water into area  $x$ . (The determination might be, for example, that as a condition of the transfer, not more than a particular number of megalitres may be transferred, and that a particular type of drainage provision must be installed.)

The determination in relation to the matter (ie, the conditions to be applied to transfers in that area) “will then have effect for the purposes of this Act”. That is, it will be a policy of the Minister in respect of which regulations may then be made under section 148A, limiting appeals.

If no regulations are made under section 148A, the Minister’s assumptions have no particular status. They may be challenged, for example by a person who has appeal rights against a decision of the Minister in relation to licence transfer applications.

However, if regulations are made that so provide, no appeal will lie against a prescribed type of determination that has been based on the prescribed assumption. In this example, regulations could be made stating that there would be no appeal against particular conditions where they have been made on the specified assumption of salinity impacts.

## **12.9 WHEN SHOULD THE RIVER MURRAY ACT BE USED INSTEAD OF THE WATER RESOURCES ACT?**

### **12.9.1 How to choose between the available mechanisms?**

The amendments to the *Water Resources Act*, coupled with the *River Murray Act* itself, mean that in some cases there may be a number of different ways to achieve essentially the same outcome.

For example, given the extended powers of the Water Resources Minister, why would any water resources licence dealings be referred?

Put simply, the *River Murray Act* treats the River and environs in a more ‘holistic’ manner than the *Water Resources Act*. This is reflected in the definition of the ‘River Murray’, the objects and ORMs, in the range of applications that may be referred under the related operational Acts, and in the conditions that may be attached to referred applications. Because the Minister for the River Murray is able to take into account broader environmental matters, including amenity, heritage, cliff protection and native vegetation, there is greater potential in the *River Murray Act* for taking action for biodiversity conservation.

### **12.9.2 Referrals of licences apply only to water used within the Basin**

Under the current Regulations, only licences for the use of River water within the Murray Darling Basin are referred to the Minister for the River Murray. This excludes referral of water transfers for use outside of the Basin (in the Barossa Valley, for example). Environmental issues associated with such transfers should be addressed under the existing provisions of the *Water Resources Act* with regard to the use of ‘imported’ water.



## INDEX TO SECTION NUMBERS

### Part 1—Preliminary

1. Short title
2. Commencement, ix
3. Interpretation, 1, 2
4. River Murray Protection Areas, 3
5. Interaction with other Acts, 3, 4

### Part 2—Objects of Act and statutory objectives

6. Objects, 5 (see also 7, 8, 9 re administration)
7. Objectives, 6 (see also 7, 8, 9)
8. Administration of Act to achieve objects and objectives, 7, 8

### Part 3—Administration

#### *Division 1—The Minister*

9. Functions and powers of the Minister, 12,13
10. Annual report, 13
11. Three-yearly reports, 14
12. Power of delegation, 14

#### *Division 2—Authorised officers*

13. Appointment of authorised officers, 15
14. Powers of authorised officers, 15, 16, 17 (see also 7, 10 re indigenous matters and native title)
15. Hindering etc persons engaged in the administration of this Act, 17
16. Protection from self-incrimination, 17

### Part 4—Ministerial activities and arrangements associated with the River Murray

#### *Division 1—Minister may undertake works*

17. Minister may undertake works, 19

#### *Division 2—Management agreements*

18. Management agreements, 20, 21

#### *Division 3—Entry onto land*

19. Entry onto land, 22

#### *Division 4—Compulsory acquisition of land*

20. Compulsory acquisition of land, 22

### Part 5—Implementation Strategy

21. Implementation Strategy, 23, 24 (see also 13 re consultation)

### Part 6—Development of related policies and consideration of activities

22. Development of related policies and consideration of activities, 25, 26, 27, 28, 29, 30 (see also 11 re cultural heritage; 42 re related operational Acts)

### Part 7—General duty of care

23. General duty of care, 31

### Part 8—Protection and other orders

#### *Division 1—Orders*

24. Protection orders, 32 (see also 34)
25. Action on non-compliance with a protection order, 32, 34
26. Reparation orders, 32, 34
27. Action on non-compliance with a reparation order, 32, 34
28. Reparation authorisations, 33, 34
29. Interim restraining orders, 33
30. Related matters, 33, 34

#### *Division 2—Registration of orders and effect of charges*

31. Registration, 35
32. Effect of charge, 35

#### *Division 3—Appeals to Court*

33. Appeals to Court, 35 (see also 29 re appeals from directed conditions)

### Part 9—Miscellaneous

34. Native title, 36 (see also 11, 16 re indigenous matters; 39 re regulations)
35. Immunity provision, 36, 37

- 36. False or misleading information, -
- 37. Continuing offence, 37
- 38. Liability of directors, 38
- 39. Criminal jurisdiction of Court, 38
- 40. Service, 38 (see also 16 re powers of authorised officers to serve persons on vessels)
- 41. Application or adoption of codes or standards, 38
- 42. Regulations, 38, 39

- 19. Amendment of *Petroleum Act 2000*, 49
- 20. Amendment of *Soil Conservation and Land Care Act 1989*, 49
- 21. Amendment of the *South Eastern Water Conservation and Drainage Act 1992*, 49
- 22. Amendment of *Water Resources Act 1997*, 50 (see detail in 56 – 63)
- 23. Transitional provisions, 52

**Schedule—Amendments and transitional provisions**, 41, 42 (overview)

- 1. Amendment of *Animal and Plant Control (Agricultural Protection and Other Purposes) Act 1986*, 43
- 2. Amendment of *Aquaculture Act 2001*, 43
- 3. Amendment of *Coast Protection Act 1972*, 43
- 4. Amendment of *Crown Lands Act 1929*, 44
- 5. Amendment of *Development Act 1993*, 44
- 6. Amendment of *Environment Protection Act 1993*, 45
- 7. Amendment of *Fisheries Act 1982*, 45
- 8. Amendment of *Harbors and Navigation Act 1993*, 45
- 9. Amendment of *Heritage Act 1993*, 45
- 10. Amendment of *Historic Shipwrecks Act 1981*, 46
- 11. Amendment of *Irrigation Act 1994*, 46
- 12. Amendment of *Mining Act 1971*, 46
- 13. Amendment of *Murray-Darling Basin Act 1993*, 47 (see detail in 54, 55)
- 14. Amendment of *National Parks and Wildlife Act 1972*, 47
- 15. Amendment of *Native Vegetation Act 1991*, 48
- 16. Amendment of *Opal Mining Act 1995*, 48
- 17. Amendment of *Parliamentary Committees Act 1991*, 48
- 18. Amendment of *Parliamentary Remuneration Act 1990*, 48