

Accountability Interactions

Multiple Accountabilities in the Murray-Darling Basin Plan

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Abstract

This thesis investigates whether different public accountability forums interact with one another when they oversee the same decision maker. It contributes to the larger study of how decision makers are held to account in constitutional democracies where the simultaneous operation of multiple accountability relationships has become routine. Looking beyond the dominant assumption that multiple forums autonomously assess a decision maker' accountability against different and diverging standards, I aim to understand whether forums can influence the standards against which other forums evaluate the same decision maker.

I draw on political and normative understandings of public accountability to answer one central question: do different public accountability forums interact with one another in a way that influences the scope of what a decision maker is obliged to account for and the normative standards against which that account is evaluated? Answering this research question involves examining the mechanisms by which interactions might occur and the motivations of actors to interact.

I begin by critically reviewing the literature on multiple accountabilities, arguing that existing approaches can only partially explain how public accountability is constructed in multiple accountability regimes. I argue the focus on typologies of accountability emphasise the attributes of individual forums and overlook the broader dynamics of the accountability regime. I then

develop an analytical framework to examine how the interactions between different forums, and other actors, might reshape the accountability dialogue.

This framework is used to analyse the case of the Murray-Darling Basin Plan in Australia (2008-2012). By presenting a context-rich analysis of interactions between forums, and other actors, I find that multiple forums act in concert with one another and other actors to contest and then reshape the standards against which the two decision makers are evaluated. The thesis concludes by discussing the implications of recognising accountability interactions for understanding multiple accountability regimes.

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240 CLR 242

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Introduction

Accountability concerns a “dialogue” between an actor who is obliged to account for their action, and the forum that receives and assesses that account. It is now routine for public decision makers in constitutional democracies to be party to these accountability dialogues within a multiplicity of forums. Given this development, this thesis explores how forums that simultaneously hold the same decision maker to account might relate to one another. The relationships between forums suggest that the traditional two-party analysis of accountability dialogues should be re-imagined to extend beyond a single forum and decision maker to include other accountability forums.

Specifically, I argue in this thesis that where multiple accountability forums oversee the same public decision maker, we should recognise the potential for those forums to *interact* with one another. This interaction can be in the sense of reciprocally acting upon or influencing one another, or of acting in concert with one another. By examining the various ways that multiple accountability forums interact, I will show that interactions between different forums can affect how an individual forum assesses a decision maker’s accountability. Rather than multiple autonomous forums each judging the decision maker against different standards and generating conflicting or parallel evaluations, I suggest that evaluations of a decision maker’s public accountability can converge between multiple forums.

In order to examine this phenomenon, I develop an analytical framework to explain accountability interactions and their practical significance for public accountability processes. The framework consists of insights gained from a critical engagement with the key analytical approaches of public accountability scholarship and is also anchored in a qualitative, empirical, context-rich analysis of accountability interactions within a case study. The case study uses the idea of *accountability politics* as a heuristic for examining contestation within accountability processes. It thereby seeks to understand the dynamics of multiple accountability regimes in which accountability interactions are more likely to arise.

The case is the Murray-Darling Basin Plan (2008-2012), which was a major and controversial attempt to sustainably regulate water in Australia's largest and most productive river system. During its development, the Basin Plan was perceived as a spectacular policy failure despite Australia's historical status as a world leader in water regulation. This perception meant that public accountability processes became prominent, and these processes influenced subsequent decision making about the final Basin Plan. This case study reveals how multiple accountability forums came to interact in ways that not only shaped how individual forums evaluated the key decision maker's accountability, but also resulted in those various evaluations converging. In the process, accountability forums reframed the key decision maker's responsibilities and thereby the direction of their subsequent decision making.

The backdrop to accountability interactions: the evolution of multiple accountability regimes

A foundational premise of this thesis is that what constitutes accountable decision making in a given scenario is *constructed* by forums within accountability processes—and through accountability dialogues with decision makers—rather than being *predetermined* by the conventions and normative standards associated with a given accountability forum.¹ It has long been recognised that ‘accountability [processes are] all about the construction of an agreed language ... about conduct and performance, and the criteria that should be used in assessing them’² within each context. Nonetheless, commonly within the Westminster tradition, conventions around the agreed language for accounting and criteria for evaluating accountable public decision making were fairly settled. I argue that the evolution towards multiple accountability regimes often led to these conventions becoming more unsettled. This unsettling of conventions creates the context within which interactions between accountability forums can influence the construction of public accountability by the forums that are party to that interaction.

In constitutional democracies, public decision makers were traditionally rendered accountable by methods that channelled the two-party accountability dialogue into formal processes. Within Westminster systems, in particular,

¹ Accountability is used in this thesis to refer to the processes (or practices) through which decision makers are held to account by forums. Accountable decision making is used in this thesis to refer to the outcome of accountability processes, and what constitutes accountable decision making in a given scenario is constructed by forums within those processes.

² P Day and R Klein, *Accountabilities: Five Public Services* (Tavistock 1987) 2.

three processes secured public accountability: hierarchical accountability between public officials and Ministers, ministerial responsibility to parliament, and judicial review.³ Theoretically at least, each of these three accountability forums was autonomous in the sense that it could take all necessary steps to hold a given public decision maker to account. Hence these forums could oblige decision makers to account for their (in)actions, could receive and assess the accounts, and could ensure that decision makers faced consequences, especially for inadequate accounts.

Within each accountability process, the relevant forum's jurisdiction determined which decision makers were obliged to account to it, for what, in what manner and with what consequences. The normative standards underpinning the evaluations of these traditional forums slowly developed over time,⁴ and at any given point provided reasonably stable guidance about the *subject matter* a public decision maker needed to account for to each forum and the *normative standards* by which that forum would evaluate the account. Underpinning this stability was, generally, a mutual understanding by both parties about what constituted appropriate conduct and how it should be assessed.

³ Generally, I provide relevant references for the propositions put in this section in the body of the thesis.

⁴ This is reflected in such classic works as G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1984) and J Evans, *De Smith's Judicial Review of Administrative Action* (4th edn, Stevens & Sons 1980). Making this point regarding ministerial responsibility, see J Olsen, 'The institutional basis of democratic accountability' (2013) 36 *West European Politics* 447, 458.

Hence, the traditional accountability dialogue between each forum and public decision maker took place within formal accountability processes that acted like silos. Each forum operated according to its own conventions, and, to a substantial degree, operated in isolation from other forums and the accountability dialogues those other forums might be in with the same decision maker.⁵ The assessment of accountability resulting from such dialogues can be characterised as a “monologue” from each forum. In the rare event that more than one forum assessed the same decision maker for the same (in)action, constitutional relationships between the legislature, judiciary and executive often predetermined which evaluation—or monologue—took precedence.

Constitutional democracies have long been evolving away from this idealised scenario of traditional public accountability. Most obviously, an expanding range of potential accountability forums has prompted this evolution. Additional forums created by the nation-state, such as auditors-general, ombudsmen and administrative tribunals, have supplemented traditional arrangements. Direct accountability relationships have been forged between public officials and citizens (and/or “stakeholders”). New types of potential accountability forums have emerged, such as professional networks, experts and even markets, as well as civil-society based forums such as “watch-

⁵ I note that some human rights legislation establishes an “institutional dialogue” between constitutional courts and parliaments, which could be understood to be an exception to this characterisation; see A Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2012) Chapters 2 and 6 especially. Indeed, the autonomy of traditional forums did not preclude such relationships, and there is a long tradition of literature examining relationships between the three forums. For example, J Mashaw, ‘Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability’ (2005) 11 *Especial* 153.

dog” organisations and independent media, including social media. This extended range of forums reflects the contemporary aspiration for public decision making to be continuously monitored and evaluated.

Consequently, public decision makers are often now simultaneously party to multiple accountability dialogues with diverse forums. This scenario is commonly referred to by accountability researchers as “multiple accountabilities”.⁶ In this thesis, multiple accountabilities refers to the existence of multiple, diverse accountability forums, which simultaneously oversee public actors and may assess those actors for multiple subject-matters and against multiple standards of accountable decision making. This scenario is described as a “multiple accountability regime”.

Given these developments, the focus of this study is on whether the accountability dialogue can be *multilateral*, involving multiple forums (and potentially other actors), instead of only a bilateral dialogue between decision maker and forum (or series of silo-like bilateral dialogues). Going beyond the

⁶ W Knutsen and R Brower, ‘Managing Expressive and Instrumental Accountabilities in Nonprofit and Voluntary Organizations: A Qualitative Investigation’ (2010) 39 *Nonprofit and Voluntary Sector Quarterly* 588, 589; M Messner, ‘The Limits of Accountability’ (2009) 34 *Accounting, Organizations and Society* 918, 919; E Fisher, ‘Drowning by Numbers: Standard Setting in Risk Regulation and the Pursuit of Accountable Public Administration’ (2000) 20 *Oxford Journal of Legal Studies* 109, 120; and, C Polidano, ‘Why Bureaucrats Can’t Always do What Ministers Want: Multiple Accountabilities in Westminster Democracies’ (1998) 13 *Public Policy and Administration* 35, 37. Sometimes ‘multiple accountability’; M Dubnick and G Frederickson, ‘Introduction: The Promises of Accountability Research’ in Dubnick and Frederickson (eds), *Accountable Governance: Problems and Promises* (M.E. Sharpe 2011) xv; M Bovens and T Schillemans, ‘The Challenge of Multiple Accountability: Does Redundancy Lead to Overload?’ in M Dubnick and G Frederickson (eds) and J Koppell, ‘Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder”’ 65 *Public Administration Review* 94. A similar term is ‘multidimensional’ accountability; R Wettenhall, ‘Parliamentary Oversight of Statutory Authorities: A Post-Uhrig Perspective’ 20 *Australasian Parliamentary Review* 38, 49.

assumption that multiple accountability regimes are comprised of a series of *autonomous* accountability forums, I examine whether accountability forums *interact* with one another. I develop the concept of *accountability interactions* to capture this overlooked phenomenon within multiple accountability regimes.

Accountability interactions are a plausible corollary of suggestions in existing studies that different accountability forums can effectively (even if not always intentionally) operate jointly to hold public decision makers to account as part of multiple accountability regimes. Challenging the assumption that accountability forums are generally autonomous, these studies emphasise the fact that many additional accountability forums specialise in some steps of the accountability processes, yet effectively rely on other forums for the remaining steps. For example, ombudsmen and civil society monitors excel at collecting information that contextualises a decision maker's account. But often such forums have limited power to oblige the decision maker to render an account or to sanction the decision maker for an inadequate account, and so rely on a minister or parliament to do so.

In this study, I examine whether the interactions between different accountability forums extend beyond interactions involving functional transfers of information or sanctioning powers. I ask whether these interactions can also shape how the decision maker's accountability is evaluated, potentially by transferring between forums assessments of the scope of what a decision maker is obliged to account for and the relevant normative standards against which

they should be judged and sanctioned. I argue that this second kind of interaction can influence not just *whether* a decision maker is held to account, but *how* a decision maker's accountability is constructed through the accountability dialogue.

I also examine how the existence of multiple accountability regimes might shape how public decision makers and other actors can engage in public accountability processes. I suggest that the dialogue at the heart of the traditional accountability relationship may itself be transformed by the advent of a broader accountability dialogue between different forums and perhaps also additional accountability actors. This is because the way that public decision makers frame their own account to one forum can be shaped by the fact that they are involved in dialogues with other forums. The decision maker also appreciates that each accountability forum is likely to be aware of the other dialogues the decision maker participates in and that multiple forums are often provided with the same information.

I further investigate whether this multilateral accountability dialogue should be conceptualised as potentially extending to include "additional accountability actors", who do not function as forums that evaluate a decision maker following a dialogue, but are instead actors affected by decisions or with expertise relevant to the decisions. Despite the absence of an accountability relationship with the decision makers, existing literature points to these actors making accountability demands of public decision makers, providing information to forums, and creating pressure for sanctions following judgments

from forums, both in the public sphere and through formal accountability processes. I therefore include them in my examination of accountability interactions.

Converging assessments of accountability as an alternative outcome of multiple accountability regimes

By focusing on the potential interactions between forums, and between forums and additional accountability actors, this thesis examines an alternative scenario to those examined in most existing studies on multiple accountability regimes. Existing studies tend to focus on how the *decision maker* rather than the *forum* is affected by being subject to multiple accountability regimes.

The most influential study of a decision maker being affected by subjection to multiple demands for accountability, by Koppell, found that the result could be ‘multiple accountability disorder (MAD)’. Koppell found that decision makers are overloaded by diverse demands for accountability and paralysed by the ‘attempts to be accountable in multiple senses’.⁷ Diverse demands for accountability are assumed to result in diverging assessments of a decision maker’s accountability—or discordant monologues—based on different normative standards.⁸ Given this assumption, absent the traditional predetermined precedence between different forums’ evaluations, “MAD” is found to result in decision making chaos.

⁷ Koppell 95.

⁸ Koppell 96. However, I argue in Chapter Two that Koppell’s “standards” are better understood as norms associated with accountability.

Another seminal study by Romzek and Dubnick found an alternative but equally dysfunctional outcome of multiple accountability regimes for decision makers: namely that the decision maker's accountability was determined by whichever forum had the loudest voice within a multiple accountability regime.⁹ In other words, multiple accountability regimes lacked 'balance'¹⁰ between the different forums, resulting in the dominant forum determining what constituted publicly accountable decision making in a given case.¹¹

I argue that the focus of these studies on *decision makers* contributes to these findings. My case analysis points to a different potential outcome: the convergence of evaluations between different forums that interact with one another. By focusing on forums, I examine conclusions from existing studies that the assessment of decision makers by multiple forums actually results in diverging evaluations from different forums, or the dominance of a single forum's assessment.

⁹ For example, the dominance of managerial accountability in M Dubnick and B Romzek, 'Accountability in the Public Sector: Lessons from the Challenger Tragedy' (1987) 47 *Public Administration Review* 227, 235 and the dominance of legal accountability in S Kim, 'Balancing Competing Accountability Requirements: Challenges in Performance Improvement of the Nonprofit Human Services Agency' (2005) 29 *Public Performance and Management Review* 145, 149.

¹⁰ Kim 149. Also see C Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38, 55. Reviews of this idea of 'balance'; K Yang, 'Further Understanding Accountability in Public Organizations: Actionable Knowledge and the Structure –Agency Duality' (201b) 20 *Administration & Society* 1, 6 and S Page, 'The Web of Managerial Accountability: The Impact of Reinventing Government' (2006) 38 *Administration & Society* 166, 192.

¹¹ This was found to be particularly problematic when the dominant type of accountability forum was 'inappropriate' given the nature of the decision maker's task; Dubnick and Romzek (187) 235.

As part of this research, I examine whether accountability forums' evaluation of a public decision maker can be shaped through interactions so as to incorporate the way that other forums (and/or additional accountability actors) assess the public decision maker.

Combining these aims, the key research question addressed by this thesis is: do different public accountability forums that simultaneously hold the same public decision maker to account interact with one another in a way that influences the scope of what a decision maker is obliged to account for and the normative standards against which the decision maker's account is evaluated?

Answering this research question involves asking three further sub-questions. First, by what mechanism(s) and at what points in the accountability process does forum A interact with forum B (and perhaps forum C, D, etc)? Second, does forum B adopt forum A's evaluation of the scope of what the public decision maker is required to account for and/or the normative standards against which the account is assessed?

Finally, what conditions prompt such a transfer of one forum's evaluation of the scope of the decision maker's accountability and applicable normative standards to other forums? For instance, does a forum A act in a manner that makes it more likely that its evaluations will be picked up by forum B (or C, D, etc)? Does the decision maker, or additional accountability actors appearing before forum B, act to make the transfer of evaluations from forum A more likely? Alternatively, do transfers of assessments between two (or more) forums occur without any intentional actions by accountability actors?

I will suggest that when forums A and B interact with one another, the way that forum B evaluates the accountability of the public decision maker *can* adopt forum A's evaluation of *both* the scope of what should be accounted for, and the normative standards underpinning forum A's evaluation. This adoption thereby changes forum B's ultimate evaluation. I will also suggest that a feature of multiple accountability regimes is that the accountability demands of forums and additional accountability actors, and/or the evaluations of some forums, are *echoed* by other forums or additional accountability actors, particularly in the public sphere, and that this can arise as a result of interactions between those actors in some instances.¹² Instead of conflicting expectations of the decision maker being reflected in diverging assessments of the same (in)action, I conclude by proposing that interactions between multiple forums can lead to various evaluations *converging*.

The result of multiple accountability forums overseeing the same public decision maker might be more aptly described as an echo chamber rather than multiple, discordant monologues or a single dominant monologue in which evaluations accumulate. I propose that this "cumulative" accountability can influence the leeway that the decision maker has to act in different ways in future, and thereby influence the direction of their future decision making.

This is an alternative impact of multiple accountability regimes on public decision making. It is neither the paralysis of "MAD" nor the distorting impact

¹² This is alluded to in T Schillemans, 'Accountability in the Shadow of Hierarchy: The Horizontal Accountability of Agencies' (2008) 8 Public Organization Review 175, 187.

of an over-dominance of a single forum's conception of accountability identified in existing literature. It instead points to the possibility that the trajectory of decision making can be at least partially shaped by how multiple actors construct accountability and decision making within a multiple accountability regime.

Situating this thesis within public accountability scholarship

This thesis is about public accountability, specifically multiple accountability regimes. I define public accountability as a relationship where the actor—who is obliged to account—accounts for exercises of authority made as part of governing,¹³ and where ultimately that actor accounts to the public.¹⁴ Public accountability also involves the processes for rendering and assessing accounts predominantly occurring in public or through public institutions.¹⁵

¹³ Marshall's idea of 'governing authority' is more inclusive than alternatives such as "public power" or "executive power", but in this thesis are equivalent; G Marshall, *Constitutional Theory* (Clarendon Press 1971) 31. Also see P Craig and A Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press 2006) 4. For this thesis public decision making is that which takes place 'under public law and/or [with respect to] public funds and/or under formalised public control'; D Grunow, 'Development of the Public Sector: Trends and Issues' in F Kauffmann, G Majone and V Ostrom (eds), *Guidance, Control, and Evaluation in the Public Sector: The Bielefeld Interdisciplinary Project* (Walter de Gruyter 1985) 46.

¹⁴ Understood as citizens, rather than only those "stakeholders" with a direct material interest in a decision; R Mulgan, 'The Processes of Public Accountability' (1997) 56 *Australian Journal of Public Administration* 25, 28 and J Steffek, 'Public Accountability and the Public Sphere of International Governance' (2010) 24 *Ethics & International Affairs* 45, 50.

¹⁵ Public accountability can, in principle, include processes where accounts are given confidentially to the representatives of the public, but whether such instances constitute public accountability needs to be assessed in each context; J Kearne, 'Monitory Democracy' in M Fotou

Thesis scope: public accountability for public decision making in constitutional democracies

This thesis examines how public accountability operates to call executive government decision makers to account within well-established constitutional democracies. My analysis focuses on parliamentary democracies, particularly Westminster systems.¹⁶

The decision makers examined include both elected representatives and unelected public officials.¹⁷ Citizens can call executive decision makers to account for two kinds of decisions: decisions about a citizen's individual circumstances resulting in 'particular' accountability, and decisions about societal goals resulting in 'general' accountability.¹⁸ I focus on the latter kind of decisions, because they are more likely to be subject to active oversight by multiple accountability forums, and, to be engaged with by additional accountability actors.¹⁹

Specifically, the empirical case study examines two types of public decision makers responsible for decision making about societal goals: those responsible

and others (eds), *The Future of Representative Democracy* (Cambridge University Press 2011) 219. This definition tends to include accountability mechanisms such as peer-review and collegial connections between civil servants; C Hood and others (eds), *Controlling Modern Government* (Edward Elgar 2004) 7.

¹⁶ Multiple accountability is a feature of parliamentary and presidential constitutional democracies, although more associated with the latter; Polidano 36.

¹⁷ On broader and narrower conceptions of 'government'; R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave MacMillan 2003) 39.

¹⁸ R Mulgan, 'Comparing Accountability in the Public and Private Sectors' 59 *Australian Journal of Public Administration* 87 (2000a), 88.

¹⁹ This is because general decisions are more likely to be salient, controversial and/or be associated with policy failure. These factors are all found in the literature to prompt multiple accountability regimes, as I examine in Section Three, Chapter Four.

for setting regulatory standards and those responsible for implementing those standards. The relevant context in which I examine the operation of the multiple accountability regime is the polity rather than a government organisation.²⁰

Thesis focus: multiple accountability regimes

Two questions have dominated accountability scholarship, particularly since the 1980s.²¹ The first is whether traditional public accountability principles and institutions can (and should) be extended to new contexts and techniques of governing. The second is whether alternative accountability institutions can (and should) be added to traditional arrangements within constitutional democracies. The broad answer to both questions has been that public accountability can and should be extended and expanded in form, function and application.

Public accountability scholars are therefore increasingly concerned with understanding how public accountability operates in the light of these extensions.²² This thesis is situated in this subsequent wave of scholarship. It focuses on one of the key implications of these changes to traditional public

²⁰ This is equivalent to Olsen's focus on 'regime-level accountability'; Olsen 450. Hence my focus is not on the internal decision making or accountability dynamics of the organisation within my study. This contrasts with organisational studies, a classic of which is M Bovens, *The Quest for Responsibility* (Cambridge University Press 1998).

²¹ Mulgan argues that accountability became prominent only in the 1980s alongside the New Public Management reforms; Mulgan (2003) 9. Also see M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, 449.

²² For example, C Harlow, 'Accountability, New Public Management, and the Problems of the Child Support Agency' (1999) 26 *Journal of Law and Society* 150, 154 and Scott (2000) 40.

accountability: the operation of multiple accountability regimes in constitutional democracies.

Researching multiple accountabilities builds on previous scholarly work cataloguing and explaining the proliferation in public accountability actors and arrangements. If it is assumed that most public decision makers—at least in constitutional democracies—will be (potentially) subject to multiple accountability processes, then understanding how these processes operate as a dynamic whole—or a regime—becomes imperative.

As Mulgan argues: ‘the need is to take a wider view, to examine the different contributions that different channels of accountability can make to the overall goal of public accountability at different stages of the accountability process’.²³ This thesis seeks to respond to these calls by moving beyond a focus on the individual components of a multiple accountability regime. I instead focus on researching how those individual components might relate to one another,²⁴ and moreover how those relations²⁴ might be influenced by dynamics within the overall accountability regime. This is essential to researching ‘accountability-in-action’.²⁵

²³ Mulgan (1997a) 35.

²⁴ For example, K Clark, ‘The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program’ (Washington University in St Louis Legal Studies Research Paper Series, Paper No. 10-11-12, 2010), 404.

²⁵ Schillemans 184. This term captures the key socio-legal insight that the social practices can differ from the formal design of those that take place within legal and political institutions.

The idea of accountability-in-action emphasises that accountability is a *process*, understood as ‘a sequence of events that describe how things change over time,’²⁶ as distinct from the ‘single-snapshot’²⁷ view. Studying accountability as a process emphasises this temporal element, as well as the agency of actors within that process, both essential factors to being able to recognise how multiple accountability regimes might shape accountability practices.

There is a reasonable corpus of case studies, and some theoretical literature, that focuses on multiple accountabilities within the broader field of accountability scholarship that I describe below. However, a close review reveals substantial fragmentation within this corpus and a lack of clear strands of studies that build upon one another. I review this fragmentation in Chapters One and Two. In this Introduction, I set out my preliminary choices regarding my research focus in order to identify the relevant existing scholarship.

First, this thesis focuses on the implications of multiple accountabilities for public accountability rather than for any aspect of “governance”,²⁸ such as regulatory standard setting. In the case study analysis, I consider how the

²⁶ A Pettigrew, R Woodman and K Cameron, ‘Studying Organizational Change and Development’ 44 *Academy of Management Journal* 697, 700.

²⁷ The corollary of this approach is also moving away from framing theories as ‘universal and free from the specifics of time and place’; Pettigrew, Woodman and Cameron, 699.

²⁸ Morgan characterises accountability scholarship on changing forms of accountability as focused on their ‘*effectiveness* as governance mechanisms’ rather than ‘the implication for accountability’; B Morgan, ‘Tecnocratic v. Convivial Accountability’ in M Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press 2006) 243. Also see K Yang, ‘Emergent Accountability and Structuration Theory’ in M and G Frederickson (eds) (2011a) 276.

construction of the decision maker's public accountability influenced the trajectory of decision making,²⁹ but my focus remains on how multiple accountability regimes affect the *dialogues* within accountability processes. I argue that a proper understanding of the implications of multiple accountabilities for public accountability is the necessary foundation for any examination of the implications of multiple accountability regimes for governance.³⁰ I have chosen in this thesis to concentrate on this foundation.

The second choice I make is to focus on how operating within multiple accountability regimes affects accountability forums, rather than public decision makers. Most case studies of multiple accountabilities, particularly North American studies, use the decision maker as the primary unit of analysis and examine the experience of being subject to multiple accountabilities³¹

²⁹ Following the approach in Schillemans 187.

³⁰ The relationship between accountability and governance is very complex; P Cane, 'Understanding Judicial Review and its Impact' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact* (Cambridge University Press 2004) 40 and P Schmitter, 'The Ambiguous Virtues of Accountability' 15 *Journal of Democracy* 47, 55. Dubnick argues that the links drawn between the two in existing literature are 'often based on unfounded or untested assumptions'; M Dubnick and K Yang, 'The Pursuit of Accountability: Promise, Problems, and Prospects' in D Menzel and H White (eds), *The State of Public Administration: Issues, Challenges and Opportunities* (M.E. Sharpe 2011) 174. Also see C Harlow, *Accountability in the European Union*, vol 2, book 3 (Oxford University Press 2002) 1. Dubnick urges accountability researchers to move away from a 'simple input-output model: in goes accountability, out the other end comes justice/democracy/ethics/performance'; M Dubnick, 'Pathologies of Governance Reform: Promises, Pervasions and Perversions in the Age of Accountability' (2007) *Chief Officer* 31, 3. Also see Yang (2011a) 277.

³¹ For example, D Dunn and J Legge Jr, 'US Local Government Managers and the Complexity of Responsibility and Accountability in Democratic Governance' (2001) 11 *Journal of Public Administration Research and Theory* 73, 80. This strand of work is related to Tetlock's famous studies of how accountability affects individuals; P Tetlock, 'Accounting for the Effects of Accountability' (1999) 125 *Psychological bulletin* 255 and P Visser and P Tetlock, 'Coping with Accountability Cross-pressures: Low-effort Evasive Tactics and High-effort Quests for Complex Compromises' (2000) 26 *Personality and Social Psychology Bulletin* 1380.

and/or the impact on decision making.³² For these studies, ‘the question then becomes how agencies handle conflicting and different pressures of accountability.’³³ This study instead follows a minority strand of literature, particularly from the United Kingdom and other European countries, which focuses on how accountability forums respond to the simultaneous operation of other accountability forums or arrangements.³⁴

A crucial distinction exists between these two strands of literature on multiple accountabilities that goes beyond a choice to make the decision maker or forum the focus of the analysis. Most studies of decision makers involve *potential* rather than actual accountability processes.³⁵ Such studies tend to rest on assumptions about how different forums *would* evaluate the decision maker were an accountability process to occur. The main focus is the decision maker’s response to expected accountability demands, or to demands made outside the context of an accountability process as defined in this thesis.³⁶ As I examine

³² The classic example is Koppell and Romzek and Dubnick’s seminal early study of the Challenger disaster; Dubnick and Romzek (1987). A string of studies employ Romzek and Dubnick’s approach. For example, B Romzek and P Ingraham, ‘Cross Pressures of Accountability: Initiative, Command, and Failure in the Ron Brown plane crash’ (2000) 60 *Public Administration Review* 240; B Romzek and J Johnston, ‘State Social Services Contracting: Exploring the Determinants of Effective Contract Accountability’ (2005) 65 *Public Administration Review* 436; and Kim.

³³ Reiss points out that this research focus is associated particularly with public administration literature; D Reiss, ‘Agency Accountability Strategies After Liberalization: Universal Service in the United Kingdom, France, and Sweden’ (2009) 31 *Law & Policy* 111, 113.

³⁴ Notable examples are Harlow (1999) and Schillemans.

³⁵ These are still rightly understood as accountability case studies, given that to be accountable is to be subject to potential, as well as actual, calls to account; R Mulgan, ‘Accountability: An Ever-Expanding Concept?’ (2000b) 78 *Public Administration* 555, 560.

³⁶ A process in which a decision maker is obliged to account to a forum through some arrangement that facilitates an accountability dialogue between the two actors, and the forum conveying its evaluation and ensuring that the decision maker faces consequences.

further in Chapter Two, this dominant strand of scholarship on multiple accountabilities uses this hypothetical frame predominantly to examine how public agents manage ‘the challenge of multiple, diverse and conflicting expectations’.³⁷

By contrast, studies that focus on accountability forums tend to examine instances where the forum evaluates the accountability of a decision maker following an *actual* process involving an accountability dialogue between the two. A key issue for this thesis is the extent to which assumptions made in the strand of literature concerned with hypothetical accountability processes—especially those about accountability “expectations”—are relevant to, or borne out in, studies of actual accountability processes. This is important because the two strands of literature tend to be conflated, and therefore the conclusions of the literature about accountability expectations tend to generalise further than they perhaps should. Because actual accountability processes are very complex, this kind of study is initially best suited to an in-depth, single case study.

Third, I examine the implications of multiple accountability regimes on the construction of a decision maker’s accountability within each accountability process, rather than merely examining the functional implications for holding the decision maker to account (such as whether a decision maker can actually

³⁷ M Dubnick, ‘Clarifying Accountability: An Ethical Theory Framework’ in C Sampford and N Preston (eds), *Public Sector Ethics: Finding and Implementing Values* (Routledge 1998) 77. Also see Romzek and Ingraham 242. I discuss this literature in Section Three, Chapter Two.

be obliged to account, be evaluated and be made to face consequences).³⁸ I make this choice because we know relatively little about how a given decision maker's accountability is constructed within accountability processes.³⁹ This can leave accountability scholarship with relatively little to say about 'what it actually means to be accountable',⁴⁰ and, as a result, with a lack of 'theoretical context or conceptual clarity about the subject'.⁴¹ Nonetheless, I also include accountability interactions that have functional implications in my analysis.⁴²

Finally, I analyse *how* multiple accountability regimes affect processes of holding a decision maker to account. My purpose is not to evaluate whether such regimes are a good thing. A key concern in the literature on multiple accountabilities is evaluating whether multiple accountability regimes are a positive or negative development: for democratic politics, administrative performance, and/or public accountability itself.

³⁸ An example of the functional focus is D Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13 *European Law Journal* 523. An example of the constitutive focus is Sinclair's case study of how senior Australian civil servants 'establish their accountability, to themselves and to others'; A Sinclair, 'The Chameleon of Accountability: Forms and Discourses' (1995) 20 *Accounting, Organizations and Society* 219, 220.

³⁹ This argument is made by J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137, 144. A significant early study that examined this construction is Day and Klein 244.

⁴⁰ Dubnick and Frederickson xv.

⁴¹ Dubnick and Frederickson xiv.

⁴² Understanding both functional and constitutive implications is important for understanding the implications for public accountability more generally; Sinclair 220.

A preponderance of this scholarship focuses on the negative impact of multiple accountability regimes.⁴³ This literature often critiques the assumption that more accountability is always a good thing;⁴⁴ that accountability is an ‘unqualified human good’.⁴⁵ Some authors instead examine the potential for multiple accountabilities to strengthen public accountability and governance.⁴⁶ The argument that various kinds of accountability arrangements can be ‘integrated into an accountability system to counteract the limitations of each type’⁴⁷ is an example of this approach. In this thesis, I proceed on the basis that we need to understand how multiple accountability regimes actually operate

⁴³ See the review in Bovens (2007) and Schillemans 6. Also see a key recent example M Flinders, ‘Daring to be a Daniel: The Pathology of Politicized Accountability in a Monitory Democracy’ (2011) 43 *Administration & Society* 595. C.f. Mulgan (2003) 220; J Denhardt and R Denhardt, *The New Public Service: Serving, Not Steering* (ME Sharpe 2003); and, D Kettle, *The Global Public Management Revolution* (2nd edn, Brookings Institution 2005) 119. This literature sits within a broader tradition of examining the potential negatives of accountability more generally. On opportunity costs, see M Power, *The Audit Society: Rituals of Verification* (Oxford University Press 1997) 1 and Mulgan (2003) 237. On the potential to prompt ‘perverse behaviour’, see Dubnick (2007) 3; C Pollitt and G Bouckaert, *Public Management Reform—A Comparative Analysis: New Public Management, Governance, and the Neo-Weberian State* (3rd edn, Oxford University Press 2011) 200 and Messner.

⁴⁴ For example, M Lodge, ‘Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments’ in J Jordana and D Levi-Faur (eds), *The Politics of Regulation* (Edward Elgar 2004) 128 and M Considine, ‘The End of the Line? Accountable Governance in the Age of Networks, Partnerships, and Joined-Up Services’ (2002) 15 *Governance* 21, 21. An ‘accountability industry’ can be generated by this idea; M Bøstrum and C Garsten, ‘Organizing for Accountability’ in M Bøstrum and C Garsten (eds), *Organizing Transnational Accountability* (Edward Elgar Publishing 2008) 1.

⁴⁵ As EP Thompson famously described the rule of law in *Whigs and Hunters* (Penguin Books 1990) 266. Also see Mulgan (2003) 236. This is echoed in the idea that accountability risks becoming an “essentially uncontested concept” in public discourse; Flinders 596 and W Wirth, ‘Control in Public Administration: Plurality, Selectivity and Redundancy’ in Kauffmann, Majone and Ostrom (eds), 598. Instead, ‘accountability itself may be a problematic practice’; Messner 919.

⁴⁶ The sentiment that ‘a circle of spotlights uncovers more than is revealed by a single spotlight, however strong that single light may be’ reflects this approach; R Rhodes, S Binder and B Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press 2008) 219.

⁴⁷ G Garn, ‘Moving from Bureaucratic to Market Accountability: The Problem of Imperfect Information’ (2001) 37 *Educational Administration Quarterly* 571, 579. Also see Scott 55.

before we can rigorously evaluate their positive or negative implications beyond a given case or context. These preliminary choices each direct this thesis towards the least researched aspects of multiple accountability regimes.

The field: the nascent state of contemporary public accountability scholarship

The basic idea that those who exercise power over, and on behalf of, others should be held publicly accountable is an ancient one.⁴⁸ It was in Anglo-American political systems that the iconic modern tradition of public accountability developed.⁴⁹ Public accountability has become a more universal aspiration.⁵⁰ Today, as Dubnick has observed, ‘we live in an Age of

⁴⁸ While the specific terminology of “accountability” is Anglo-Norman in origin, the basic idea has other historical origins; D von Dornum, ‘The Straight and the Crooked: Legal Accountability in Ancient Greece’ (1997) 97 *Columbia Law Review* 1483; S Carmona and M Ezzamel, ‘Accounting and Accountability in Ancient Civilizations: Mesopotamia and Ancient Egypt’ (2007) 20 *Accounting, Auditing and Accountability Journal* 177; and, B Barlev, ‘A Biblical statement of Accountability’ (2006) 11 *Accounting History* 173. In modern times, Normanton described public accountability as a ‘phenomenon chiefly associated with western-type states’; E Normanton, ‘Public Accountability and Audit: A Reconnaissance’ in B Smith and D Hague (eds), *The Dilemma of Accountability in Modern Government: Independence versus Control* (St Martin’s Press 1971) 312. The need for accountability stems from the basic need to delegate authority in any system of governing; Dubnick (1997) 3. Hence, Dubnick understands accountability as a “metaproblem”, one that is ‘historically transcendent’; Dubnick and Yang 179. Yet the challenge of practically securing accountability is recurrent because the specifics of that challenge will change over time. In short, ‘there is no static way of organising accountability’; T Erkkila, ‘Governance and Accountability-A Shift in Conceptualisation’ (2007) 31 *Public Administration Quarterly* 1, 3.

⁴⁹ Dubnick describes accountability as an ‘Anglican’ concept: M Dubnick, ‘Accountability and Ethics: Reconsidering the Relationships’ (2003) 6 *International Journal of Organization Theory and Behavior* 403, 408. There is no equivalent term in most other romance languages, where “responsibility” is the equivalent term, although not an exact synonym; Dubnick (1997) 69. Also see Harlow (2002) 15. However, there are also various legal and political traditions around holding public decision makers to account in continental system; in German, for example, as *Rechenschaft* (*Rechtsstaatlichkeit*). As Goodin points out the ‘modern, democratic version of accountability piggybacks, of course, on much earlier notions of political accountability: that of a servant of the Crown to the Sovereign for the performance of his or her duties’; R Goodin, ‘Modes of Democratic Accountability’ (2008) 32 *Innovating Democracy* 155, 156.

⁵⁰ Fisher argues ‘accountability is the obsession of the contemporary age’; E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007) 251. Flinders refers to it

Accountability’.⁵¹ The necessity of public accountability is now invoked across many more contexts,⁵² and is a ‘pervasive presence in almost any discussion of governance’.⁵³

A proliferation in scholarship on public accountability is one consequence of these diverse changes to public accountability practices. The significant shifts in public accountability scholarship that have resulted from this proliferation create a particular need to explain how this thesis is situated with respect to, and seeks to contribute to, this now broad field.

Hence, I argue that it is important to identify how changes to public accountability practice have influenced the “field” of contemporary public accountability scholarship. This “field” is in the odd position of being connected to well-established scholarly traditions but lacking settled theoretical underpinnings.⁵⁴ This is because accountability institutions and

as ‘the über-concept’ of our times; Flinders 597. Also see C Borowiak, *Accountability and Democracy: The Pitfalls and Promise of Popular Control* (Oxford University Press 2011) ix.

⁵¹ Dubnick (2007) 3.

⁵² For example, Kjær’s categorises governance contexts as public administration and policy-making, international relations, European governance, comparative politics, and the World Bank’s “good governance” agenda; A Kjær, *Governance* (Polity Press 2004) 15. I argue for caution in applying concepts and approaches across these different governing contexts; R Keohane, ‘Accountability in World Politics’ in S Gustavsson, C Karlsson and T Persson (eds), *The Illusion of Accountability in the European Union* (Routledge 2009) 13.

⁵³ Dubnick and Yang 176.

⁵⁴ This assessment underpins Lindberg’s important recent contribution in S Lindberg, ‘Mapping Accountability: Core Concept and Subtypes’ (2013) 79 *International Review of Administrative Sciences* 202.

practices have changed a great deal over the past few decades, as have popular conceptions of what public accountability ‘promises’.⁵⁵

In response, accountability scholars have both catalogued the expansion of public accountability into new forms and sites,⁵⁶ and highlighted the ‘accountability deficit’⁵⁷ arising from changes to how power is exercised.⁵⁸ Scholars have also often worked to reshape and sometimes reject existing traditions of thought by reconceptualising the forms public accountability can take, the meanings it can have, and the functions it can fulfil.⁵⁹ The complexity of contemporary public accountability has become a key theme.⁶⁰

This effort has occurred in a crowded but fragmented field of accountability literature. Fragmentation has persisted between different disciplinary traditions, different sites of governance and different dimensions of

⁵⁵ Dubnick and Frederickson xvii.

⁵⁶ Mulgan (2000b) 1 and P Kearns, *Managing for Accountability: Preserving the Public Trust in Public and Nonprofit Organizations* (Jossey-Bass Publishers 1996) 9. Examples of empirically based studies set in constitutional democracies include C Holley, ‘Facilitating Monitoring, Subverting Self-Interest and Limiting Discretion: Learning From New Forms of Accountability in Practice’ (2010) 35 *Columbia Journal of Environmental Law* 127; J Freeman and D Farber, ‘Modular Environmental Regulation’ (2005) 54 *Duke Law Journal* 795 and Schillemans.

⁵⁷ Schillemans 175.

⁵⁸ Responding to continual change means playing the ‘game of procedural catch-up’; M Shapiro, ‘Administrative Discretion: The Next Stage’ (1983) 92 *The Yale Law Journal* 1487, 1487. Also see M Taggart, ‘The Province of Administrative Law Determined?’ in Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997) 6 & 20. It can also mean redesigning accountability institutions. Both responses have been a particular preoccupation of public lawyers, in response to the shift of government activity to the private sector and to the supra-national and international sphere. See M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th edn, Lawbook Co. 2009) 5.

⁵⁹ Lodge 141. Key examples are J Freeman, ‘Extending Public Accountability Through Privatization: From Public Law to Publicization’ in M Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press 2006); J Braithwaite, ‘Accountability and Governance under the New Regulatory State’ (1999) 58 *Australian Journal of Public Administration* 90; and Scott (2000).

⁶⁰ Bovens (2007) and Schillemans and Reiss 113.

public accountability practices.⁶¹ The result is a lack of consensus around concepts, analytical frameworks and methodologies for researching public accountability, and a lack of clarity regarding what approaches are available and what choices a researcher makes when selecting between them.⁶²

Over the past decade or so, this situation has led a number of leading accountability scholars to treat scholarship on contemporary public accountability as a nascent field,⁶³ with relatively underdeveloped concepts, analytical frameworks and methodologies.⁶⁴ These scholars argue that understanding contemporary public accountability will require the development of approaches that are both cross-disciplinary and applicable across contexts.⁶⁵ This argument rests on a critique of common approaches in

⁶¹ For example, 'there is no global grammar of accountability that makes sense across settings'; P Newell, 'Taking Accountability Into Account: The Debate So Far' in P Newell and J Wheeler (eds), *Rights, Resources and the Politics of Accountability* (Zed Books 2006) 40.

⁶² See J Mashaw, 'Structuring a Dense Complexity: Accountability and the Project of Administrative Law' (2005) *The Reformation of American Administrative Law Issues in Legal Scholarship* 1, 16.

⁶³ Even amongst its proponents, the idea of a 'field of accountability studies' is described as 'emerging' or 'embryonic'; Dubnick and Frederickson xiv.

⁶⁴ This argument rests on the idea that detaching the study of accountability from the various disciplinary debates which framed previous research has underscored the many lacuna in our knowledge of accountability-in-action. In particular, it has revealed more starkly the partiality of existing analytical frameworks and research methodologies; partiality in both the sense of being incomplete and tending to pre-frame the research focus. This is unexceptional, given that disciplines are 'powerful but constraining ways of knowing', both in terms of the scope of what they examine and how they examine it; L Lattuca, *Creating Interdisciplinarity: Interdisciplinary Research and Teaching Among College and University Faculty* (Vanderbilt University Press 2001) 2.

⁶⁵ Notable contributions to this debate are Dubnick and Yang; Dubnick and Frederickson; J Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in M Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press 2006); M Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 *West European Politics* 946; Yang (2011a); M Bovens and T Schillemans, 'Does public accountability work? An assessment tool' (2008) 86 *Public Administration* 225 and C Harlow, 'Accountability as a Value in Global Governance and for

existing work: particularly the empirical reliance on studies of single cases or individual accountability mechanisms, and the tendency in theoretical work to develop idiosyncratic, atomised concepts of accountability that insufficiently connect back to, and build on, existing concepts.⁶⁶

The idea of ‘accountability studies’⁶⁷ has been proposed to overcome the fragmentation within accountability scholarship. Prominent accountability scholars have argued for the development of approaches to researching public accountability that can create links between varied accountability practices across different contexts,⁶⁸ notwithstanding the contextually-bound nature of accountability practices.

This context of academic debate shapes the focus, contribution and limitations of this thesis. The focus on multiple accountabilities reflects a key aspect of the emerging research agenda for accountability studies.⁶⁹ A contribution of the thesis is to develop analytical concepts for researching

Global Administrative Law’ in G Anthony and others (eds), *Values in Global Administrative Law* (Hart Publishing 2011). Also see the debate between Flinders; M Dubnick, “Move Over Daniel: We Need Some Accountability Space” (2011) 43 *Administration & Society* 704 and P Tetlock, ‘Vying for Rhetorical High Ground in Accountability Debates : It Is Easy to Look Down on Those Who Look Soft on’ (2011) 43 *Administration & Society* 693.

⁶⁶ Bovens 946 and Dubnick (2011) 706. Lindberg recently counted over one hundred “types” of accountability used in the literature, and provides a barbed critique of this tendency in accountability relationships; Lindberg 203.

⁶⁷ Dubnick and Frederickson xiv and Flinders 598.

⁶⁸ “The challenge is to devise a general approach to analysing instances of accountability that will allow us to see and discuss common problems across multiple domains”; Mashaw (2005) 16. And ‘the current framings ... fall short in providing the much needed commensurability required to generate theoretically fruitful scholarship’; Dubnick and Yang 171. Also see M O’Loughlin, ‘What is Bureaucratic Accountability and How Can We Measure It?’ (1990) 22 *Administration & Society* 275 and Yang (2011a).

⁶⁹ Dubnick and Frederickson 203 and Dubnick and Yang 176. The advent of multiple accountability was a major focus of two of the first empirical studies to consider “contemporary” accountability: Day and Klein and Dubnick and Romzek (1987).

accountability interactions that are transparent in how they connect to existing scholarship and the extent to which they might be applicable to other contexts.⁷⁰

Because accountability *interactions* are relatively unexamined, this analytical contribution is underpinned by extensive, cross-disciplinary engagement with a wide variety of accountability case studies and conceptual literature. This includes literature concerned with contexts and manifestations of public accountability beyond the specific focus of this thesis. I then further develop the analytical framework through my application to accountability interactions. It becomes apparent that empirically tracing where these interactions take place within accountability processes, and understanding their significance contextually, is an involved task that is best suited to an in-depth, single case study.⁷¹

Disciplinary orientation

This thesis draws on accountability literature from across the disciplines and sub-disciplines traditionally concerned with public accountability: public law (including administrative law), political science (including public administration) and regulation studies.⁷² However, as a socio-legal project, this

⁷⁰ This approach underpins the referencing in this thesis, which seeks to identify connections between the point being referenced and existing scholarship where appropriate. The result is more extensive footnotes than might be necessary in a more developed field.

⁷¹ R Yin, *Case Study Research: Design and Method* (Sage 2009) 3.

⁷² Scholars within these disciplines have long reflected on the relationships between them. On the connections between public administration and public law see J Bell, *Comparative Administrative Law* (Oxford University Press 2006) 1264. On the connections between public

thesis emphasises how public accountability processes are ‘socially ... constructed’ rather than ‘apolitical and autonomous’.⁷³

Specifically, I draw on accountability literature that examines how public accountability processes involve power dynamics and implicate power relations.⁷⁴ Accountability processes are not apolitical, procedural appendages to political decision making, always institutionally insulated from that decision making. As such, I do not understand accountability processes as merely checks on the exercise of power, but instead as sites within which different actors seek to influence the exercise power and the construction of public accountability. As Fisher points out, this understanding has important implications for how all actors are understood: ‘no actors within that regime are neutral—each and everyone is acting on their own normative basis’.⁷⁵ This understanding also requires consideration of whether the design (and operation) of accountability is in turn influenced by the ‘way in which power is allocated and negotiated’ in any public decision making context.⁷⁶

law and political science see G Drewry, ‘Bridging the Chasm: Public Law and Political Science’ in D Butler, V Bogdanor and R Summers (eds), *The Law, Politics and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford University Press 1999) 214.

⁷³ L Mather, ‘Law and Society’ in G Caldeira, D Kelemen and K Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 681.

⁷⁴ See Section Five, Chapter Two.

⁷⁵ E Fisher, ‘The European Union in the Age of Accountability’ (2004) 24 *Oxford Journal of Legal Studies* 495, 514.

⁷⁶ Lodge 142.

Case study selection, scope and function

The Murray-Darling Basin Plan (the “Basin Plan”) became a controversial regulatory decision-making process that attracted oversight from multiple accountability forums during its four-year development (2008-2012).⁷⁷ My case analysis examines the accountability processes through which both of the decision makers—the Murray-Darling Basin Authority (“the Authority”) and the Minister for Water (“the Minister”)—with respect to the two most significant aspects of that regulatory process.⁷⁸ In this section, I define the unit of analysis of the case study, its scope and the kind of case study it is. A methodology appendix (Appendix A) sets out the case method and sources.

Case selection

I selected the Basin Plan because it is a contemporary case of public decision making that took place within a federal constitutional democracy and was overseen by a multiple accountability regime over a relatively long time-scale⁷⁹ for an accountability case study. The Basin Plan involved two different kinds of public decision makers—an administrative and political decision

⁷⁷ Interestingly, two other case studies of the relationships between multiple accountabilities are based on water regulation; Freeman and Farber and Morgan.

⁷⁸ The regulation of the Murray-Darling Basin as a whole involves considerable institutional and decision making complexity, and it is beyond the scope of this thesis to include the entire regulatory process in the accountability analysis; P Wallis and R Ison, ‘Appreciating Institutional Complexity in Water Governance Dynamics: A Case from the Murray-Darling Basin, Australia’ 25 *Water Resources Management* 4081.

⁷⁹ Olsen emphasises the value of longer accountability case studies to understand how dynamics might develop over time within a multiple accountability regime; Olsen 467.

maker—making decisions about salient and controversial issues that were likely to involve contestation. This made the Basin Plan case a good case for understanding how accountability processes might be affected by contested decision making contexts.

Unit of analysis

The unit of analysis for this case study is the accountability interactions between accountability forums overseeing the two key decision makers in the Basin Plan process.⁸⁰ Defining the unit of analysis around empirical accountability interactions reflects Yin’s admonition that a case should be a real-life phenomenon rather than an abstraction such as an argument or hypothesis.⁸¹

More specifically, I focus on those accountability forums that produced ‘an external ex-post evaluation’ of either, or both, decision makers following a process involving ‘an information exchange’⁸² between the decision maker and forum. External, as opposed to internal, accountability relationships involve the agent being obliged to account to forums with external oversight.⁸³ Where

⁸⁰ This focus on the key regulatory actors, rather than all actors within the regulatory regime, reflects the approach advocated by Black 157.

⁸¹ Yin 32.

⁸² This reflects the definition used in J Biela and Y Papadopoulos, ‘Strategies for Assessing and Measuring Agency Accountability’ (32nd EGPA Annual Conference, Toulouse, September 2010)

5. As those authors argue, this relatively narrow definition improves the veracity of empirical analysis. Information exchange functions as a proxy for dialogue. This is similar to Schillemans’ definition of accountability as ‘a communicative interaction between two parties’; Schillemans 181.

⁸³ This distinction between accountability and “responsibility” (i.e., within internal organisational hierarchies) is articulated by Mulgan (2003) 28. It underpins the approach in

internal accountability processes become the subject of the scrutiny of external accountability forums, and thereby become public, I include them.⁸⁴ I consider the (bureaucratic) accountability relationship between the Authority and the Minister to the extent that the Minister's evaluations or sanctioning of the Authority is evident from the public record.⁸⁵

Scope of the case analysis

The accountability analysis focuses on a qualitative empirical investigation of a particular aspect of accountability-in-action: interactions between accountability forums. The purpose of the analysis is to examine the dynamics underpinning *how* the accountability of the Authority and the Minister was constructed by the multiple forums.⁸⁶ It is therefore not an accountability analysis that seeks to assess the sufficiency of the particular accountability arrangements in place,⁸⁷ nor to explain why public decision makers are held to account for certain decisions and actions and not others.

To ensure rigorous analysis, the scope of my analysis is limited to examining the accountability of these decision makers (the Authority and the Minister) for exercises of power around two key issues: the development of the

Biela and Papadopoulos 6. As Uhr argues, this reflects the distinction drawn in the classic Finer-Friedrich debate; J Uhr, 'Redesigning Accountability: From Muddles to Maps' (1993) 65 *The Australian Quarterly* 1, 3.

⁸⁴ This follows the approach in Harlow (1999) 171.

⁸⁵ This follows the approach in Y Papadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance' (2007) 13 *European Law Journal* 469, 477.

⁸⁶ This responds to the call for a greater focus on *how* accountability is practiced as well as the sites where it is practiced; Newell 38.

⁸⁷ This distinguishes it from studies such as Schillemans; Bovens (2007) and O'Loughlin.

proposed limit on water extraction from the Murray-Darling Basin and the recovery of environmental water necessary in order to implement that limit.⁸⁸ Accountability interactions are most evident with respect to these two decisions.

The first of these key decisions involved setting regulatory standards, which is a particular aspect of regulation, and the second decision involved deciding how these standards should be implemented.⁸⁹ Both of these decisions are appropriately characterised as involving political decision making, where decisions around establishing and realising collective goals that bind and affect different social actors are understood as political.⁹⁰ Such decisions implicate the values that collective goals should reflect, the impact that the preferences or actions of some individuals should be allowed to have on others, and how communal resources should be used and distributed. Both decision makers in the Basin Plan case exercised power as members of the executive

⁸⁸ On the importance of examining the accountability relationship between agent and forum with respect to specific issues, given that relationship can differ between issues, see Biela and Papadopoulos 11.

⁸⁹ For a definition of regulation see J Black, 'The Decentred Regulatory State?' in P Vass (ed), *CRI Regulatory Review 2006/2007* (Centre for the Study of Regulated Industries 2007) 265. I do not view regulation and accountability as synonymous, although clearly accountability arrangements can be used to 'regulate'; C Scott, 'Regulation in the Age of Governance: The Rise of the Post-regulatory State' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation* (Edward Elgar 2004) 148 and C Hood and C Scott, 'Bureaucratic Regulation and New Public Management in the United Kingdom: Mirror-Image Developments?' 23 *Journal of Law and Society* 321, 321.

⁹⁰ The Basin Plan binds and affects states as well as private actors; *Water Act 2007* 2007 ss35A & 40A and *Water Amendment Act 2008* ss86H & 250. This definition of political draws on C Hay, *Why We Hate Politics* (Polity Press 1998) 1.

government.⁹¹ While one decision maker was a political actor and the other a bureaucratic actor, both made political decisions.

As established above, this thesis is concerned with general rather than particular accountability. This distinction encompasses policy decisions around the development and implementation of the Basin Plan; it does not include instances where the decision makers were called to account over decisions relating to whether, for example, to purchase water entitlements from individuals.⁹² Finally, the case analysis focuses on accountability processes overseeing the decision making of the Commonwealth of Australia; it does not include accountability processes that might have taken place at a sub-national or community level.

Nature of the case study

My accountability analysis is based on a single case design. The case study ‘serves an exploratory role’⁹³ by helping to develop concepts and analytical approaches that may illuminate the more specific phenomenon of accountability interactions.⁹⁴ An exploratory single case, as distinct from a

⁹¹ Hence I examine how the legislature or judiciary hold members of the executive to account, but not how those branches of government are themselves held accountable. As such I adopt the same scope of analysis as Mulgan (2003) 39.

⁹² Mulgan (2000a) 88. On occasion the Minister was called to account regarding decision making around the purchase of water from individuals, especially a potentially large purchase of water from the notorious cotton station *Cubby Station*. In general, however, accountability demands and evaluations were not focused on individual impacts.

⁹³ J Gerring, *Case Study Research: Principles and Practices* (Cambridge University Press 2007) 91.

⁹⁴ On this role for single case studies see Gerring 43.

descriptive or explanatory study,⁹⁵ is appropriate where a phenomenon is previously unexplored, and so the literature does not offer a pre-existing framework that can be tested and refined.⁹⁶ Because my central thesis—that interactions between accountability forums can affect the very process of holding to account—aims to prove a counter-factual, strictly this only requires a single observation.

I also argue that the in-depth, qualitative understanding of the accountability processes that a single case study enables justifies the limited focus, especially across a fairly significant time period (four years). The single case methodology can function to ‘make previously obscure theoretical relationships sufficiently apparent’⁹⁷ and contribute to the ‘heuristic identification of new variables’.⁹⁸ The analytical framework that I develop is likely to be useful in examining other instances of accountability interactions, and my case analysis also points to specific avenues for further research of this under-examined aspect of multiple accountability regimes.⁹⁹ Where possible, I also attempt to offer insights that can possibly be applied to analysing multiple accountability regimes more generally.

⁹⁵ Yin 3.

⁹⁶ Ibid. Also see Gerring 62.

⁹⁷ C Mitchell ‘Case Studies’, cited in T McKeown, ‘Case Studies and the Limits of the Quantitative World View’ in H Brady and D Collier (eds), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (Rowman & Littlefield Publishers 2004) 153.

⁹⁸ A George and A Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) 20. C.f. G King, R Keohane and S Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press 1994) 208.

⁹⁹ Yin points out that the aim of the case study is ‘analytic generalization’ rather than ‘statistical generalization’; Yin 15.

In addition, in accordance with my focus on external accountability relationships, the project design reflects two methodological constraints. First, it is difficult to assess the accountability processes arising from relationships internal to public bureaucracies without extensive and long-running access to all participants, which was precluded by the long time-scale and sensitivity of the Basin Plan process.¹⁰⁰ Secondly, for a project focused on examining the standards underpinning evaluations, access to evaluations that are recorded in some form is essential. Such records were available for external processes, but were limited in all but a few instances for internal accountability processes.

Outline of arguments

This thesis begins by critically reviewing accountability scholarship concerned with multiple accountabilities and how public accountability processes might be impacted by changes to practices and conceptions of accountability. In Chapter One, I argue that accountability researchers need to more explicitly situate studies within the heterogeneous literature on multiple accountabilities. I identify an approach for explicitly identifying what changes are relevant to my study of the manifold changes that scholars refer to as multiple accountabilities. I argue that the two predominant approaches to analysing

¹⁰⁰ See Harlow (1999) 171. Although this research is based on good access to participants, and is based on a significant number of interviews, including with senior actors, a full outline of how internal accountability processes operated over the four-year period of the Basin Plan process was well beyond the scope of this project. Access was very restrictive in the first stage of the Basin Plan's development, and so even a longer project that encompassed internal accountability relationships was likely to have been infeasible.

multiple accountabilities in the literature are not able to account for the whole range of possible accountability interactions, because they focus too much on institutional design and too little on actors.

In Chapter Two, I start to develop an analytical framework adapted to researching the accountability interactions that this thesis examines also empirically. In particular, this analytical framework conceptualises accountability interactions as also encompassing the impact that these interactions might have on the construction of public accountability in a given scenario. I develop approaches to analysing the normative dimension of accountability, and refine the idea of “accountability politics” to examine the political dimension of accountability processes. Finally, I draw on existing literature to identify the contexts in which forums are less likely to act autonomously, and therefore more likely to interact with one another.

In the further chapters I analyse the case of the Murray-Darling Basin Plan and use my analytical framework to examine accountability interactions that occur within the case. In Chapter Three, I explain the complex political, legal and regulatory context in which the Basin Plan was developed. By mapping the political debates around the Basin Plan, and the interests, ideology and power of key actors in the decision making, I am able to analyse the origins of the contestation—or accountability politics—that becomes a key feature of the case. This contextual understanding also informs my analysis of how different actors approach their involvement in accountability processes once the

accountability processes become embedded in decision making in the second half of the case.

In Chapters Four and Five I directly address this thesis' research questions by examining two different manifestations of accountability interactions. The first manifestation is interactions between multiple accountability forums and various additional accountability actors that result in the establishment of extra accountability forums to oversee the two key decision makers on which I focus. I argue in Chapter Four that this interaction functions to challenge and reshape the nature of the formal multiple accountability regime established to oversee the decision makers. The second manifestation involves interactions between multiple accountability forums that result in forum A adopting forum B's evaluation of the decision maker, and the normative standards underpinning that evaluation. I argue in Chapter Five that this interaction changed how the decision makers are held to account, and functions to challenge and reshape the construction of accountable decision making within the Basin Plan case. By analysing the interests that various actors have in effecting both of these changes in the Basin Plan case I analyse why and how different forums might interact with one another, and also interact with additional accountability actors. I also explore the possibility that decision makers might play a role in accountability interactions.

I conclude by arguing that the operation of multiple accountability regimes might change what is at stake for accountability actors. Specifically, I argue that the awareness of multiple accountability processes operating simultaneously

might prompt actors to frame demands for accountability from a decision maker, and forums to frame evaluations of a decision maker, in a way that makes it more likely other actors will adopt those demands and evaluations.

Chapter One: Multiple accountability regimes

Introduction

The proliferation of public accountability practices, and of conceptions of public accountability, has been a striking feature of contemporary accountability in constitutional democracies. This proliferation is increasingly conceptualised by accountability scholars as *multiple accountabilities*. Multiple accountabilities mean that public decision makers can be subject to what are described as ‘webs’,¹⁰¹ ‘regimes’,¹⁰² or ‘systems’¹⁰³ of processes of being held to account. In constitutional democracies, what this thesis terms “multiple accountability regimes” comprises three traditional forums—the legislature, judiciary, and executive hierarchy—plus additional accountability forums. Multiple accountability regimes are the precursor to accountability interactions, and provide the context in which accountability interactions take place.

In this chapter, I explore the advent of multiple accountabilities in constitutional democracies and develop an analytical approach to situating

¹⁰¹ Böstrum and Garsten 6; Page; Mulgan (2003) 40; Sinclair 220; Page 168; L O’Connell, ‘Emergent Accountability in State-Local Relations’ 38 *Administration & Society* 500, 502; and, D Klingner, J Nalbandian and B Romzek, ‘Politics, Administration and Markets’ (2002) 32 *The American Review of Public Administration* 117, 120.

¹⁰² Scott 55; Schillemans 179; and, Biela and Papadopoulos 11.

¹⁰³ Romzek and Ingraham 242. Another term is accountability ‘architecture’; Clark 404.

studies—most relevantly, my study of accountability interactions—within the corpus of scholarship about multiple accountabilities. I commence by characterising the differences between traditional and multiple accountability regimes in constitutional democracies. Using heuristics developed from existing literature to break accountability into its component parts, I then map what accountability scholars mean by multiple accountabilities. This mapping reveals that existing studies of multiple accountabilities focus on a variety of different aspects of accountability as the objects of multiplication.

This analysis supports my argument that there are analytical advantages to conceptualising “multiple accountabilities” as an *umbrella* term. It assists in overcoming fragmentation in accountability scholarship, consistent with the aspiration to develop a more coherent field of “accountability studies”, as set out in the Introduction. In accordance with this aspiration, I argue that the first step in a study of multiple accountability regimes should be to explicitly identify the multiplications of aspects of accountability that are pertinent to the research questions. By adopting this approach, this thesis is transparent about the analytical implications of multiple accountabilities that are relevant to my study, and transparent about the studies my research builds upon. In turn, this approach assists in identifying how future research can build on this study, and the extent to which my conclusions can be generalised to scenarios where different aspects of accountability are multiplied.

In this study, the most significant multiplication is that of accountability forums. Hence, my research questions are about the interactions between

forums within a multiple accountability regime. The multiplication of the subject matter for which a decision maker can be called to account, and the normative standards against which that account is evaluated, are also directly relevant to my focus on how interactions might affect evaluations of a decision maker's accountability by individual forums. I also identify how multiplications of other aspects of accountability have some specific, but secondary, relevance to my case analysis.

I then provide a brief historical survey of the development of multiple accountabilities in constitutional democracies, and the various ways accountability scholars explain this development. This survey reveals that there are manifold origins of additional forums, and more diverse subject matters of accounts and normative standards used to assess accounts. This survey also reveals that multiple accountability regimes are likely to be a product of 'historical accretion more than rational planning'.¹⁰⁴ I argue that the heterogeneous genesis of multiple forums, subject matters and normative standards points to the limitations of understanding interactions between different accountability forums within multiple accountability regimes as a function of historical origins or institutional design.

I end the chapter by reviewing the dominant analytical approach—which develops typologies of accountability—and concluding that this approach is, on its own, inadequate for researching accountability interactions. In particular, I

¹⁰⁴ Mulgan (2003) 40. Thus I use the term accountability "regime" in preference to "system", to avoid the implication that different arrangements will necessarily operate systematically.

argue that focusing on the attributes of the “types” of accountability within an accountability regime can obscure the dynamics of the regimes overall. It is for this reason that I develop alternative approaches adapted to researching accountability interactions in Chapter Two.

Section 1: Differences between traditional and multiple accountability regimes

The emergence of multiple accountability regimes has been a significant change to public accountability within constitutional democracies. In this section, I identify the key attributes of traditional, hierarchical public accountability and multiple accountability regimes.¹⁰⁵ This distinction underpins my analysis of the broad conceptual changes to public accountability in constitutional democracies, while acknowledging differences between various polities, periods and sectors.¹⁰⁶

¹⁰⁵ This is necessarily a stylised approach, and the differences tend to be a matter of degree. For example, the basic recognition that administration can be held accountable ‘in a variety of ways’ is long-standing; H Parris, *Constitutional Bureaucracy: The Development of British Central Administration Since the Eighteen Century* (George Allen & Unwin 1969) 304.

¹⁰⁶ Hence ‘it is difficult to make sweeping claims about changes in accountability’; P Lægreid and P Mattei, ‘Introduction: Reforming the Welfare State and the Implications for Accountability in a Comparative Perspective’ (2013) 79 *International Review of Administrative Sciences* 197, 200.

Traditional, hierarchical public accountability in constitutional democracies

The traditional conception of constitutional government makes elected officials responsible for establishing policy to reflect the ‘political preferences’¹⁰⁷ of citizens (as expressed through elections), and a professional, neutral bureaucracy responsible for implementing that policy.¹⁰⁸ In this context, public accountability sought to ensure ‘bureaucratic accountability and conformity ... to politically set standards’¹⁰⁹ and compliance with laws, rules and procedures.¹¹⁰ Elected officials were rendered accountable for their political decision making through elections.¹¹¹ Within Westminster systems, legislative actors who exercised executive power as Ministers were accountable to parliament and the courts for their conformity to political and legal standards.

¹⁰⁷ T Jørgensen, ‘Modes of Governance and Administrative Change’ in J Kooiman (ed), *Modern Governance: New Government-Society Interactions* (SAGE Publications 1993) 220.

¹⁰⁸ Denhardt and Denhardt 7 and Jørgensen 220.

¹⁰⁹ Wirth 619.

¹¹⁰ O Dwivedi and J Jabbra, ‘Public Service Responsibility and Accountability’ in O Dwivedi and J Jabbra (eds), *Public Service Accountability: A Comparative Perspective* (Kumarian Press 1988) 5 and Kettle 129.

¹¹¹ It should be noted that there is a lively debate about whether elections should be understood as accountability mechanisms, or whether they should instead be viewed as the way citizens select better governments and approve their mandates, or, can be validly viewed as both; A Przeworski, B Manin and S Stokes, ‘Elections and Representation’ in Przeworski, Manin and Stokes (eds), *Democracy, Accountability and Representation* (Cambridge University Press 1999) 48 and J Fearon, ‘Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance’ in Przeworski, Manin and Stokes (eds) 69 & 83. I adopt the view that public accountability processes operate *between* elections; Borowiak 18. Like conceptions of market accountability, elections involve an aggregation of preferences more than an accountability dialogue. It is for this reason that I exclude them from my analysis.

Public accountability was conceptualised as a vertical “chain” within the ‘institutional hierarchy’ of bureaucracies,¹¹² and, within a ‘hierarchical state’:¹¹³ a chain formed between the executive, judiciary and legislature (with the last being sovereign within constitutional bounds).¹¹⁴ The focus on vertical accountability relationships meant that there were ‘no short-cuts [from officials] to parliament or the public’.¹¹⁵ Such short-cuts were viewed as both ‘unnecessary and inappropriate’.¹¹⁶

These public accountability relationships were institutionalised through ‘clearly defined’¹¹⁷ arrangements. These arrangements differed between constitutional democracies but fell into the basic triumvirate of legislative, judicial and bureaucratic mechanisms.¹¹⁸

Multiple public accountability regimes in constitutional democracies

The existence of multiple accountability regimes that extend beyond the traditional accountability arrangements challenge the assumption that public accountability must be founded in hierarchical relationships between decision

¹¹² R Rhodes, *Understanding Governance* (Open University Press 1997) 59. Also see J Freeman, ‘The Private Role in Public Governance’ (2000) 75 *New York University Law Review* 543, 672 and S Ranson, ‘Public Accountability in the Age of Neo-Liberal Governance’ (2003) 18 *Journal of Education Policy* 459, 460. For an outline of the traditional assumption of a hierarchical civil service, see K Dowding, *The Civil Service* (Routledge 1995) Chapter Two.

¹¹³ Jørgensen 220.

¹¹⁴ Mulgan (2003) 232.

¹¹⁵ Mulgan (1997a) 25.

¹¹⁶ Denhardt and Denhardt 129.

¹¹⁷ P Kearns 1. Also see M Dowdle, ‘Public Accountability: Conceptual, Historical and Epistemic Mappings’ in M Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press 2006) 3.

¹¹⁸ See collection in Kauffmann, Majone and Ostrom (eds) (1985).

maker and forum.¹¹⁹ Multiple accountability regimes are comprised of ‘autonomous accountability forums existing in a social relationship with the (administrative) actor’.¹²⁰ Also jettisoned are ‘(unbroken) chains of delegation’ in which each “agent” generally has a single “principal” as the necessary foundation for accountability.¹²¹

Contemporary ideas of public accountability are based instead on the principle that those exercising power should be *directly* accountable to the people on whose behalf they exercise that power, or whom they affect in the exercise of power.¹²² This establishes direct accountability relationships between citizens and public decision makers (or regulators and service-

¹¹⁹ F Kaufmann, ‘Introduction: History of the Project and Background to the Problem’ in Kauffmann, Majone and Ostrom (eds) (1985) 17; Wirth 597 and Black 150.

¹²⁰ Curtin 531. Although the autonomy of those forums are another matter that this thesis further examines.

¹²¹ Curtin 524 and K Strøm, ‘Delegation and Accountability in Parliamentary Democracies’ 37 *European Journal of Political Research* 261, 269. Also see Papadopoulos 472; W Dooren and T Willems, ‘Lost in Diffusion? How Collaborative Arrangements Lead to an Accountability Paradox’ 77 *International Review of Administrative Sciences* 505, 517 and Polidano 36.

¹²² Indeed, this proposition is virtually uncontested across the spectrum of political reform movements; L Bresser-Pereira, *Democracy and Public Management Reform: Building the Republican State* (Oxford University Press 2004) 194 and D Dunn, ‘Accountability, Democratic Theory, and Higher Education’ (2003) 17 *Educational Policy* 60, 61. It reflects broader reconceptions of the relationship between the state and society; J Kooiman (ed) *Modern Governance: New Government-Society Interactions* (Newbury Park 1993). Also see B Stone, ‘Administrative Accountability in the Westminster Democracies: Towards a New Conceptual Framework’ (1995) 8 *Governance* 505, 518. Of course, the idea of citizens directly holding governments to account, including between elections, is not itself new; see E Weber, ‘The Question of Accountability in Historical Perspective’ (1999) 31 *Administration & Society* 451, 468 and Wirth 597. Indeed, direct accountability to the public is sometimes viewed as the original meaning of *public* accountability; Steffek 46.

providers) rather than routing accountability through elected representatives.¹²³

Direct accountability involves a scenario where:

... individuals or groups (as citizens, professionals or members of interest groups) also hold governments to account directly in a larger societal setting: by actively engaging in policy discussion, using various complaints and grievance procedures and freedom of information rights, etc.¹²⁴

Unelected public officials thus become (potentially) accountable to the legislature as a distinct entity, especially to opposition members, as well as 'to the media, and to formal and informal representatives of civil society',¹²⁵ to 'specific constituencies' and to communities of experts.¹²⁶

This conceptual shift towards direct accountability underpins the emergence of additional types of accountability.¹²⁷ Traditional public accountability assumed:

Self-conscious oversight, on the basis of authority, by defined individuals or offices endowed with formal rights or duties to conduct inquiries, to call for changes in

¹²³ For an excellent overview of this shift, see Mulgan (1997a). Also see Sinclair 222. This can be understood as reflecting a more general shift towards "participatory democracy"; P Cane, 'Participation and Constitutionalism' in C Charters and D Knight (eds), *We, The People(s): Participation in Governance* (Victoria University Press 2011) 258.

¹²⁴ Dooren and Willems 510. Also see A Meijer and T Schillemans, 'Fictional Citizens and Real Effects: Accountability to Citizens in Competitive and Monopolistic Markets' (2009) 14 *Public Administration and Management – An Interactive Journal* 254, 255; Sinclair 225; and, J Langford, 'Responsibility in the Senior Public Service: Marching to Several Drummers' 27 *Canadian Public Administration* 513, 520.

¹²⁵ Bresser-Pereira 193. On the 'constitutional function' of the media or 'the fourth estate', see M Barker, 'Accountability to the Public: Travelling Beyond the Myth' in P Finn (ed), *Essays on Law and Government: Values and Principles* (Law Book Company 1995) 262.

¹²⁶ Olsen 451. Schillemans recognises 'boards of experts' as horizontal accountability forums for independent, expert agencies; Schillemans 182. On accountability to external experts, see O'Loughlin 282.

¹²⁷ Harlow (1999) 153. For the most comprehensive review of these types see Lindberg.

behaviour where performance is unsatisfactory and perhaps also to punish miscreants.¹²⁸

However, it is now recognised that there are more ad hoc and informal accountability relationships arising between public decision makers and forums,¹²⁹ including instances where those forums may not have all the requisite formal powers to investigate and punish the decision maker. Accountability relationships are also recognised as potentially emerging outside of constitutional structures, for example in the market or social spheres.¹³⁰

In Westminster systems, constitutionally based accountability to parliament and the courts, and through hierarchical arrangements, ultimately retain their precedence—but they are ‘no longer dominant’ or, at least, they may not be dominant.¹³¹ Multiple accountability regimes generally involve the addition rather than substitution of accountability arrangements,¹³² although

¹²⁸ C Hood, ‘Concepts of Control Over Public Bureaucracies: "Comptrol" and "Interpolable Balance"’ in Kauffmann, Majone and Ostrom (eds) 766.

¹²⁹ One concept developed to capture this is ‘emergent’ accountability; L O’Connell, ‘Program Accountability as an Emergent Property: The Role of Stakeholders in a Program’s Field ’ (2005) 65 *Public Administration Review* 85, 85.

¹³⁰ Bovens (2007) 457 . On both social and market accountability see S Paul, ‘Accountability in Public Services: Exit, Voice and Control’ (1992) 20 *World Development* 1047, 1048 and J Ackerman, ‘Co-Governance for Accountability: Beyond "Exit" and "Voice"’ (2004) 32 *World Development* 447. Market accountability as an idea is based on economic theory, but its functioning was rarely elaborated upon by its advocates or policy-designers; see D Osborne and T Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (William Patrick 1992) and Garn 579 & 574.

¹³¹ Olsen 462.

¹³² Some reform movements, such as the reinvented government agenda, touted new kinds of accountability as a substitute for constitutionally-based public accountability, but this substitution has not generally occurred in practice; Harlow (1999) 153. Also see Garn.

direct accountability can be conceptualised as an alternative to indirect political accountability relationships.¹³³

Thus advocates of “new” accountabilities promoted the ongoing importance of constitutionally-based arrangements;¹³⁴ indeed, “new” accountabilities were sometimes represented as reinforcing traditional accountability regimes.¹³⁵ However, the novelty of these arrangements meant that the conventions around how different forums and arrangements relate to one another are less clearly defined than the conventions around relationships between the traditional triumvirate of political, bureaucratic, and legal accountability. This is one of the factors that prompt empirical examination of these relationships.¹³⁶

Understanding multiple accountabilities in terms of pluralisation

Accountability scholars often conceptualise the changes captured/encompassed by multiple accountabilities as part of a broader pluralisation in the conceptions and practices of public accountability.¹³⁷

¹³³ M Dubnick, ‘Accountability and the Promise of Performance: In Search of the Mechanisms’ (2005) 28 *Public Performance and Management Review* 376, 378. On the corresponding shift away from political legitimacy, see G Majone, ‘Regulatory Legitimacy’ in G Majone (ed), *Regulating Europe* (Routledge 1996) 284.

¹³⁴ For example, Weber 456.

¹³⁵ For example, Freeman and Farber 905. The counter-argument is that multiple accountability regimes could result in merely ‘symbolic accountability’; Bovens and Schillemans (2011) 8.

¹³⁶ For example, Harlow (1999) and Schillemans.

¹³⁷ Mulgan describes contemporary accountability scholarship as characterised by a ‘multifaceted, pluralist approach’, which tends to assume that a ‘diverse range of accountability points’ have a better chance of guaranteeing accountability; Mulgan (2003) 189. Keohane refers to the idea of a ‘pluralistic accountability system’ which ‘relies on a variety of sub-types of accountability’; Keohane 11. Salamon calls for scholars to ‘develop more pluralistic conceptions’

Multiple accountabilities clearly imply more numerous public accountability relationships attaching to public decision makers.¹³⁸ But pluralisation also emphasises the *diversity* of accountability forums, and additional accountability actors, as a significant change.¹³⁹ The continuous monitoring from different perspectives that multiple accountability regimes seem to promise is nicely captured by the idea of ‘360 degree accountability’.¹⁴⁰

of accountability to match the complexity of contemporary governance; L Salamon, ‘The New Governance and the Tools of Public Action: An Introduction’ in L Salamon (ed), *The Tools of Government: A Guide to the New Governance* (Oxford University Press 2002) 38. Schillemans and Bovens explicitly seek to respond to Salamon; Bovens and Schillemans (2011) 19. Also using this terminology is Freeman and Farber 906; M Philip, ‘Delimiting Democratic Accountability’ (2009) 57 *Political Studies* 28, 45; and, M Flinders and J Buller, ‘Depoliticization, Democracy and Arena Shifting’ in T Christensen and P Laegreid (eds), *Autonomy and Regulation: Coping with Agencies in the Modern State* (Routledge 2006) 75. Beyond accountability literature, this terminology also reflects a more pluralistic understanding of power, control and what counts as a public purpose or the public interest; see M Shapiro, ‘Administrative Law Unbounded: Reflections on Government and Governance’ 8 *Indiana Journal of Legal Studies* 369, especially 372 and Wirth 598. Pluralisation is not used in the sense of the pluralist model of the state, which views interest-group involvement in administration as a more important form of representation than representative legislatures; see Dowding 4.

¹³⁸ Mulgan (2003) 189.

¹³⁹ I prefer “pluralisation” to other descriptions of changes such as “new”, “extended” or “attenuated” accountability because it is more agnostic as to the historical significance of the changes that took place. The terminology of “new” accountability is widely used in public administration and governance literature, but tends to over emphasise change at the expense of continuity for example. In some examples the language of “new” accountability is used critically; D McBarnet, A Voiculescu and T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 54; Holley 132; P Kearns 22; P Barberis, ‘The New Public Management and a New Accountability’ (1998) 76 *Public Administration* 451, 462; and, C Lesser and E Bardach, ‘Accountability in Human Services Collaboratives—For What? And to Whom?’ (1996) 6 *Journal of Public Administration Research and Theory* 197, 222. Whilst in others “new” is used more rhetorically; Osborne and Gaebler 136 and T Melish, ‘Maximum Feasible Participation: New Governance, New Accountability and a Twenty-First Century War on the Sources of Poverty’ (2010) 13 *Yale Human Rights and Development Law Journal* 1. Extended accountability is used by Scott (2000) 40. Whilst I do not adopt this adjectival form, I employ the terminology of extensions with respect to specific features of public accountability. Attenuated accountability is used by R Rhodes, ‘The New Governance: Governing without Government’ XLIV *Political Studies* 652, 663.

¹⁴⁰ R Behn, *Rethinking Democratic Accountability* (Brookings Institution Press 2001) 197. The House of Lords subsequently adopted this term; House of Lords Select Committee on the Constitution, *The Regulatory State: Ensuring its Accountability* (6th Report of Session 2003-04, 2004) 19. It originated in management discourse.

This diversity potentially opens up the range of normative values and aspirations that all three kinds of accountability actors—forums, decision makers and additional accountability actors—might seek to incorporate into conceptions of public accountability.¹⁴¹ I argue in Chapter Two that the multiplication of accountability relationships, and the pluralisation of conceptions of accountability, together expand the prospect of *contestation* about public accountability.

Section 2: Identifying what is multiplied in multiple accountabilities

The concept of multiple accountabilities is increasingly used by accountability scholars to describe changes to public accountability over recent decades. In this section, I examine the scholarly use of multiple accountabilities more closely. I begin identifying an analytical approach by parsing accountability processes which I adopt throughout my accountability analysis. I outline what aspects of public accountability can be multiplied, by refining Mashaw’s “grammar” to use as a heuristic. I then map existing studies of multiple accountabilities using this approach, and find that the concept is used to refer to a myriad of changes to public accountability.

I argue that multiple accountabilities should be understood as an umbrella concept; one that usefully encompasses a range of related phenomenon, but the

¹⁴¹ B Romzek and B Radin, ‘Accountability Expectations in an Intergovernmental Arena: The National Rural Development Partnership’ (1996) 26 *Publius: The Journal of Federalism* 59, 62.

use of which needs to be clarified in each study. I suggest an approach whereby researchers identify what changes—or “multiplications”—are relevant to their focus and why. This forms the basis of my approach in the remainder of this chapter, and in this thesis more generally.

What aspects of public accountability might be multiplied?

Because of its context dependency, public accountability cannot be defined with reference to form, function, or associated values, except within a given cultural, temporal and spatial context.¹⁴² Consequently, accountability scholars have sought to identify common “elements”¹⁴³ that are necessary for a process of calling and holding a decision maker to account (or accountability process).¹⁴⁴ An accountability process is comprised of the *actions* of accountability actors (decision makers, forums and what I term additional accountability actors).¹⁴⁵ These common elements can form the analytical building blocks of accountability research generally, but are especially useful for identifying precisely what aspect of public accountability might be

¹⁴² Dubnick and Yang 177 and Olsen 449. The most developed analysis of the research implications is from Dubnick and collaborators. Variants of this explanation appear in Dubnick’s previous work; see especially M Dubnick, ‘Seeking Salvation for Accountability’ (Annual Meeting of the American Political Science Association, Boston, August 2002).

¹⁴³ I use this in preference to ‘basic features’ or ‘dimensions’, although they are synonyms; Mashaw (2005) 17 and Mulgan (2003) 22.

¹⁴⁴ Authors who also characterise accountability as a process include: Mashaw (2006) 132; A Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press 2001) 81; Mulgan (200b) 555; P Newell and J Wheeler, ‘Rights, Resources and the Politics of Accountability’ in Newell and Wheeler (eds) 14 and Schillemans 177.

¹⁴⁵ This focus on actions is implied by the distinction Dubnick develops between the three forms that accountability takes in governance studies, being ‘institutional configurations’, ‘mechanisms’ and ‘processes’; Dubnick (2011) 708.

multiplied within multiple accountabilities. I continue to use this terminology throughout this thesis to achieve greater analytical precision.

In this thesis, I adopt Mashaw's articulation of this project, which identifies six elements that make up the "grammar" of accountability.¹⁴⁶ An accountability process first requires an *agent*¹⁴⁷ (or, in this thesis, "decision maker") and an *accountability forum*¹⁴⁸ who are in an accountability relationship,¹⁴⁹ in which the agent is 'obliged' to render an account to the forum.¹⁵⁰ It requires a *subject matter* for which the agent is obliged to account to that forum, and *accountability arrangements*¹⁵¹ through which the agent's account can be given and debated and the forum's assessment of the account given. It further requires a normative *standard* against which the forum evaluates the agent's

¹⁴⁶ Mashaw's 'grammar of governance' is developed in Mashaw (2005) 17 and Mashaw, (2006) 118. These elements overlap with the schema of other authors to a great extent, but more clearly distinguish between elements that go into *how* an agent is held to account than, for example, Mulgan (2003) 22.

¹⁴⁷ Used in the sense of an "agent of accountability" rather than the principal-agent sense; A Schedler, 'Conceptualizing Accountability' in A Schedler, L Diamond and M Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Reiner Publishers 1999) 20.

¹⁴⁸ While I use "forum" to refer to the actor who receives the account, strictly actor/s within the forum receive the account; see Dooren and Willems 509. Both actors are social actors; Dubnick and Frederickson xv.

¹⁴⁹ Davies points out that accountability relationships are a precondition to any particular processes existing, but need to be analysed in their own right because they may not be institutionalised; Davies 137. Also see Day and Klein 5 and Mashaw (2006) 118.

¹⁵⁰ Bovens (2007) 451. This separates accounting from consultation; Day and Klein 84. I do not include a subjective element in this arising from whether the decision maker 'felt' obliged to account, instead focusing on whether the decision maker was in fact obliged to account; Schillemans 177.

¹⁵¹ Davies 76. Also see B Romzek and M Dubnick, 'Accountability' in J.M. Shafritz (ed), *Defining Public Administration: Selections from the International Encyclopedia of Public Policy and Administration* (Westview Press 2000) 382 and R Goodin, 'Democratic Accountability: The Distinctiveness of the Third Sector' (2003) 44 *European Journal of Sociology* 359, 365.

account and for ‘assigning accountability’.¹⁵² Finally, an accountability process requires *consequences*, or at least the potential for consequences, for the agent of the forum’s assessment.

It is useful to also specify the actions or steps within some of the different elements of the accountability process.¹⁵³ This specification enables the researcher to identify which actors perform each of those actions.¹⁵⁴ Davies explicitly adopts such an approach, identifying the four essential steps taken by a forum as: ‘setting standards against which to judge the account’; ‘obtaining the account; judging the account; and deciding what consequences, if any, should follow from it’.¹⁵⁵ To this Curtin adds the step of ‘debate’ between the obtaining of and judging of the account.¹⁵⁶ I also add the frequently noted step of ‘demands’¹⁵⁷ or ‘requests’¹⁵⁸ for accountability, which can occur separately to

¹⁵² This language is from Olsen 453. The normative standards element of accountability is often excluded from surveys of required elements of accountability, for example, Papadopoulos 471. However, it is included in Mashaw (2005) 17 and Davies 81. On the necessity for some criteria to be incorporated into conceptions of public accountability; see Harlow (1999) 173 and Lindberg.

¹⁵³ This approach is recommended in Curtin 352.

¹⁵⁴ Mulgan (1997a) 28. Also see Curtin 532. What I refer to as “actions” here are also referred to as ‘features’ of accountability mechanisms in Davies 81 and ‘functions’ of accountability processes in Mulgan (1997a) 28.

¹⁵⁵ This approach is chosen because it explicitly includes standard-setting. Note that Davies acknowledges that ‘the elements are often closely linked in practice, and that some variations in their chronological order are possible’; Davies 81. Bovens subsequently acknowledges that account giving processes require ‘standards against which the conduct of actors can be assessed’, although it does not include this element explicitly in his widely-adopted definition of accountability; Bovens 962.

¹⁵⁶ Curtin 534.

¹⁵⁷ Langford 520 and D Clark, J Fox and K Treakle (eds), *Demanding Accountability* (Rowman and Littlefield Publishers 2003). Also see Olsen 453.

¹⁵⁸ Knutsen and Brower 589.

obtaining the account where those accountability demands are made outside of an established accountability relationship.

It is important to note that not all accountability processes will involve all actions or steps.¹⁵⁹ Similarly, a process of calling and holding a decision maker to account may cross different accountability relationships,¹⁶⁰ as I examine in Chapter Two, where I conceptualise various kinds of accountability interactions.

Most studies of multiple accountabilities also classify different accountability relationships or processes into different *types* of accountability. Because typologies are the dominant heuristic for analysing the relations between different components of multiple accountability regimes, I examine their relevance to researching accountability interactions in Section Five. For now, it is important to recognise that some studies are framed around multiple *types*, as a shorthand for multiplications of one or more of the empirical aspects of accountability set out above.

What is described as “multiple accountabilities” in accountability literature?

Multiple accountabilities is a concept that is used by accountability researchers to refer to varied phenomena. In the corpus of multiple accountabilities studies, researchers have examined the multiplication of one or

¹⁵⁹ Papadopoulos 470.

¹⁶⁰ Mulgan (1997a) 35.

more of the six elements of accountability processes.¹⁶¹ Some researchers focus on the multiplication of actors, whether there are multiple decision makers¹⁶² or, more commonly, multiple forums;¹⁶³ and hence the multiplication of accountability or ‘reporting’ relationships.¹⁶⁴ Other researchers focus on the multiplication of arrangements, or mechanisms, through which the accountability relationship takes place.¹⁶⁵ Yet others consider the multiplication of the two elements that form the substance of what constitutes public accountability in a given context:¹⁶⁶ the subject matter of accounts¹⁶⁷ and the normative standard against which accountability is assessed.¹⁶⁸ Finally, there is copious literature, albeit more theoretical, that charts the multiplication (or pluralisation) of the sanctions or consequences element of public accountability.¹⁶⁹

¹⁶¹ The corpus crosses the distinctions drawn in the Introduction between focusing on decision makers versus forums, and between cases where accountability processes are hypothetical versus those where they actually take place.

¹⁶² Holley 135.

¹⁶³ Curtin 524; Papadopoulos 480; and Polidano 36.

¹⁶⁴ Polidano 37; Page 169; Dunn and Jr 86; Klingner, Nalbandian and Romzek 120; and, Kim 148.

¹⁶⁵ Clark 362; Schillemans 176; Clark 363; and, Scott 48.

¹⁶⁶ There is relatively little accountability scholarship focused on ‘what it actually means to be accountable’; Dubnick and Frederickson xv. Also see Black 138.

¹⁶⁷ O’Connell 502.

¹⁶⁸ For example, Sinclair 231; Romzek and Radin 62; and, Koppell 95.

¹⁶⁹ For example, Schedler 14 and Schillemans 177. Blame and punishment are on the more traditional side of sanctions, but providing for redress is usually now also included; D Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press 1991) 22 and Day and Klein 259. Nonetheless, arguably most citizens still seek punishment; J Uhr, ‘Three Accountability Anxieties: A Conclusion to the Symposium’ (1999) 58 *Australian Journal of Public Administration* 98, 99.

Researchers analyse the multiplication of accountability processes¹⁷⁰ and of what I refer to as “steps” within these processes, such as demands¹⁷¹ for accountability. Accountability researchers also analyse the simultaneous operation of multiple kinds or *types* of accountability relationships or processes.¹⁷²

Approaching multiple accountabilities as an umbrella concept

This varied use is not, I argue, best addressed by adopting idiosyncratic definitions of multiple accountabilities for each study. Neither is it likely to be fruitful to attempt to develop a shared definition of multiple accountabilities that focuses on one or two aspects of public accountability that are usually multiplied (e.g., forums) to the exclusion of others.¹⁷³

Instead, I argue it is preferable to recognise “multiple accountability/ies” as an umbrella term, which can be used by researchers to refer to the full gamut of aspects of public accountability that can be “multiplied”. This approach avoids fragmentation between many more specific terms, which is desirable given that many of the multiplications of different elements and steps of public

¹⁷⁰ Dooren and Willems 510 and R Mulgan, ‘AWB and Oil for Food: Some Issues of Accountability’ in J Farrall and K Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press 2009) 334.

¹⁷¹ Langford 520. This step is also sometimes described as multiple ‘pressures’; Reiss 113 and Romzek and Ingraham.

¹⁷² Dubnick and Romzek (1987) 229; Schillemans 176; B Romzek and J Johnston, ‘Contracting and Accountability in State Medicaid Reform: Rhetoric, Theories, and Reality’ (1999) 59 *Public Administration Review* 383, 395; Garn 579; Knutsen and Brower 590; Morgan especially 256; and, Romzek and Ingraham 242.

¹⁷³ Böstrum and Garsten argue that ‘the problems with multiple accountabilities ... cannot be effectively tackled’ through definitions; Böstrum and Garsten 6.

accountability are connected and originate in the same sets of historical and ideological changes.¹⁷⁴ However, researchers then need to explicitly identify what specific aspect of public accountability they examine within this broader concept. This will enable researchers to identify what existing case study and conceptual literature their project builds upon, and articulate the relevance of their findings to other aspects of multiple accountabilities.

What multiplications are relevant to this thesis' research questions?

For this thesis, the most significant multiplication is that of accountability *forums*. I examine interactions between *actors*, and particularly forums. This focus distinguishes this thesis from literature that focuses on how multiple arrangements might stand in relation to one another as a matter of institutional design.¹⁷⁵ However, research that examines the multiplication of forums and arrangements often asks the same broad question as I do in this thesis: how do the different components operate (or fail to operate) together within a multiple accountability regime? I therefore draw on both kinds of studies to inform this thesis, which together constitute the bulk of multiple accountabilities studies.¹⁷⁶

Two further multiplications are also relevant to this thesis' research questions: namely, the *subject matter* for which decision makers can be called

¹⁷⁴ See Section Four below.

¹⁷⁵ For example, Scott (2000).

¹⁷⁶ On occasions, studies of "arrangements" are actually studies of what I term "forums", as in Schillemans 182.

to account, and, the *normative standard* against which their account can be assessed. These elements are the corollary of my focus on how the simultaneous operation of multiple forums influences the evaluations of individual forums within a regime. As I examine in the following section, these two elements prove to be closely conceptually connected, with a symbiotic relationship between the extensions to both elements over the past few decades.

The multiplication of all three of these elements—forums, subject matter and normative standard—is analytically connected to the increasing number of “types” invoked in accountability scholarship. The multiplication of two other aspects of public accountability—decision makers (or agents) and arrangements—has some specific but secondary relevance for my analysis of how accountable decision making is constructed within accountability processes. The multiplication of decision making can increase the fluidity of how responsibility is allocated between decision makers. The multiplication of demands for accountability, whether from forums or from additional accountability actors, shares this secondary relevance for the case analysis.

Identifying the relevant multiplications for this thesis in this section expands the range of potential accountability relationships, subject matters and normative standards that forums base their evaluations on, It also enables me to identify the multiple accountabilities literature relevant to this thesis. I examine both of these aspects in my case analysis.

Section 3: The analytical implications of multiple accountabilities for this study

The advent of multiple accountabilities has complicated the research of public accountability. In this section, I identify the analytical implications of the multiplication of relevant elements of public accountability for my research questions and case analysis. I commence by setting out my analytical approach to identifying when an accountability relationship and arrangements exist. This approach recognises that the multiplication of forums, and to a lesser degree the multiplication of accountability arrangements, has complicated this aspect of accountability research. I then set out my analytical approach to identifying the subject matter of accounts and identifying the normative standard(s) underpinning a forum's evaluation of those accounts. This recognises that the multiplication of these two elements, and to a lesser degree the multiplication of decision makers and or accountability demands, has complicated analysis of how accountable decision making is constructed within in a given context.

Analysing accountability relationships given multiple accountabilities

Decoupling public accountability from relationships of formal authority has been a key conceptual shift in public accountability. It has enabled the proliferation of additional accountability forums beyond just those forums with constitutional accountability relationships with public decision makers. As a result, accountability relationships are now recognised as originating in two contexts. The first arise where 'the requirement to report, and the right to

sanction, are *mutually* understood and accepted',¹⁷⁷ usually because of some preexisting relationship of authority where the decision maker acts on behalf of the forum.¹⁷⁸

The second arises with an actor, who is not in an accountability relationship with the decision maker but who seeks to forge one, successfully makes accountability demands that the decision maker is obliged to respond to, thereby establishing a relationship that turns that actor into an accountability forum.¹⁷⁹ Whether the decision maker perceives themselves to be obliged to account (or not) in response to accountability demands made outside existing accountability relationships will depend on the 'practical capacity' of the actor making the demands 'to make another actor ... account for its actions'.¹⁸⁰ The alternative is that the decision maker subject to the demand rebuffs them and does not render an account in response. Within this "practical capacity", actors making demands for accountability are more likely to be able to extract an account from public decision makers where their demands are founded in moral authority, either because their 'rights or

¹⁷⁷ Böstrum and Garsten 6 (my emphasis).

¹⁷⁸ In this scenario the forum usually has the right to set objectives; Mulgan (2000) 12. Accountability often exists in 'asymmetric authority relationships'; Mulgan (1997a) 27. These relationships have often been conceptualised in principal-agent terms; Steffek 51 and J Broadbent, M Deitrich and R Laughlin, 'The Development of Principal-Agent, Contracting and Accountability Relationships in the Public Sector: Conceptual and Cultural Problems' (1996) 7 *Critical Perspectives on Accounting* 259.

¹⁷⁹ That these relationships can begin with demands reflects an understanding of accountability as being based in dialogue rather than (necessarily) authority; see Day and Klein 5 & 244 and Black 152.

¹⁸⁰ Scott (2000) 50. For example, whether an external actor will be able to influence decision making will depend on the power relationship between the two actors; O'Loughlin 278. Also see Böstrum and Garsten 6.

interests are adversely affected by the actions'¹⁸¹ of the decision maker or because they have a legitimate interest in the decision making.¹⁸²

A multiplication closely related to the recognition of additional forums is the multiplication of accountability arrangements, or the multiplication of mechanisms whereby decision makers give their accounts and forums convey their evaluations. Pluralisation is also particularly evident with accountability arrangements, which are now recognised as able to be more and less formal or 'proceduralised'.¹⁸³ While traditional arrangements through parliament, the courts and bureaucratic hierarchies are still likely to be formalised, professional, social and market arrangements are often less so. The implication of this multiplication is that individual forums may hold a decision maker to account through multiple arrangements, and those arrangements may be more or less procedural.

Analysing the accountability dialogue given multiple accountabilities

The most significant elements of accountability for the construction of what public accountability means in a given context are the subject matter and

¹⁸¹ In this scenario the actor who becomes the forum gains power that generally only extends to the right to avoid harm; Mulgan (2000) 12. Also see K MacDonald, 'Public Accountability Within Transnational Supply Chains: A Global Agenda for Empowering Southern Workers?' in E Weisband and A Ebrahim (eds), *Global Accountabilities* (Cambridge University Press 2007) especially 274; and, A Goetz and R Jenkins, 'Hybrid Forms of Accountability: Citizen Engagement in Institutions of Public Sector Oversight in India' (2011) 3 *Public Management Review* 1, 1.

¹⁸² Davies 75. Both principles are also recognised as a 'legitimate interest' by R Keohane, 'Global Governance and Democratic Accountability' in D Held and M Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Polity Press 2003) 140.

¹⁸³ Curtin 534.

normative standards elements.¹⁸⁴ As a result, the way each of these elements is formulated is often linked to the other. For example, Davies points out that standards have ‘an important role to play in determining the scope of the accountability process’.¹⁸⁵ The multiplication of decision making and accountability demands is also relevant to this construction. If additional accountability demands are made with reference to a particular standard, decision makers may find themselves made responsible for a related subject matter.¹⁸⁶

Each accountability dialogue between a decision maker and forum has a *subject matter* for which the decision maker must account. Analytically, that subject matter is comprised of the context-specific matters for which the decision maker is responsible, as well as broader conceptual categories of what decision makers are routinely called to account for. There are now three of these broad categories of subject matters: financial probity; fairness and proper use of power; and performance or results.¹⁸⁷ The first two connect to the traditional focus of public accountability processes, while the third is associated with attempts at government reform, as I examine further in the following section.

¹⁸⁴ Ensuring proportional consequences can also be an aspect of this construction, although a less significant one; J Fox, *Accountability Politics* (Oxford University Press 2007) 28.

¹⁸⁵ Or the range of responsibilities ascribed to the decision maker; Davies 82. Schedler likewise equates the ‘criteria of accountability’ with the ‘for what’ of accountability processes; Schedler 22.

¹⁸⁶ This is more common in multilevel governance; Papadopoulos 473. This potential is borne out in my case study, where a minister, an independent agency and, to some extent, a federal council of ministers, are decision makers around the same regulatory development.

¹⁸⁷ Behn 6 and Dubnick and Frederickson xviii. Also see Dooren and Willems 512.

In a constitutional democracy, public decision makers will still tend to be formally identified through instruments that delegate responsibility and where there are multiple decision makers each actor will tend to have formally delineated responsibilities. Nonetheless, *who* is actually called to account and *for what* can be more malleable in practice,¹⁸⁸ and indeed can be subject to political contestation.¹⁸⁹ Bostrum and Garsten coin the term ‘responsibilisation’¹⁹⁰ to describe scenarios in which an actor is in practice “responsibilised” for decision making that they do not have formal responsibility for—either at all, or, for a particular subject matter. The potential for actors to be responsibilised is therefore also relevant to the subject matter element of accountability, and is further examined in my case analysis.

Therefore, within a given case, it is important to clarify that the *subject matter* of an account (or of *demands* to account for something) can be comprised of three aspects. The first is the formal responsibilities delegated to a decision maker, which may include the objectives that the decision maker is meant to pursue.¹⁹¹ Hence, conceptually “responsibility” is a necessary prerequisite for “accountability”.¹⁹² The second aspect of the subject matter element is the broad categories of subject matters set out above. A given forum

¹⁸⁸ M Power, ‘Foreward’ in Böstrum and Garsten (eds) xvi.

¹⁸⁹ Olsen 449.

¹⁹⁰ Böstrum and Garsten 2 & 4.

¹⁹¹ This is a well-recognised principle; Mulgan(2000) 107; Davies 75; and, Schedler 19.

¹⁹² Dunn 62; Uhr (1993) 3; and, Day and Klein 5. Accountability is best conceptualised as a more specific and narrower concept than responsibility; Mulgan (1997a) 26; Bovens(2008) 25; and, Schedler 19. The two concepts can be understood as symbiotic insofar as the narrower practice of holding to account rests on the broader practice of giving and executing responsibilities; Uhr (1999) 98.

might only oblige a decision maker to account for their responsibilities with respect to one of these broad categories, for example financial probity. Alternatively, a forum might shape the accountability dialogue to include all these broad categories. This will depend partly on the forum's jurisdiction and the conventions surrounding the subject matter of the accountability dialogue between that forum and a given decision maker, as well as the interests and motivations of a forum.

The third aspect of the subject matter of an account can be the additional responsibilities that a decision maker becomes obliged to account for through the process of responsabilisation described above. (If public decision makers need to be responsible before they can be called to account, then the goal of many forums and third-party actors is to make decision makers (appear) responsible so they can then call them to account.) A finding in the existing literature relating to the subject matter element of accountability is that forums tend to expand rather than constrict the range of responsibilities and subject matters included in the accountability dialogue over time.¹⁹³

The multiplication of the subject matter element is closely connected to the multiplication of the normative standards against which forums may assess a decision maker. This is because, as argued above, each of the three categories of subject matter imply certain standards.

¹⁹³ Bovens and Schillemans (2011) 18.

As established in Section Two, each accountability dialogue requires normative standards against which the forum assesses the decision maker's account (or the (in)action accounted for) in order to deliver their evaluation of the decision maker's public accountability. These normative standards are formulated by the forum within the accountability process; a process of formulation that produces and (re)produces standards by drawing on various sources. These include *ex ante* standards articulated in internal procedures or laws; standards conventionally associated with a given accountability institution or forum (especially in the case of traditional forums); and expectations of decision makers about how they will go about their decision making, and what they will decide, held by forums or additional accountability actors.¹⁹⁴ Both the evolution of conventional standards and the expectations of decision makers are likely to be informed by the meanings associated with public accountability within a given polity and within a given decision making context. In Chapter Two, I set out a more developed analytical approach to examining how standards are formulated that elucidates the contribution of these three sources to this crucial element of public accountability

The pluralisation of practices and conceptions of public accountability has significantly expanded the potential range of normative standards that forums can use to evaluate the accounts of public decision makers. Yet there is less analytical clarity around how multiple accountabilities has changed this element of public accountability when compared with other elements, such as

¹⁹⁴ Behn 4.

arrangements and consequences.¹⁹⁵ For this reason, I devote significant attention to unpacking these changes—and how they are understood within accountability scholarship—in this thesis.¹⁹⁶ For now, the most important analytical implication of this expansion, however, is that the researcher cannot presume that ‘accountability processes are founded on clear agreement about the standards in relation to which a decision maker is being held to account’.¹⁹⁷

In the following section, I outline the historical changes to public accountability that have produced the multiplication of those three elements of accountability that are of most relevance to this study: forums, subject matter and normative standards.

¹⁹⁵ This lack of clarity reflects relatively sparse engagement with standards specifically in contemporary accountability scholarship. I argue that this inattention is because much of the focus of contemporary scholarship is on the accountability relationship and arrangement. By contrast, traditionally, these aspects of accountability could be largely assumed. And so doctrinal scholarship focused on standards, studied as the grounds of judicial review and the conventions around ministerial responsibility and other mechanisms. For example, Marshall (1984); D Oliver, ‘Standards of Conduct in Public Life - What Standards?’ [1995] Public Law 497; D Oliver, ‘Ministerial Accountability: What and Where are the Parameters?’ in D Butler, V Bogdanor and R Summers (eds), *The Law, Politics and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford University Press 1999) and H Evans, ‘Parliament and Extra-Parliamentary Accountability Institutions’ (1999) 58 *Australian Journal of Public Administration* 87. An example of an official attempt to articulate standards for accountable behaviour is Lord Nolan, *Standards in Public Life: First Report of the Committee on Standards in Public Life* (United Kingdom Parliament, London, 1995).

¹⁹⁶ See especially Sections Two and Three, Chapter Two.

¹⁹⁷ Fisher (2004) 497.

Section 4: The emergence of multiple accountability regimes in constitutional democracies

In this section, I briefly review explanations for when and why multiple accountability regimes arose. Specifically, I trace how the multiplication of accountability forums result from various structural changes and reforms to the state over several decades. These changes are also related to the subject matters of accounts and normative standards invoked by forums multiplying, including as a result of the greater variety of types of forums. This review reveals that multiple accountability regimes are not generally a product of intentional institutional design, nor ‘directed toward certain ends’, but instead are often ‘spontaneous’.¹⁹⁸ These regimes result from the accretion of accountability arrangements over time,¹⁹⁹ and from the potential for additional accountability relationships to be forged in a given context.

Given this, I argue that we should be wary of general explanations for how various kinds of accountability forums might interact, and be particularly wary of explanations based on historical origins or institutional design. The origins

¹⁹⁸ C Scott, ‘Spontaneous Accountability’ in M Dowdle (ed), *Public Accountability, Designs, Dilemmas and Experiences* (Cambridge University Press 2006) 175.

¹⁹⁹ P Light, *The Tides of Reform: Making Government Work, 1945-1995* (Yale University Press 1997) 3; Scott (2000) 48; Lægreid and Mattei 200; Romzek and Radin 61; and, Papadopoulos 483. Peters argues this accretion may be by design or due to the ‘path-dependency’ that tends to afflict most ‘reform strategies’; G Peters and J Pierre, ‘Governance Without Government? Rethinking Public Administration’ (1998) 8 *Journal of Public Administration Research and Theory* 223, 224. However, I lean towards Olsen’s perspective that ‘it is problematic to assume that accountability institutions emerge and develop through institutional engineering and choice’; Olsen 458.

of particular forums within a given regime may provide useful context for a study.²⁰⁰ But, I argue, other analytical approaches for examining interactions are needed, which is why I develop a new analytical framework in Chapter Two.

Additional forums as a response to the inadequacy of traditional forums

Additional accountability entities within the state were the earliest recognised “additional” forums, encompassing *inter alia* ombudsmen,²⁰¹ auditor-generals,²⁰² administrative tribunals,²⁰³ and human rights and anti-corruption commissions.²⁰⁴ Kearne argues that accountability forums proliferated in western constitutional democracies in the post-World War II period as a response to pre-war failures of electoral and parliamentary accountability.²⁰⁵ Such forums came to be viewed as an essential complement to periodic elections.²⁰⁶

²⁰⁰ Scholars often begin by tracing the origins of particular accountability forums or arrangements. For example, Reiss and Harlow. I do so in Section One, Chapter Five.

²⁰¹ On the history of ‘Ombudsman techniques’ in the United Kingdom see C Harlow and R Rawlings, *Law and Administration* (1st edn, Weidengeld and Nicolson 1984) Chapter 7. On the Australian context see A Reilly and others, *Australian Public Law* (Oxford University Press 2011) 134 and G Lindell, ‘Responsible Government’ in P Finn (ed) (1995) 100.

²⁰² For a comparative overview of audit institutions see G Arvidsson, ‘Audit Control: Trends and Options’ in Kauffmann, Majone and Ostrom (eds) (1985). For an earlier history of audit see E Normanton, *The Accountability and Audit of Governments: A Comparative Study* (Manchester University Press 1966) 13.

²⁰³ For an excellent historical overview of Anglo-American tribunals see P Cane, ‘Understanding Administrative Adjudication’ in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing 2008).

²⁰⁴ The scope of these additional arrangements has differed between jurisdictions, ranging from a general brief to check ‘maladministration’ to powers to remedy ‘unreasonable, unjust, oppressive’ and ‘wrong’ administrative decisions; Marshall (1984) 81.

²⁰⁵ This is the basis for Kearne’s idea of a ‘monitory democracy’, where public decision makers are continually subject to monitoring from a variety of sources; Kearne. This is supported by the analysis of the UK context in Marshall (1984) 80 and of the United States context in W

Within the Westminster tradition, there is a longer tradition of concerns about the limitations of representative and responsible government, and about the adequacy of ministerial responsibility and judicial review as accountability mechanisms.²⁰⁷ The establishment of additional state-based forums in Westminster systems, predominantly during the 1950s-1970s, can be understood in this context.²⁰⁸ More broadly, these additional forums, and the increased salience of public accountability in political discourse,²⁰⁹ have also been linked to a decline in the popular trust of government in constitutional democracies.²¹⁰

Additional forums as a response to structural changes in government

Additional accountability forums have also emerged as adaptations to 'structural changes'²¹¹ in government and changes in who exercises governing

West, *Controlling the Bureaucracy: Institutional Constraints in Theory and Practice* (ME Sharpe 1995) 3.

²⁰⁶ Dooren and Willems 510.

²⁰⁷ These concerns, relating to the growth of the state, can be traced back to the final quarter of the nineteenth century; Harlow and Rawlings 6. Concerns particularly relate to the capacity and political will of legislatures to hold executive government to account; D Oliver and G Drewry, *Public Service Reforms: Issues of Accountability and Public Law* (Pinter 1996) 37 and Lindell 75.

²⁰⁸ Aronson, Dyer and Groves 11 and Reilly and others 134. On the Australian context see Lindell 93 and P Finn, 'Public trust and public accountability' 65 *The Australian Quarterly* 50, 55. For a general comparative view of parliamentary reforms designed to address these inadequacies see G Hellstern, 'Unwilling to Bark, Not Able to Bite? Theories and Realities of Parliamentary Control' in Kauffmann, Majone and Ostrom (eds).

²⁰⁹ B Radin, *Challenging the Performance Movement: Accountability, Complexity, and Democratic Values* (Georgetown University Press 2006) 1 and L Pellizzoni, 'The Antinomy of Accountability' in Böström and Garsten (eds) 212.

²¹⁰ Flinders 596; Pollitt and Bouckaert 8; Mulgan (2000) 2; and, P Kearns xiii.

²¹¹ Erkkilä 3.

power in constitutional democracies.²¹² As Schillemans argues, the ‘size and complexity’ of contemporary government has resulted in ‘fragmented governance ... that is ill adapted to hierarchical, Weberian models of accountability.’²¹³

Indeed, O’Donnell developed the concept of *horizontal* accountability to refer to this phenomenon, which he describes as:

... the existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions ... in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful.²¹⁴

In part, government has become more fragmented because of the greater involvement of corporate and not-for-profit entities. Fragmentation also results from the greater exercise of governing authority beyond the nation-state by supranational entities such as the European Union and World Trade Organisation, by non-government organisations, and, arguably, by

²¹² Rhodes 58 and Taggart 3.

²¹³ Schillemans 176. As such, the emergence of multiple accountabilities accompanies the ‘process of state formation’ and the mutual development of ‘governability’ and ‘accountability’; K Kersbergen and F Waarden, “Governance” as a Bridge Between Disciplines: Cross-disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy’ (2004) 43 *European Journal of Political Research* 143, 155. The shift from decision making by elected representatives to decision making by bureaucracies was also significant; O’Loughlin 276. For an earlier treatise on the ‘urgent’ need for English administrative law to adapt to the growing threat of departmental discretion see C Allen, *Bureaucracy Triumphant* (Oxford University Press 1931) 22.

²¹⁴ G O’Donnell, ‘Horizontal Accountability in New Democracies’ in A Schedler, L Diamond and M Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 37. This concept included, but extended beyond, checks between the three branches of government. Courts are viewed as a key support to “horizontal” accountability entities; G O’Donnell, ‘Why the Rule of Law Matters’ (2004) 15 *Journal of Democracy* 32, 37. Note horizontal accountability is not assumed to include participatory arrangements; Ackerman 449. For a detailed review of the secondary literature employing horizontal accountability to refer to direct accountability see Meijer and Schillemans 168. The concept has been subsequently applied to situations where additional accountability arrangements that are not specialist accountability entities attach to government bodies; for example, Schillemans.

transnational corporations.²¹⁵ As a result of these changes, there are now many “governing” actors other than the state;²¹⁶ these actors have a complex relationship to the constitutional state.²¹⁷ This fragmentation has generated demands for greater accountability within constitutional democracies, notwithstanding the broader loss of state control that may be triggered by this fragmentation.²¹⁸

In response to these structural changes, accountability advocates and scholars have argued for extensions to accountability that encompass actors and activities that would be “non-accountable” under traditional arrangements.²¹⁹ A key rationale given for extending public accountability is that ‘elected and formally accountable actors and institutions [have] become dependent on non-accountable actors for the execution of public policy’.²²⁰ Accountability scholars have long charted how government activity ‘escapes’ public accountability arrangements as a result of changes to the constitutional

²¹⁵ Keohane (2003) 130 and Fisher (2004) 495.

²¹⁶ Hence the challenge to the public/private distinction, mainly in legal scholarship; D Dyzenhaus, ‘The Politics of Deference: Judicial Review and Democracy’ in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997) 283 and Aronson, Dyer and Groves 5.

²¹⁷ Kersbergen and Waarden 157. On the changing state more generally see M Flinders, ‘Distributed Public Governance in Britain’ (2004) 82 *Public Administration* 883 and Bresser-Pereira.

²¹⁸ The state does not become impotent, but rather loses the capacity for direct control and replaces it with a capacity for influence; Peters and Pierre 223 and Kjær 4. Also see, R Rhodes, ‘Understanding Governance: Ten Years On’ (2007) 28 *Organization Studies* 1243, 1246.

²¹⁹ A specific example is arguments that corporations are now potential agents of public accountability; McBarnet, Voiculescu and Campbell and T Shearer, ‘Ethics and Accountability: From the for-Itself to the for-the-Other’ (2002) 27 *Accounting, Organizations and Society* 541. More broadly, see M Taggart and C Harlow (eds), *Administrative Law in a Changing State* (Hart Publishing 2008).

²²⁰ Böstrum and Garsten 5.

state and how it seeks to govern over time.²²¹ This role became even more significant in the face of government reforms, with major implications for public accountability.

Additional accountability forums as a result of government reforms

Perhaps the most prominent additional accountability forums are those associated with the “reforms” to government and public administration that were implemented from the 1970s onwards.²²² Accountability scholars have extensively traced the connections between particular reform movements and changes to public accountability.²²³ I argue that the two most significant reform movements were “new public management” (NPM)²²⁴ (including the emergence of the “regulatory” state)²²⁵ and various forms of “governance”.²²⁶

²²¹ Parris 297. Historically, the form and function of public authority has changed continually; Weber and Fisher 23.

²²² Pollitt and Bouckaert define “reform” as ‘deliberate changes to the structure and process of public-sector organisations with the objective of getting them (in some sense) to run better’. Accountability was primarily viewed as a means to another end (for example, effectiveness or greater political control) but could be viewed as an end also; Pollitt and Bouckaert 2. Dubnick and Yang argue that accountability is related to all reformist movements; Dubnick and Yang 171. Also see Kettle 2 and Peters and Pierre 228.

²²³ A recent example is Lægreid and Mattei. For an excellent general review of changes to accountability see Olsen 452.

²²⁴ See P Thomas, ‘The Changing Nature of Accountability’ in O Dwivedi and J Jabbra (eds), *Public Service Responsibility and Accountability* (Kumarian Press 1988) and J Lane, *New Public Management* (Routledge 2000) 6. Also see C Hood, ‘A Public Management For All Seasons?’ (1991) 69 *Public Administration* 2, 4; Barberis; Harlow (1999) 153; and Bresser-Pereira, Chapter 14. Associated movements include ‘reinvented government’; Page. Also see Oliver and Drewry especially 14 and J Mashaw, ‘Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law’ (1995) 57 *University of Pittsburgh Law Review* 405, 406.

²²⁵ Hood and Scott and Scott (2000) 48. In particular, the idea of government as ‘steering rather than rowing’; Osborne and Gaebler Chapter 1.

²²⁶ Erkkila. More precise formulations can be included in such a catalogue. For example, “new” governance in Melish 40 and Holley footnote 23; “co-governance” in Ackerman; “distributed public governance” in Flinders; “network governance” in Papadopoulos; and “New Public Service” in Denhardt and Denhardt.

(Both NPM and governance emerged around the same time and share some ideas, although they are distinct and are rarely adopted at the same time in the same polity.)²²⁷

Political attempts to reform government and public administration often involve deliberate changes to public accountability arrangements. The idea of a ‘new accountability system’ often underpins reform rhetoric.²²⁸ A key part of all designed “new” approaches to public accountabilities, as identified in Section One, was direct accountability ‘to society’ as well as to society’s elected representatives.²²⁹ It was central to both NPM and governance-inspired reforms to public services.²³⁰ Both NPM and governance-based ideas also tend to redefine the “public” to include stakeholders and civil-society representatives as well as individual citizens, especially for collective decision making.²³¹ Hence,

²²⁷ Peters and Pierre 227. Peters and Pierre argue that few states have adopted ideas associated with both NPM and governance, with the former being seen in the UK, developed Commonwealth countries and the state level of the US and the latter in western Europe (with the federal level of the US not especially associated with either, aside from instances such as negotiated rule-making). In general, NPM reforms are most associated with the Anglophone world; Pollitt and Bouckaert 12. Whilst the specifics of the transfer of NPM to other countries is a matter of academic debate, it is generally viewed as a globally significant movement.

²²⁸ This term comes from the ‘reinvented government’ context; Osborne and Gaebler 136. Accountability is a key concern for governance scholars also; Kjær 11.

²²⁹ Bresser-Pereira 194 (my emphasis). For a version of this argument from 1969, see Parris 304.

²³⁰ On NPM’s use of direct accountability see Peters and Pierre 228. A governance-associated use of direct accountability is “New Public Service”; Denhardt and Denhardt 132.

²³¹ NPM tended to emphasise stakeholders while governance emphasised civil society. Harlow points out that with NPM this involves an ideological redefinition of ‘the public dimension’ of accountability as applying to ‘stakeholders’; Harlow (2002) 21. Also see Harlow (1999) 153. Generally see C Garsten and M De Montoya, ‘Introduction: Examining the Politics of Transparency’ in C Garsten and M De Montoya (eds), *Transparency in a New Global Order: Unveiling Organizational Visions* (Edward Elgar Publishing 2008) 7 ; Lodge 125; Page 170; Weber 455; and, Lindberg 14. This equation has been critiqued; J Roberts, ‘No One is Perfect: The Limits of Transparency and an Ethic for ‘Intelligent’ Accountability’ (2009) 34 *Accounting, Organizations and Society* 957, 966 and P Dyrberg, ‘Accountability and Legitimacy: What is the

direct accountability often rests on ‘the notion of consumer choice and stakeholderism as channels of accountability’.²³²

In a related development, government reforms also tended to promote “new” kinds of accountability that were based in the professional, social or market spheres. Professional accountability often refers to the idea that professionals or technical experts employed in the public service should be held to account by their professional peers and according to standards of their profession.²³³ Monitoring through peer review processes and ‘peer’ networks²³⁴ is intended to ensure that professionals and experts work in the public

Contribution of Transparency?’ in A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002) 82.

²³² Peters and Pierre critique this on the basis that this does not amount to accountability to citizens ‘who are not presently consumers or stakeholders’; Peters and Pierre 231. A corollary of such alternative mechanisms was often thought to be a lessening of bureaucratic accountability arrangements; Bresser-Pereira 190.

²³³ The more general value of “professionalism” long been a feature of bureaucratic accountability; Weber 473. Professional accountability was included in the two seminal accountability studies published in 1987, in both instances to recognise the need for governments to employ increasing numbers of technically trained, expert or professional staff as opposed to a focus on the “professionalism” of public servants: Dubnick and Romzek (1987) 229 and Day and Klein 4.

²³⁴ For example, meetings between different government agencies as accountability practices; Freeman and Farber 894 & 908 and Scott (2000) 50. An early example is A Barker, ‘Government Bodies and the Networks of Mutual Accountability’ in A Barker (ed), *Quangos in Britain: Governments and the Networks of Policy-Making* (MacMillan 1982). On where responsibility is shared in a federal system, or between departments and agencies, see Mulgan (2000) 212 On informal examples within governments see C Hood, ‘Controlling Public Services and Government: Towards a Cross-National Perspective’ in C Hood and others (eds), *Controlling Modern Government* (Edward Elgar 2004) 7. For other national government examples see G Whitaker and L Altman-Sauer, ‘Mutual Accountability Between Governments and Nonprofits’ (2004) 34 *The American Review of Public Administration* 115; C Sampford, R Smith and A Brown, ‘From Greek Temple to Bird’s Nest: Towards A Theory of Coherence and Mutual Accountability for National Integrity Systems’ (2005) 64 *Australian Journal of Public Administration* 96; and, C Ryan and P Walsh, ‘Collaboration of Public Sector Agencies: Reporting and Accountability Challenges’ (2004) 17 *The International Journal of Public Sector Management* 621. On the EU context see Papadopoulos 279. For a critical stance see C Harlow and R Rawlings, ‘Promoting Accountability in Multilevel Governance: A Network Approach’ (2007) 13 *European Law Journal* 542, 543 and R Stewart, ‘Administrative Law in the Twenty-First Century’ (2003) 78 *New York University Law Review* 437, 452.

interest.²³⁵ Professional accountability can also refer to the idea that experts can review public decision making relevant to their expertise.²³⁶ This is the manifestation relevant to my case analysis.

Social accountability tends to be conceptualised as participatory, voice-based accountability for citizens and stakeholders.²³⁷ This includes civic ‘dialogue’;²³⁸ participation in decision-making processes;²³⁹ social protest and bad publicity;²⁴⁰ and the use of state-based accountability mechanisms, such as judicial or administrative review and ombudsmen, to challenge government decisions.²⁴¹ Market accountability tends to be conceptualised as making public

²³⁵ Majone 300 and Garn 578. Although in keeping with the definition of *public* accountability I set out in the Introduction, most of these dialogues need to be in public; Mulgan (2000b) 558. Hence not all scholars recognise professional accountability relationships as part of *public* accountability, where it does not link back to a public chain of accountability (as in hierarchical relationships); Mulgan (1997a) 29. By contrast, other scholars characterise professional accountability as part of “traditional” public accountability, for example Erkkila 8.

²³⁶ Olsen 450.

²³⁷ For example, Majone 284.

²³⁸ For example Denhardt and Denhardt 132.

²³⁹ For example, Ackerman 449. Also see Erkkila 22. On the emphasis on participation and ‘voice’ in public policy making see Harlow 153; P Gibson, D Lacy and M Dougherty, ‘Improving Performance and Accountability in Local Government with Citizen Participation’ (2005) 10 *The Innovation Journal: The Public Sector Innovation Journal*, 2; Bovens 949; A Brysk, ‘Democratizing Civil Society in Latin America’ (2000) 11 *Journal of Democracy* 151, 152; and, P Magnette, ‘European Governance and Civic Participation: Beyond Elitist Citizenship?’ (2003) 51 *Political Studies* 144, 146. In the regulatory field, this is particularly evident in attention to collaborative and grass-roots approaches to environmental issues; see Holley 128.

²⁴⁰ ‘Public reputational accountability’ is sometimes conceptualised as a distinct type of accountability, one that acts in concert with other types but also in their absence; see R Grant and R Keohane, ‘Accountability and Abuses of Power in World Politics’ (2005) 99 *The American Political Science Review* 29, 37 and Lindberg 14. On the application to the media see Philip 33.

²⁴¹ Social accountability is often conceptualised as reliant on traditional processes of judicial review; S Peruzzotti and C Smulovitz, ‘Held to Account: Experiences of Social Accountability in Latin America’ (2002) 3 *Journal of Human Development* 209, 211.

services accountable to “customers”²⁴² or establishing internal markets within the public sector.²⁴³

Conversely, pressure for additional accountability forums also arose as a reaction to government reforms that were perceived to create accountability deficits.²⁴⁴ Again, some of this pressure came from accountability scholars themselves.²⁴⁵ In general, government/governance—and hence public accountability—was politically and academically re-conceptualised during the same period as these changes to conceptions of accountability were taking place. Conceptions evolved from involving only ‘traditional rule-based, authority-driven processes’ to also potentially involving peer-based, market-based or socially-based processes.²⁴⁶ Moving away from ‘hierarchical modes of

²⁴² For example, NPM recast citizens as preference-expressing ‘citizen-users’ of public services; Pollitt and Bouckaert 6. Also see Denhardt and Denhardt 131; Wirth 758; Philip 33; and, S Ranson, ‘Towards a Political Theory of Public Accountability in Education’ (1986) 12 *Local Government Studies* 77, 87. For a critique of this see Mulgan (1997a) 30.

²⁴³ See the analysis of how National Health Service internal contracts functioned as accountability mechanisms in the UK in Davies Chapter 6 & 185.

²⁴⁴ *Kettle v and Dyzenhaus* 283.

²⁴⁵ Kersbergen and Waarden 155 and Erkkila 7. The extension of public accountability to additional agents is a result of a tendency to view ‘publicness’ on a spectrum; M Antonsen and T Jørgensen, ‘The ‘Publicness’ of Public Organizations’ (2002) 75 *Public Administration* 337. Another response to concerns about exercises of power not being subject to public law doctrines has been to develop the idea of “public law values”, which are less context-dependent than legal doctrines; C Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *European Journal of International Law* 187, 190. Accountability is on most lists of public law ‘values’; Davies xi.

²⁴⁶ *Kettle* 3. Also see G Stoker, ‘Governance as Theory: Five Propositions’ (1998) 50 *International Social Science Journal* 17, 17 and Peters and Pierre 224.

thinking'²⁴⁷ and towards ideas of “horizontal” and “mutual” accountability also reflected changing ideas about control.²⁴⁸

Associated changes to subject matters and normative standards elements of accountability

The most prominent change to what is recognised as a legitimate subject matter for accountability demands is the incorporation, especially since the 1980s, of accountability for performance or results.²⁴⁹ (The preferable formulation of accountability for performance is whether a decision maker has ‘accomplish[ed] public purposes’ without adverse impacts.)²⁵⁰ This focus on performance was a central tenet of government reforms, particularly reforms associated with NPM,²⁵¹ but also with those associated with governance.²⁵² As such, accountability for performance was often presented as both a shift in what public decision makers would be called to account for,²⁵³ and as

²⁴⁷ Stoker 24.

²⁴⁸ Pollitt and Bouckaert 22 and Hood 6. On mutual accountability see Mulgan (2003) 231; Behn 201; and, Borowiak 14.

²⁴⁹ Dubnick (2005) 378 and G Hodge and K Coghill, ‘Accountability in the Privatized State’ (2008) 20 Governance 675, 677. Although Hood cautions against uncritically accepting accounts of previous accountability approaches, or assuming that performance management has not also become a ‘rules-based, process-driven style’; Hood (1991) 14 & 17.

²⁵⁰ Behn 9.

²⁵¹ Peters and Pierre 230. Bovens points out that accountability was originally touted for its ability to enhance the efficiency and effectiveness of government, but then evolved to become a desirable end *per se*; Bovens (2007) 449. For an original example of linking of these goals, see Osborne and Gaebler 47. Also see L Martin, ‘Performance Measurement: The New Accountability’ (1997) 21 Administration in Social Work 17 and Bresser-Pereira 193.

²⁵² See Holley. Also see S Thiel and F Leeuw, ‘The Performance Paradox in the Public Sector’ (2011) 25 Public Performance and Management Review 267.

²⁵³ For example in Kearns 24. Also see Langford 515.

antithetical to the “red tape” associated with financial probity and procedural fairness.²⁵⁴

Despite this change, there is also considerable continuity around the subject matter of calls to account. Being accountable for the (efficient) use of public resources stems from the origins of accountability in financial probity,²⁵⁵ with efficiency emphasised by more contemporary ideas of value for money. Similarly, a significant subject matter of calls to account relates to the way that decision makers exercise public power. Behn refers to the focus of procedural propriety as ‘accountability for fairness’²⁵⁶ because procedural propriety seeks to ensure decency and fairness in dealings by government with citizens and private entities. Accountability for fairness was traditionally associated with limiting discretion;²⁵⁷ it then evolved to also encompass calls to account for the

²⁵⁴ Consequently, the normative implications of performance accountability have been of concern to public lawyers; P Craig, ‘Community Administration, History, Typology and Accountability’ (Oxford Legal Studies Research Paper, 57, 2010). The gap between the rhetoric and reality of performance accountability has also been extensively critiqued in Dubnick, (2005) 392.

²⁵⁵ J Chan, ‘Government Accounting: An Assessment of Theory, Purposes and Standards’ (2003) 23 *Public Money & Management* 13. On the historical connection see Normanton (1966). The misuse of public funds, or a financial conflict of interest, remains one of the few instances in which sanctions such as resignation tend to be enforced on elected and public officials; L Raffin, ‘Individual Ministerial Responsibility During the Howard Years: 1996-2007’ (2008) 54 *Australian Journal of Politics and History* 225, especially 228.

²⁵⁶ Behn 7.

²⁵⁷ For an overview see R Pires, ‘Beyond the Fear of Discretion: Flexibility, Performance, and Accountability in the Management of Regulatory Bureaucracies’ (2011) 5 *Regulation & Governance* 43, 44. Also see G Treves, ‘Administrative Discretion and Judicial Control’ (1947) 10 *The Modern Law Review* 276; J Jowell, *Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action* (Dunellen Publishing 1975); Shapiro (1983); and, J Vaughn and E Otenyo, *Managerial Discretion in Government Decision-Making: Beyond the Street Level* (Jones and Bartlett Publishers 2007) especially 125.

“proper” use of public power.²⁵⁸ Hence decision makers are called to account for whether they acted with ‘institutional integrity’, understood as ‘fidelity to public purposes’ and ‘the application of public values’, rather than narrower (and less contestable) conceptions of legality.²⁵⁹ A public decision maker would expect to be called to account for fairness and the proper use of public power, even if not by the same forum.

A key change to public accountability is that there is now less consensus about what the normative standards against which public decision makers should be assessed should be. This has created more potential contestation around the normative standards element of public accountability for types beyond political accountability.²⁶⁰

Public accountability, at least for unelected decision makers, has been traditionally described as involving processes ‘in which actions are held up to specific standards of behavior or performance’.²⁶¹ This is reflected in Day and Klein’s idealised description of managerial accountability processes as ‘making those with delegated authority answerable for carrying out agreed tasks

²⁵⁸ As Harlow and Rawlings note, that can mean accountability mechanisms either checking or furthering the exercise of power; C Harlow and R Rawlings, *Law and Administration* (2nd edn, Cambridge University Press 1997) 27. Also see M Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 1 and F Frankfurter, ‘The Task of Administrative Law’ (1927) 75 *University of Pennsylvania Law Review and American Law Register* 614, 617. It also includes a focus on accountability for the abuse of power; Behn 9.

²⁵⁹ Spigelman also argues this should be distinguished from a concern with ‘actual outcomes’; J Spigelman, ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724, 725. On the idea of ‘institutional integrity’ also see A Stuhmcke, ‘Ombudsmen and Integrity Review’ in Pearson, Harlow and Taggart (eds) 350.

²⁶⁰ Morgan 244 and Mashaw (2006) 153.

²⁶¹ Fox 28.

according to agreed criteria'.²⁶² The contrast is with political accountability (for elected decision makers) in which 'the criteria for judgment are, themselves, contestable'.²⁶³

This change partly flows from the greater diversity of potential accountability forums, which imports 'broader standards of accountability'²⁶⁴ drawing on normative frameworks associated with, for example, epistemic communities or the market. Direct accountability, whether to parliament, to "society", or to particular "stakeholders", also broadens the scope of standards that could be applied to in order to assess public decision makers.

But the multiplication of normative standards also flows from the reconception of public accountability in terms of an expanded range of norms, or what Bovens refers to as the 'political desiderata' associated with public accountability.²⁶⁵ Dubnick provides the most extensive survey of what he describes as the 'promises of accountability': control, integrity, ethical behaviour, democratic legitimacy (including transparency, representativeness and participation), performance and justice.²⁶⁶

²⁶² Day and Klein 27.

²⁶³ The authors point out that in practice managerial accountability can be as mutable as political accountability; Day and Klein 28

²⁶⁴ Kearns 24.

²⁶⁵ Bovens 946.

²⁶⁶ Dubnick and Frederickson xvii. Another example is Koppell's typology of the five 'dimensions' of accountability (transparency, liability, controllability, responsibility, and responsiveness); Koppell 96.

Interestingly, the extension of the subject matter of accountability to include performance has also prompted more widespread attempts to articulate standards *ex ante*.²⁶⁷ This is because ‘accountability for results cannot be enforced when the objectives of an organisation are either too broad or too vague’,²⁶⁸ a point that becomes relevant in the case study analysis of this thesis.²⁶⁹ Accountability is also more likely to be included in codes of conduct and charters in the public sector that are meant to more substantively define the standards against which public officials are judged.²⁷⁰

This historical review of changes to the kinds of accountability forums, and to the recognised subject matters and normative standards that those forums might invoke, illustrates why accountability scholars might be concerned about the dysfunctional results of multiple accountability regimes. If public decision makers are routinely scrutinised by forums with varying origins—forums that

²⁶⁷ Some *ex ante* standards also relate to procedural fairness; Hood 16; I McPhee, *Public Sector Accountability* (CPA Australia International Public Sector Convention, Melbourne, April 2011) 2; Page 167 & 172 and C Aulich, H Batainah and R Wettenhall, ‘Autonomy and Control in Australian Agencies: Data and Preliminary Findings from a Cross-National Empirical Study’ (2010) 69 *Australian Journal of Public Affairs* 214, 214. Hood notes that the expansion of *ex ante* standards correlates with the “comptrol” understanding of bureaucratic control: Hood (1985) 770. On how this relates to traditional retrospective accountability see Harlow (1999) 153. Performance indicators are the most obvious example of *ex ante* standard-setting; Van Thiel and Leeuw 268 and S Osborne and others, ‘Performance Management and Accountability in Complex Public Programmes’ (1995) 11 *Financial Accountability & Management* 19, 22. The assumption that it is possible to accurately measure performance has been widely critiqued; M Meyer and K Shaughnessy, ‘Organizational Design and the Performance Paradox’ in R Swedberg (ed), *Explorations in Economic Sociology* (Russell Sage Foundation 1993) 251.

²⁶⁸ Majone 294. On this shift see Harlow 10 and Oliver (1995) 497. For a practical example see Scott (2000) 56.

²⁶⁹ See Section Four, Chapter Three. It should be clarified from the outset that this does not mean that *ex ante* standards are actually used to evaluate accountability within empirical processes; but their articulation is based on a premise that it will be more likely that they will be.

²⁷⁰ Oliver and Drewry 3; Harlow (1999) 153; Weber 459; and, Hood and Scott 337.

emphasise accountability for different subject matter and assess that accountability against different normative standards—it might be logically expected that the result would be diverging evaluations. However, I argue in this thesis that these variations between different forums does cannot be automatically assumed to produce diverging evaluations. Accountability researchers still need to examine what occurs in practice.

Section 5: Analysing multiple accountability regimes— typologies and a regime-level perspective

In the Introduction, I situated this thesis within a wave of accountability scholarship concerned with understanding multiple accountability regimes and especially how different kinds of accountability relationships and arrangements relate to one another and/or co-exist in the same regime.²⁷¹ The dominant analytical approach to multiple accountability regimes are typologies of accountability which have proliferated along with the changes reviewed in Section Four. In this section, I argue for the development of a “regime-level” perspective when analysing accountability that goes beyond the current reliance on typologies. I map the variety of typologies in existing literature before setting out their analytical limitations in regards to understanding the relations between different components of a multiple accountability regime. I argue that accountability researchers need to adopt a regime-level perspective

²⁷¹ For example, Freeman 665; Romzek and Johnston (1999) 387; and, Oliver 87.

that looks beyond the reliance on typologies towards analytical approaches to also researching the overall dynamics within a system. This provides the scholarly context in which I develop the concept of accountability interactions and a framework for analysing these interactions, in the following chapter.

Analysing multiple accountability regimes using typologies of accountability

The dominant analytical frameworks adopted in existing case studies of multiple accountability regimes are various typologies of accountability, which classify the accountability relationships and arrangements found in a given case into general “types”.²⁷² Typologies can be based on various analytical distinctions, and there are now many different typologies..²⁷³

The most prevalent classifications in accountability scholarship establish categories based on the ‘type of forum to which the actor is required to render account’,²⁷⁴ and the ‘basis’²⁷⁵ or ‘source’²⁷⁶ of the forum’s authority. The resulting typologies include some or all of political, legal, bureaucratic,

²⁷² These can be understood in the Weberian sense of ideal-types that ‘do not describe the facts but offer a standard against which the facts can be compared or understood’; M Root, *Philosophy of Social Science* (Blackwell 1993) 49.

²⁷³ No typology ‘has emerged as a standard or is generally accepted’; Mulgan (2003) 30. The most comprehensive analysis of this analytical approach is Lindberg. Lindberg adopts the political science approach to classical concept formation associated with authors such as D Collier and S Levitsky, ‘Democracy with Adjectives: Conceptual Innovation in Comparative Research’ (1997) 49 *World Politics* 430. Dooren and Willems also provide a useful visual representation of the predominant typologies; Dooren and Willems 511.

²⁷⁴ Bovens 953.

²⁷⁵ O’Connell 502.

²⁷⁶ Dubnick and Romzek (1987) 242.

professional, market and social accountability relationships.²⁷⁷ Another common approach to classifying accountability relationships is to emphasise the ‘nature of the obligation’²⁷⁸ or the type of control underpinning a relationship.²⁷⁹ This leads to typologies of vertical, horizontal, or diagonal accountability,²⁸⁰ and, less commonly, hierarchical or mutual accountability;²⁸¹ upward or downward accountability;²⁸² and external or internal accountability.²⁸³ Another classification rests on the identity of the actor being held to account,²⁸⁴ resulting in a typology of individual or collective (organisational) accountability.²⁸⁵

In addition to these familiar typologies, there are many idiosyncratic typologies, coined by accountability scholars to represent a particular aspect of public accountability. For example, various typologies are based on the relative objectivity or subjectivity of the normative standards element. This results in

²⁷⁷ Dubnick and Romzek’s (1987) study of the Challenger disaster established a typology in this category. This typology was based on two criteria: whether the forum was external or internal to the agency and whether the extent of control of the forum was high or low. The authors identified four types: legal, political, bureaucratic and professional. This typology has been used in many subsequent studies—see note 32. A typology that includes all types is developed by Mashaw (2005) 21-29.

²⁷⁸ Bovens 953.

²⁷⁹ Schillemans 178.

²⁸⁰ Bovens 954. This typology is used in Schillemans’ study of the relationship between traditional and ‘horizontal’ accountability forums; Schillemans 191. This classification has also been theorised in O’Donnell (1999) and P Schmitter, ‘Limits of Horizontal Accountability’ in Schedler, Diamond and Plattner (eds) (1999).

²⁸¹ For example, Whitaker and Altman-Sauer; Sampford, Smith and Brown; and, Barker.

²⁸² For example, Mulgan (2003) 27.

²⁸³ Dubnick and Romzek (1987) 228. This typology is used in Harlow’s study of the relationship between traditional external forums and new internal accountability arrangements; Harlow (1999) 154. Also see Oliver and Drewry 2.

²⁸⁴ Bovens 953.

²⁸⁵ Mulgan (2003) 23.

‘political’ or ‘managerial’ accountability;²⁸⁶ ‘rule-based’ or ‘negotiable’ accountability;²⁸⁷ and ‘convivial’ or ‘technocratic’ accountability.²⁸⁸ A similar example classifies accountability according to the subject matter element, resulting in accountability for ‘finances’, for ‘fairness’ and for ‘performance’.²⁸⁹

I argue that continuing to rely on these typologies as the predominant analytical framework is limiting when it comes to understanding the dynamics of multiple accountability regimes. This is mostly a matter of focus. A sole reliance on typologies focuses the researcher’s attention on the attributes of various “types”, and the compatibility or incompatibility of those attributes, as the major factors shaping how multiple accountability regimes operate. This deflects attention from the dynamics within a multiple accountability regime. Relying solely on typologies to conceptualise *interactions* between different forums is likely to be particularly problematic because it pre-frames the analysis in terms of the “variable” that underpins the typology. It is potentially also an approach that involves reification and essentialism.

²⁸⁶ Day and Klein’s seminal 1987 study of public accountability uses a typology based on whether the subject matter of the accountability dialogue results in contestable or agreed normative standards for the evaluation of accounts. They identified two types, political and managerial, and then further divided managerial accountability into fiscal/regulatory; process/efficiency and program/effectiveness accountability, again according to the subject matter; Day and Klein 26.

²⁸⁷ J Morrison, ‘Governance for Broadened Accountability: Blending Deliberate and Emergent Strategizing’ (2007) 36 *Nonprofit and Voluntary Sector Quarterly* 195. Also see S Ospina, W Diaz and J Sullivan, ‘Negotiating Accountability: Managerial Lessons from Identity-Based Nonprofit Organizations’ (2002) 31 *Nonprofit and Voluntary Sector Quarterly* 5.

²⁸⁸ Morgan especially 256.

²⁸⁹ Behn 6. Performance is tricky for classification purposes, because it can be simultaneously understood as a subject matter of accountability, as the standard for judging the accountability of an actor, and as a “promise” or connotation of accountability. I agree with Erkkila’s argument that rather than analysing ‘performance’ as a individual type of accountability the focus should instead be on how its introduction into accountability discourse has transformed traditional types; Erkkila 19.

Typologies of accountability can also be limiting when they include context-specific attributes of accountability forums and arrangements in the conception of each “type”.²⁹⁰ Where this results in the development of idiosyncratic typologies only applicable to specific contexts it contributes to the fragmentation of the field of accountability studies, as examined in the Introduction.²⁹¹ Where contextually contingent typologies are inappropriately transplanted they can import an ‘unacceptable number of assumptions’²⁹² into the analysis.²⁹³ However, the strength of well-conceptualised typologies is that by using abstract categories they can be useful to illuminate the similarities and differences between particular manifestations of a category of phenomena across various contexts.

Given these considerations, I do not argue that typologies should be discarded entirely when researching multiple accountability regimes. They are useful analytical heuristics, and indeed have gained meaning in the social discourses that accountability actors use to understand public accountability.²⁹⁴

²⁹⁰ This argument builds on Mulgan’s analysis of the different dimensions and types of accountability; Mulgan (2003) 22. Consequently, it is necessary to conceptualise types with reference to the context being examined. In this thesis, that context is a well established constitutional democracy with a Westminster political tradition, Weberian bureaucratic tradition, and a common law tradition of judicial review.

²⁹¹ This argument is made more broadly around conceptions of accountability by Lindberg, who characterises much accountability scholarship as a ‘dialogue of the deaf’ in which ‘constructive theoretical and conceptual advancement is no longer being achieved’; Lindberg 204. There are extensive debates within the accountability scholarship on the legitimacy of various types, and their definitions. Arguably, these debates are a distraction from more important matters.

²⁹² I adopt this terminology from Olsen, although his critique there is of the principal-agent framework; Olsen 467.

²⁹³ Lindberg 204.

²⁹⁴ This is reflected in Sinclair’s study of senior public servants, which involves a modified version of the most commonly used forum-based typologies; Sinclair 223.

Instead, I argue that accountability researchers need to be transparent about which heuristics use typology sources, but also identify supplementary approaches to analyse dynamics within accountability regimes.

The attributes highlighted by typologies can be usefully described as the *capacities* of forums and the *normative bases* of accountability relationships. Capacities refers to resources (such as time, money, motivation, knowledge and expertise) and authority (in the form of official powers or the unofficial ability to exert influence).²⁹⁵ Legitimacy and/or credibility should also be understood as an attribute that can result in authority; indeed, the ‘capacity to bestow legitimacy’²⁹⁶ is a distinct capacity. Most commonly, accountability scholars describe the capacities of forums relevant to gathering information and imposing sanctions.²⁹⁷ The normative basis of an accountability relationship is encompassed by the values or principles reflected in the normative standards against which accountability forums assess a decision maker. For example, at a high level, principles of legality, probity, responsiveness or peer-recognised practice might underpin standards, which are then articulated in a more concrete way within a given context.

Some attributes are commonly associated with specific “types” of accountability. For example, Day and Klein’s observation that in political

²⁹⁵ This reflects Olsen’s approach; Olsen 454.

²⁹⁶ Scott (2000) 50.

²⁹⁷ Biela develops a comprehensive list of capacities to obtain and process information and to sanction; Biela and Papadopoulos 8. Also see the analysis of the relative capacities of forums in Mulgan (1997a).

accountability relationships ‘the criteria of judgement are, themselves, contestable’²⁹⁸ is commonly associated with the relationship between elected representatives and citizens as well as the relationship between a minister and parliament, because contestation is an inherent feature of politics.

However, many attributes are better understood as being associated with certain accountability *arrangements* or mechanisms through which forums conduct their accountability dialogue with the decision maker.²⁹⁹ For example, the extent to which political accountability arrangements facilitate the extraction of information from decision makers varies between arrangements. Indeed, the limits of generalisation are revealed by the fact that this capacity can even vary according to the skill of individuals acting as a forum.³⁰⁰ Some attributes also attach to particular kinds of accountability actors. For example, agents of accountability such as elected officials are likely to be especially sensitive to adverse media coverage.³⁰¹

Existing literature about different types of accountability provides a useful guide to researchers about the attributes that they should look for when empirically analysing accountability relationships and arrangements. But the utility of typologies does not extend to being able to predict how those different relationships and arrangements *will* relate to one another across

²⁹⁸ Day and Klein 26. Also see Mashaw (2006) 130.

²⁹⁹ This approach is developed in Clark.

³⁰⁰ Mulgan (2003) 47 & 54 and P Giddings, ‘Select Committees and Parliamentary Scrutiny: Plus ça change’ (1994) 47 *Parliamentary Affairs* 669, 684.

³⁰¹ Dunn and Legge 86.

different contexts. That is because there are more factors that shape the relationship within a multiple accountability regime in addition to the attributes of the different types of accountability relationships and arrangements within that regime.

This argument can be elucidated by considering the autonomy of accountability forums, which amounts to the forum's ability to undertake all the steps that make up an accountability process.³⁰² Mulgan insists that not all forums are able to 'fulfil all the functions of accountability' and, furthermore, that there is 'no reason to expect' such autonomy.³⁰³ In reality, forums are of 'varying independence and efficacy'.³⁰⁴ This point is also made by various studies that note the lack of autonomy within certain types of accountability.³⁰⁵ However, if we limit ourselves to analysing *types* of forums we may mistakenly assume that where a forum *can* take each step in an accountability process that forum automatically functions autonomously. A recent important contribution by Olsen emphasises that other factors about the multiple accountability regime might influence the autonomy of forums operating within it.³⁰⁶ To

³⁰² See Section Two above.

³⁰³ Mulgan (2003) 35.

³⁰⁴ Clark 356. Also see Wirth 617.

³⁰⁵ For example, Garn's study of market accountability arrangements attached to charter schools found that they require bureaucratic accountability arrangements in order to function, because the latter provide the information base for parental choice; Garn 592. A similar conclusion was reached in L Vidovich and R Slee, 'Bringing Universities to Account? Exploring Some Global and Local Policy Tensions' (2001) 16 *Journal of Education Policy* 431, 449.

³⁰⁶ Olsen 450. A similar point is made in Mulgan (1997a) 26 & 35 and Papadopoulos 470.

understand these dynamics we need to adopt a ‘regime-level’³⁰⁷ perspective when analysing accountability.

Analysing the dynamics of multiple accountability regimes through regime-level perspectives

Accountability regimes in constitutional democracies can operate in two quite different ways, Olsen argues, depending on how settled the ‘political orders’³⁰⁸ in which they exist are. In the first picture multiple ‘accountability processes are likely to take place in *parallel, relatively autonomous* institutional settings’ characterised by ‘*dyadic* accountability relations, routines ... and de-politicisation’.³⁰⁹ Olsen associates this picture with ‘settled polities and well-understood situations confronted repeatedly’.³¹⁰

In the second picture, this autonomy breaks down. Instead, ‘accountability relations and processes are likely to be more *controversial, politicised and dynamic*’³¹¹ and be ‘characterised by *competing and contested* accountability claims, ambiguity and uncertainty, appeals to different audiences and normative standards, and multiple channels of accountability’.³¹² *Prima facie*, such contexts are more likely to involve accountability interactions.³¹³ Olsen associates this picture with ‘unsettled’ or ‘emerging polities and polities in

³⁰⁷ Olsen 450.

³⁰⁸ Olsen 449.

³⁰⁹ Olsen 464 (my emphasis).

³¹⁰ Ibid. Olsen characterises accountability processes in the United States as ‘settled’; 449

³¹¹ Olsen 451.

³¹² Olsen 449.

³¹³ See Section One, Chapter Two.

transformation'.³¹⁴ Moreover, 'unprecedented situations',³¹⁵ such as 'exceptional, unexpected and undesired events, scandals, accidents and performance crises'³¹⁶ might transform a settled political order into an unsettled one.³¹⁷

Olsen argues that the second picture of public accountability is becoming more widespread, even in developed constitutional democracies.³¹⁸ In the case analysis, I examine the response of accountability processes to events and argue that the Basin Plan case becomes an "unsettled" context mid way through the 2008-2012 timeframe (after which point accountability interactions take place). In my case analysis, I also consider the findings of other studies that have identified salience, controversy and the perception of administrative deviance or policy failure as likely to trigger active oversight by multiple forums.³¹⁹

Olsen's regime-level lens is in line with a more general shift towards a focus on how accountability regimes function as a whole. As I set out in the Introduction, various scholars have noted that multiple accountability forums can operate together to hold a public decision maker to account.³²⁰ Mulgan is a prominent advocate of this approach. He argues that in contemporary constitutional democracies:

³¹⁴ In which Europe is included due to the European Union; Olsen 449.

³¹⁵ Olsen 464.

³¹⁶ Olsen 452.

³¹⁷ Ibid.

³¹⁸ Olsen argues that the many changes to nation-states and governance over the past few decades have made 'unsettled' polities more likely, making it imperative to understand how public accountability functions in these contexts; Olsen 452-453.

³¹⁹ See Section Two, Chapter Four.

³²⁰ For example, Mulgan 347 and Schillemans 191.

... being able to hold a particular agent to account for a particular action is often the product of a series of accountability processes by a variety of different individuals and institutions with different power and incentives.³²¹

Scott has also developed ‘models’ of multiple accountability regimes, proposing ‘interdependence’ or ‘redundancy’ as two logics underpinning the relationships between individual accountability forums or arrangements.³²²

Notwithstanding this broader shift, systematic attention is yet to be focused on the potential interactions between multiple accountability forums (and/or arrangements). This may be because institutional designers view ‘the potential interactions of various accountability models ... as a detail for implementers’.³²³ It could also be because the relationship between different forums and arrangements is assumed to be ‘unanticipated and unpredictable’.³²⁴

I argue that these interactions have the potential to be significant to the way in which multiple accountability regimes operate, especially in unsettled political orders, and warrant further examination. This responds to the lacuna that Olsen identifies when he states that ‘[accountability] processes appear in many and shifting combinations and how these work, *interact* and change is not well understood’.³²⁵

³²¹ Mulgan (2009) 334.

³²² Scott (2000) 49. On redundancy, also see the earlier article Wirth 620, and a later study using redundancy, Bovens and Schillemans (2011). On both ideas see Day and Klein 249 and Dowdle 3.

³²³ Garn 579. Also see Day and Klein 71.

³²⁴ Mashaw (2006) 168.

³²⁵ Olsen 463 (my emphasis). A similar argument is made in Lægreid and Mattei 200.

Conclusion

In this chapter, I established that significant changes have occurred to the practice and conception of public accountability over the past few decades. Most notably, it has become ‘the pattern in western democracies ... to employ multiple accountability strategies’.³²⁶ These changes have made the research of public accountability considerably more complex. I argue that researchers need to respond to this complexity by understanding multiple accountabilities as an umbrella term and then clearly identifying which aspects of these changes each project focuses on, and therefore what existing literature it builds on and contributes to.

I identified that the most relevant multiplications for this study are accountability forums, and the subject matter of accounts and the normative standards used to assess those accounts. As revealed by my historical analysis of the origins of these multiplications, the pluralisation of public accountability practices that prompted additional forums has also involved an expansion in what is recognised as the legitimate range of subject matters and normative standards relevant to public accountability. This development is the backdrop to the concerns I set out in the Introduction and explore further in the following Chapter; namely, that multiple forums result in decision makers

³²⁶ B Romzek, ‘Dynamics of Public Sector Accountability in an Era of Reform’ (2000) 66 *International Review of Administrative Sciences* 21, 23.

being called to account for more (and varied) subject matters and being evaluated against more (and varied) normative standards.

I also argued that the ways that multiple accountability regimes operate is not generally a function of the historical origins of the various accountability forums and arrangements that make up a regime, or a function of the institutional design of the regime itself. Further, explanations relying on the relationships between different “types” of accountability forums or arrangements are limited. Instead, in order to deepen our understanding of multiple accountability regimes, I have argued we need to develop analytical frameworks adapted to researching accountability interactions, including an appreciation for regime-level dynamics that transcend individual components of the regimes. Given this analysis, in the next Chapter I develop the concept of accountability interactions and an analytical framework to examine these interactions.

Chapter Two: A framework for analysing accountability interactions

Introduction

This thesis examines the phenomenon of different accountability forums acting in concert with one another, or with additional accountability actors, to hold a decision maker to account. I describe this process of mobilisation between different accountability actors in order to hold a decision maker to account as an accountability interaction. I argue that interactions between different forums warrant research as a distinct phenomenon within multiple accountability regimes. To support such research, I develop an analytical framework to guide empirical examination of accountability interactions.³²⁷ In this chapter, I commence this project by critically analysing and adapting the analytical approaches taken in the existence accountability literature. I further refine the framework through my empirical case analysis in the following chapters.

³²⁷ I understand analytical frameworks to be more general than theories, and adopt Ostrom's description of their object: 'they attempt to identify the universal elements that any theory relevant to the same kind of phenomena needs to include'; E Ostrom, 'Background on the Institutional Analysis and Development Frameworks'(2011) 39 *The Policy Studies Journal* 7, 8. Analytical frameworks enable a more focused examination of the phenomenon being researched, rather than providing the vehicle for "testing" a particular proposition from the literature.

The first step in developing my analytical framework is to conceptualise accountability interactions. By recognising accountability interactions as a distinct phenomenon within multiple accountability regimes, I garner from existing accountability studies what is known already about when and why what I conceptualise as accountability interactions might occur. I also identify the effects these interactions might have on how accountability operates in multiple accountability regimes.

The second step in developing my analytical framework is to set out my methodological assumptions. Drawing on Olsen’s work about accountability in “unsettled” contexts, I incorporate the assumption that certain aspect of accountability—notably the subject matter and normative standards elements—can be changed *within* accountability processes. The possibility that the scope of responsibility and the meaning of accountable decision making in a given scenario can be altered through ‘dynamic’³²⁸ accountability processes explains why contestation can play a role in those processes: if it is possible to alter elements, it is worthwhile for actors to contest the status quo.

The third step in developing my analytical framework is to set out an approach to examining the construction of what accountable decision making means in a given scenario through the accountability dialogue. I review the tradition of accountability scholarship that conceives of accountability as a dialogic relationship concerned with what constitutes “good” (as well as

³²⁸ Olsen 449 & 451.

“accountable”) public decision making. I identify the methodological implication of adopting this conception as the need to understand the political debates about the decision making that is the subject of the accountability dialogue being researched.

The fourth and final step in developing my analytical framework is to refine Fox’s idea of ‘accountability politics’.³²⁹ I do so in order to better understand the contestation within accountability processes about what constitutes accountable decision making in a given scenario. In this thesis, I adopt accountability politics as an analytical heuristic to examine what is contested within a given accountability process. My analytical framework can thereby facilitate examination of the role of contestation in shaping how responsibility and accountability—and therefore what constitutes accountable decision making—is constructed within a particular multiple accountability regime. It also directs the analysis to ask how the political context in which decision making takes place, and accountability regimes operate, can influence accountability interactions and accountability actors. In my case analysis, I consider how different accountability actors can act in concert to contest a decision maker’s accountability, and thereby seek to reshape what a decision maker needs to do to be accountable.

Finally, in this chapter I set out how my focus on accountability interactions contributes to addressing the uncertainty about whether diverging

³²⁹ Fox.

evaluations of the same decision maker by different accountability forums is a common result of multiple accountability regimes. As I established in the Introduction, in existing case studies scholars identify the major result of multiple accountability regimes as the potential for different forums to demand accountability for different subject matters, and to produce diverging evaluations of those accounts based on the application of different normative standards. However, by critically evaluating this scholarship, I conclude that most existing studies do not examine scenarios where multiple forums actually evaluate the same decision maker.

Section 1: Conceptualising accountability interactions

In this section, I develop a concept of accountability interactions. This is the first step in developing a framework for analysing empirical instances of scenarios in which different forums overseeing the same decision maker interact with one another, or, with additional accountability actors. I draw on references to this phenomenon in existing literature³³⁰ and identify potential prompts for accountability interactions. I then distinguish interactions between accountability forums with a *functional* effect on public accountability processes, which I argue are better acknowledged in existing literature, and interactions with a *constitutive* effect, which I argue are barely recognised in

³³⁰ The three case studies which most fit with my conception of interactions between forums are Schillemans; Harlow (1999); and, Mulgan (2009).

existing literature. Constitutive interactions have the potential to influence the way individual forums construct a decision maker's accountability. By including an examination of both kinds of interactions, this thesis seeks to make a case for the recognition of this understudied phenomenon.

In conceptualising accountability interactions, I assume that they are phenomena that will vary according to context, as accountability does. I therefore seek to conceptualise these interactions in a way that avoids relying on context-dependent detail. I conceptualise accountability interactions as a theoretical proposition to capture a phenomenon adverted to in existing literature and that I examine in my case study.³³¹ I develop this conception such that it can be potentially useful in other studies when 'used as an object of comparison'.³³²

The concept of accountability interactions

Accountability interactions occur when different accountability forums act in concert with one another to hold a decision maker to account, or, act in such a way as to have an effect on the way one another holds a decision maker to account within the same multiple accountability regime.

I suggest that investigating accountability interactions empirically should begin by examining whether forums interact in relation to any of the "steps" of

³³¹ Understood as 'a general and abstract account of whatever phenomena is being examined'; T Schatzki, 'Introduction: Practice Theory' in T Schatzki, K Knorr Centina and E von Savigny (eds), *The Practice Turn in Contermpoary Theory* (Routledge 2001) 12.

³³² Against which the 'similarities' and 'dissimilarities' of the same phenomena in other contexts can be identified; O Kuusela, 'Do the Concepts of Grammar and Use in Wittgenstein Articulate a Theory of Language or Meaning?' (2006) 29 *Philosophical Investigations* 309, 318

accountability.³³³ This accords with the goal of finding common analytical building-blocks for accountability research. This step-based approach consists of asking a series of key questions.

For example, when a forum *demand*s that a decision maker accounts to it, does it make its demands such that it is more likely the demands will be reiterated by another forum *or* does it reiterate the demands made by another forum? When a forum *debates* an account with a decision maker does it employ information gathered by another forum to inform that debate? When a forum *sets* standards against which to assess a decision maker's account does it draw on, or replicate, standards used by another forum? When a forum *assesses* a decision maker's account, does it frame its assessment in a way that makes it more likely to be adopted by other forums *or* does it adopt the assessments of other forums (or base its assessment on information gathered by other forums)? When a forum *ensures* that a decision maker *faces consequences*, does it act to try to prompt another forum to sanction the decision maker *or* does it act to sanction a decision maker for the evaluation of another forum?

For this initial conception, it is useful to first suggest an archetypal accountability interaction. In this form of interaction, forum A acts in such a way as to affect whether, and/or how, forum B holds a decision maker to account; or forum B acts in such a way as to be affected by whether, and/or how, forum A has held the same decision maker to account.

³³³ As set out in Section Two, Chapter One.

However, it is also useful to suggest that the concept of accountability interactions includes a scenario where accountability actors act in concert to hold a decision maker to account. This could potentially involve accountability actors enlisting or mobilising other accountability actors in their efforts to hold a decision maker to account. It seems most plausible that forums are likely to act in concert with one another, and with additional accountability actors. However, in the case analysis, I also explore the possibility that decision makers could also act in concert with others to shape how they are held to account. This latter conception of accountability interactions also encompass a broader effect, where a forum generates pressure for a public decision maker to be held to account and another forum is thereby prompted to (also) hold that decision maker to account.³³⁴

The role of accountability actors in accountability interactions

Given this approach, it is apparent that while I focus on the actions of accountability forums, I also consider further in the case analysis whether the actions of decision makers and/or additional accountability actors might play a role in accountability interactions. The same step-based questioning approach outlined above could be adopted to examine the potential role played by these other accountability actors.

³³⁴ This is an important aspect of the Australian Wheat Board case examined in Mulgan (2009) 346.

For example, a decision maker may deliver the same account to multiple forums.³³⁵ The decision maker may thereby act as a conduit for transferring information—and perhaps any normative claims underpinning the framing of the account—between those different forums. Similarly, accountability interactions might be prompted by additional accountability actors acting to transfer accountability demands, information and/or evaluations between forums. Additional accountability actors might also act to create pressure for a decision maker to account to an additional forum, or for a forum to sanction a decision maker.³³⁶ Such actors might include the independent media or a civil society actor with particular credibility regarding the decision maker and/or the decisions they are required to make.

The inclusion of all three accountability actors—forums, decision makers and additional accountability actors—in the conception of accountability interactions underpins the regime-level perspective that I adopt in this thesis. This approach situates the phenomenon of accountability interactions within a broader canvas of actors and institutions that operate within a given multiple accountability regime. It also supports the argument of this thesis that bilateral accountability dialogues should be re-imagined as multilateral dialogues.

³³⁵ The possibility that a decision maker can strategically deliver different accounts to different forums is likely to be practically limited by the public nature of most accountability dialogues. Moreover, the way that a public decision maker frames their own account to one forum has been argued to be shaped by the fact that they are involved in dialogues with other forums; Black 150. Hence, the existence of multiple meanings of accountability has implications for how decision makers construct their own accountability; Sinclair 220.

³³⁶ Mulgan (2009) 347.

The prompts for accountability interactions

Two potential prompts for accountability interactions can be gleaned from accountability literature: variation in the capacities of different accountability forums and multiple accountability regimes in which the dynamics within the regime mean that forums are less likely to operate autonomously. Both of these potential prompts for accountability interactions turn on an attenuation of the *autonomy* of accountability forums. That attenuation could follow from the institutional design of the arrangements through which forums conduct their accountability dialogues with decision makers, or from the dynamics within the broader accountability regime, or, from the interplay of both. Both prompts are set out here, and will be explored further in the case analysis.

Differential capacities of accountability forums

Existing literature suggests that accountability forums might act reciprocally where doing so emphasises their respective capacities or compensates for their respective incapacities.³³⁷ As I introduced in Chapter One, typology-based literature examines the capacities of forums in terms of resources (such as time, money, motivation, knowledge and expertise), authority (in the form of official powers or unofficial ability to exert influence or sanction), and the capacity to bestow legitimacy or credibility.

³³⁷ This observation is made in R Mulgan, 'Contracting Out and Accountability' (1997) 56 *Australian Journal of Public Administration* 106, 30 and Scott (2000) 50.

Such capacities ‘are in general unevenly distributed between fora’.³³⁸ This can create the necessity, or the incentive, for different forums to operate together in order to call and hold the same decision maker to account. Therefore the varying capacities of different forums (and the accountability arrangements through which they conduct their dialogue with decision makers) might function to prompt accountability interactions.

A scenario highlighted in existing literature is the case of forums that have direct access to information, and, on occasion, superior capacities to analyse information, but limited (or no) powers to sanction a decision maker. Bovens describes this as an ‘intermediary form’ of accountability relationship. It is particularly common among forums such as ombudsmen and auditor-generals that ‘have few powers to enforce [decision makers’] compliance’.³³⁹ Similarly, forums in a “horizontal” relationship with a decision maker often need to ‘activate’ other forums with the capacity to sanction a decision maker.

If different forums have varying capabilities to hold a public decision maker to account, they can be characterised as *specialising* in certain steps of the accountability process. As Olsen argues, within a multiple accountability regime the relationship between forums can be symbiotic:

‘Some have specialised in providing normative standards, certifying institutions and actors, or monitoring, analysing and assessing performance without authority

³³⁸ Biela and Papadopoulos 8.

³³⁹ Bovens (2007) 460.

or resources to sanction misconduct. Others debate and sanction but depend on relevant and reliable information and analysis from the outside.³⁴⁰

As a result, understanding the capacities of each accountability forum within the multiple accountability regime requires the researcher to ‘consider how it builds on and contributes to the work of other accountability mechanisms.’³⁴¹

As I argued in the previous chapter, existing literature on the attributes associated with particular accountability *types* and *arrangements* can be useful in identifying what capacities to look for in an empirical case analysis. However, it is also crucial to examine how the context of a given multiple accountability regime strengthens or weakens capacities.³⁴² For example, Schillemans identifies how ‘the voice of a reputable [forum] might damage the reputation of the [decision maker] if it appears in public’. Existing literature suggests that the dynamics of multiple accountability regimes would influence whether forums act autonomously. Independent of their respective capacities, ‘the impact of negative voice depends on reputations and the saliency of the issues involved’. Yet, the significance of reputational damage will be contextually contingent.³⁴³

Multiple accountability regimes characterised by contestation

In particular, the existence of intense contestation within an accountability regime can change the behaviour of accountability actors,³⁴⁴ including forums,

³⁴⁰ Olsen 450. Also see Mulgan (1997a) 31.

³⁴¹ Clark 356.

³⁴² Mulgan (1997a) 35.

³⁴³ Schillemans 178.

³⁴⁴ Mulgan (1997a) 35.

as I examine and further argue in Section Five. Olsen has the most developed picture of these kinds of accountability regimes, and the political contexts they are associated with, namely the ‘unsettled’ contexts that I outlined in the concluding Section Five, Chapter One. Olsen argues that:

Much is known about specific accountability relations and processes in settled polities and well-known situations. Less is known about *the interaction* between multiple accountability claims in unsettled polities and unfamiliar situations.³⁴⁵

If multiple accountability forums are less likely to operate autonomously in “unsettled” contexts, it is reasonable to assume *prima facie* that it is in these contexts that accountability interactions are more likely to emerge, a point that I further pursue in the empirical analysis in Chapters Four and Five.

Functional and constitutive accountability interactions

Functional accountability interactions involve multiple forums acting in concert to ensure that a public decision maker *is* called and held to account. Existing literature points to forums being able to transfer information or sanctioning powers between them, or involving the pressure to activate existing forums or establish additional forums with these capacities. Functional interactions operate to affect the ‘efficacy’ of accountability arrangements that make up a multiple accountability regime.³⁴⁶

While functional interactions capture an important insight into how multiple accountability regimes operate, I argue that we need to further examine whether interactions between forums can also shape *how*—as distinct

³⁴⁵ Olsen 467.

³⁴⁶ Clark 357.

from *whether*—a decision maker is called and held to account. I describe this second form of accountability interaction as *constitutive*. This constitutive interaction focuses on interactions that have an effect on two of the six elements of accountability: how both the subject matter of accountability (or the responsibility of the decision maker) and the normative standards against which accountability for that subject matter are assessed. As such, constitutive interactions operate to shape what public accountability comes to mean in a given case.³⁴⁷

The possibility of constitutive as well as functional interactions is suggested by Harlow's examination of the 'relationship between' traditional and newer accountability arrangements overseeing the Child Support Agency in the United Kingdom.³⁴⁸ Harlow found that the agency was held to account in part due to the capacity of parliamentary and judicial forums to uncover information and generate the 'publicity'³⁴⁹ that activated bureaucratic accountability forums.³⁵⁰ Importantly, however, Harlow also found that a parliamentary forum evaluated the agency against the *ex ante* standards incorporated into the agency's internal accountability processes, thereby effecting a transfer of normative standards between the two processes.³⁵¹ A

³⁴⁷ Constitutive is understood in terms of making a thing what it is; essential.

³⁴⁸ Harlow (1999) 154.

³⁴⁹ Harlow (1999) 174.

³⁵⁰ Harlow (1999) 164.

³⁵¹ Harlow refers to this as 'the external use made of internal accountability procedures'; *ibid.* Note that Harlow does *not* equate these with expectations; Harlow (1999) 153. A similar observation is made by Polidano 40. Black describes this scenario in terms of the transfer of 'logics and interpretative schemes'; Black 157. While it might be possible to argue there was

similar finding from Schillemans' study of the role of 'horizontal' forums, such as independent boards overseeing an agency, is that the evaluations of horizontal forums are 'often used as input for vertical accountability' processes.³⁵²

In this thesis, I examine both kinds of interactions. I give specific attention to constitutive interactions, given that these are less examined in existing literature. This approach requires taking a regime-wide view of multiple accountability regimes to examine whether accountability actors act to prompt interactions that shape how the scope and substance of accountability is constructed.

Understanding how interactions between forums might shape the construction of public accountability is important given the existing studies that find that decision makers face diverging—and even conflicting—accountability demands when they are party to multiple accountability relationships. I assess the relevance of these studies to my study in Section Three. In the next section, I examine some methodological assumptions that I incorporate into my analytical framework.

some transfer between the traditional triumvirate of political, bureaucratic and legal accountability, the way that each was defined—particularly in the public law model—was as holding agents to account for particular (and to a large extent exclusive) values; Scott, (2000) 54.

³⁵² Schillemans 188.

Section 2: Methodological assumptions for researching accountability interactions

In this section, I set out the methodological assumptions I adopt from Olsen’s attempt to develop an institutionalist approach to analysing public accountability in “unsettled” contexts. I then incorporate these assumptions into my analytical framework, particularly the assumption that the decision maker’s responsibility and the normative standards that determine accountability can be changed *within* accountability processes. I further incorporate Olsen’s insight that change to these, and other, aspects of public accountability can occur through contestation over accountability within accountability processes. I address this point further in Section Five. Finally, I set out some core assumptions with reference to the relationship between institutions and actors that inform my approach.

Two pictures of public accountability; two traditions of analysis

In Chapter One, I set out Olsen’s two pictures of public accountability. Olsen traces the origins of these two pictures to different frameworks for conceptualising public accountability: the principal-agent and institutionalist frameworks.

In the first picture—stemming from the widespread application of principal-agent approaches³⁵³—accountability processes are presented as

³⁵³ Olsen 453. Olsen argues that various principal-agent models are used and that they do not amount to ‘a coherent, overarching theory’. Olsen points out that these approaches have been

autonomous and apolitical. Within these processes, “principals” (or forums) focus on detecting ‘deviance from pre-determined standards’ on the part of “agents” (or decision makers) and on sanctioning that deviance.³⁵⁴ A researcher working within the principal-agent framework focuses on explaining the ‘agent’s behaviour and how different opportunity and incentive structures induce the agent to act in the principal’s interest’.³⁵⁵

In the second picture—stemming from the application of institutionalist approaches³⁵⁶—accountability processes involve politics and power struggles.³⁵⁷ Within those processes, accountability actors contest both what constitutes publicly accountable behaviour and ‘good government and the good society’.³⁵⁸ Accountability processes are understood by accountability actors, and by researchers, as providing ‘opportunities for exploring and changing normative standards.’³⁵⁹

adopted most in American literature, during a period of ‘relatively stable institutional arrangements’; Olsen 449.

³⁵⁴ Olsen 453.

³⁵⁵ Olsen 448.

³⁵⁶ Olsen 448. This is not a single approach, and as the less developed tradition is still fairly embryonic. On the key tenets of new institutionalism see J March and J Olsen, ‘Elaborating the “New Institutionalism”’ in Rhodes, Binder and Rockman (eds).

³⁵⁷ For example, Newell and Wheeler 2 and C O’Kelly, ‘Accountability and a Theory of Representation’ in Dubnick and Frederickson (eds) 256. Also J Fitz, ‘The Politics of Accountability: A Perspective From England and Wales’ (2003) 78 *Peabody Journal of Education* 230; N Manring, ‘The Politics of Accountability in National Forest Planning’ (2005) 37 *Administration & Society* 5; and, S Chan and P Pattberg, ‘Private Rule-Making and the Politics of Accountability: Analyzing Global Forest Governance’ (2007) 8 *Global Environmental Politics* 103.

³⁵⁸ Olsen 448.

³⁵⁹ Olsen 457.

Olsen's contribution is especially valuable because it does not assume either picture is empirically invalid, or either tradition analytically invalid.³⁶⁰ For this thesis, an important implication of adopting Olsen's agnostic position is that multiple accountability regimes might produce diverging assessments of the same decision maker's accountability in some contexts, and not in others. In "settled" contexts, where accountability forums are more likely to operate autonomously, and where they draw on different normative traditions, those forums may indeed produce conflicting evaluations.

But this thesis' case analysis examines an "unsettled" situation, where accountability forums are less likely to operate autonomously and, I argue, accountability interactions are more likely to occur. Given that Olsen also seeks to examine 'how representative democracies cope with tensions between multiple, contested and dynamic conceptions and standards of accountability',³⁶¹ I begin from the presumption that at least some of the methodological assumptions that Olsen articulates are likely to be relevant to my analytical framework.

³⁶⁰ Hence, despite developing an institutionalist approach, Olsen argues that for settled political orders principal-agent approaches might continue to be valuable, especially regarding accountability for decisions affecting individuals; Olsen 467.

³⁶¹ Olsen 448. Olsen argues that this latter picture of accountability is less understood, and that theorising accountability will require more research into it so that we understand both manifestations; Olsen 449.

Assumptions about what is endogenous and exogenous to accountability processes

Mulgan describes the ‘overarching theme’ of accountability as being that it is ‘context-dependent’, varying ‘according to the institutional setting, the type of activity, and the respective interests and capacities of the parties to the accountability relationship.’³⁶² Indeed, accountability is ‘meaningless without a context’.³⁶³ This contextual dependency precludes drawing hard lines between public accountability processes and the decision making (or governance) context in which they operate.³⁶⁴ Nonetheless, a key conceptual choice for the accountability researcher is deciding what elements are assumed to be capable of being determined, or at least influenced, *within* accountability processes and what elements of accountability are determined by the context.

Olsen’s elucidation of the differences between principal-agent and institutional approaches turns on this choice. Olsen describes the various factors he identifies as being either endogenous and exogenous.³⁶⁵

In the dominant principal-agent approaches, ‘the distribution of information, purposes, ends, authority, power and identities are treated as

³⁶² Mulgan (2003) 226.

³⁶³ Fisher (2000) 111. An alternative formulation is that accountability ‘is sustained and given extra dimensions of meaning by its context’; Sinclair 219.

³⁶⁴ Given the complexity of many contemporary contexts, being able to identify features of a governance process that renders it an accountability process becomes a ‘powerful analytical tool’; Davies 86.

³⁶⁵ Olsen uses this terminology without invoking the causal system models often associated with these terms.

exogenous' to accountability process.³⁶⁶ In other words, these factors pre-exist the accountability process, and may affect the way that the accountability dialogue takes place, but these factors are not changed through that process. By contrast, Olsen characterises institutional approaches as treating all these factors as 'endogenous to ... accountability processes'.³⁶⁷ What turns on this distinction is whether these factors are understood as being capable of being (at least partly) shaped within a given accountability process.

For this thesis, the most important two factors are what Olsen identifies as the 'responsibility'³⁶⁸ of the decision maker and the 'normative criteria'³⁶⁹ adopted by the forum to assess the decision maker. These directly equate to the subject matter and normative standards elements of accountability. Olsen views the responsibility of a decision maker as comprised of both the 'authority' of the decision maker and the 'purposes' and 'ends' s/he is meant to pursue.³⁷⁰ This conceptual framing adds to the idea of responsabilisation introduced in Chapter One: that if the decision maker is effectively made responsible for the achievement of certain objectives, then their *de facto* responsibilities are reshaped, an insight that I examine in my case analysis.

For example, the authority of the public decision maker, and the ends that s/he is meant to use that authority to pursue, are traditionally understood to be

³⁶⁶ Olsen 454.

³⁶⁷ Olsen 454, 460, 467.

³⁶⁸ Olsen 454.

³⁶⁹ Olsen 467.

³⁷⁰ Olsen 454.

determined by the legal framework that delegates authority to public decision makers. So these factors are understood to be exogenous, or pre-determined, by the political and legal context of an accountability process. Hence, the forum demands an account from the decision maker about how they have used their delegated authority to pursue nominated ends, and evaluates the decision maker's pursuit of those ends *without* reshaping how the authority or ends are understood by any actors. As Olsen describes it 'the task is to identify the technically most efficient means to reach predetermined ends within existing constraints'.³⁷¹

The alternative suggested by Olsen's framing is to assume that it is possible that the scope of a given decision maker's authority, and the understanding of the ends s/he is meant to pursue, can be shaped through the dialogue that takes place within the accountability process and the evaluation that results from that dialogue. While these factors were likely originally determined by the political and legal context, their scope and shape can be changed within accountability processes. This conception is reflected in Olsen's argument that 'accountability processes provide occasions for *interpreting, debating and changing* world-views, normative criteria, distributions of authority, power, responsibility, accountability and conceptions of legitimate roles and identities'.³⁷² Within this broad frame, I focus on how accountability processes are occasions for contesting and constructing what it means for a decision

³⁷¹ Olsen 454.

³⁷² Olsen 454 (my emphasis).

maker to be publicly accountable, particularly the responsibilities for which a decision maker is obliged to account and the normative standards against which that accountability is assessed.

But the most significant implication of Olsen's framing of these factors as endogenous is that it points to how contestation takes place within accountability processes and to the implications of that contestation. Hence, in unsettled polities, Olsen argues that 'accountability processes provide a rhetorical arena for the struggle over minds and *purposes*'.³⁷³ Olsen presents a similar picture of contestation over normative standards:

Democracies are committed to a variety of values and norms defining 'good government'³⁷⁴ ... In settled democracies, different normative concerns are embedded in traditions, morals and institutional spheres with some autonomy and resources of their own. In unsettled polities there is less guidance due to contested or unclear normative standards.³⁷⁵

I identify two further elements in Olsen's work that are likely to be relevant to accountability interactions. The first is the 'the distribution of power',³⁷⁶ not only as between decision maker and forum but also potentially as between additional accountability actors, the decision maker and forum(s). The second is the 'distribution of information'³⁷⁷ (including the 'epistemic quality' of information),³⁷⁸ between the three kinds of accountability actors. I posit that all four factors may prompt the interaction of accountability forums and/or be the

³⁷³ Olsen 460.

³⁷⁴ Olsen 457.

³⁷⁵ Olsen 457.

³⁷⁶ Olsen 467.

³⁷⁷ Olsen 454.

³⁷⁸ Olsen 460.

subject of those interactions. I examine whether this position is apposite in my case analysis in the following chapters.

Institutional assumptions about analysing structure and agency

Unsurprisingly, an institutional approach begins with the premise that public accountability is an institution (or perhaps multiple institutions). Olsen defines an institution as ‘a set of behavioural rules and practices embedded in a structure of meaning and a structure of resources ... they provide rules and practices and mutual expectations regarding the exercise and control of authority and power, rights and duties’.³⁷⁹ What I refer to as accountability dialogue can be understood as an institution in these terms. The attributes of types or arrangements described in Section Five, Chapter One can also be understood as properties of accountability institutions.

Importantly, understanding accountability as an institution implies a certain understanding of the relationship between accountability processes and accountability actors; between structure and agency. As such, it offers one approach to addressing the criticism from Dubnick and Yang that ‘current analytic approaches lack attention to human agency and its dynamic interaction with accountability structures’.³⁸⁰

³⁷⁹ Olsen 450. Various accountability scholars employ the idea of accountability institutions; J Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (Cambridge University Press 2007) 427 and Yang (201b) 2.

³⁸⁰ Dubnick and Yang 180. Yang has recently proposed a research approach based on structuration theory, which I do not adopt formally as part of my analytical framework, but has influenced my approach to analysing accountability actors; Yang (2011a) and Yang (2011b). An earlier article, not cited by Yang, also adopts this approach; L Conrad, ‘A Structuration Analysis

It seems clear that public accountability will be shaped by factors such as the institutional form of accountability processes and conventional practices around, and meanings of, account-giving in a particular polity, as well as the values and assumptions of actors participating in accountability processes and debates.³⁸¹ This is reflected in the idea of accountability as “emergent”, in the sense of ‘emerg[ing] from the interactions of multiple parties to accountability processes’.³⁸²

What an institutional approach adds is a focus on the iteration that occurs between accountability institutions and actors.³⁸³ Hence, for a research project focused on accountability interactions that shape how ‘normative standards for assessment’ are developed in accountability processes, this approach assumes that ‘institutions constitute and influence actors ... norms of assessment, endowments and capacities’³⁸⁴ but ‘do not determine behaviour and outcomes’.³⁸⁵ In Section Four, I set out how this broad framing can be applied to analysing the normative standards element of accountability, and in Section Five to accountability actors. In the next Section, I review the studies that find

of Accounting Systems and Systems of Accountability in the Privatised Gas Industry’ (2005) 16 *Critical Perspectives on Accounting* 1.

³⁸¹ Day and Klein 52 & 55 and Morgan 244. And moreover, that individual actors will draw on those conventional meanings; Sinclair 233.

³⁸² O’Connell 92.

³⁸³ This focus on a ‘recursive relationship’ between institutions and actors is also central to structuration approaches to accountability; Conrad 3.

³⁸⁴ Olsen 450.

³⁸⁵ Olsen also points out that ‘they are human constructs but cannot easily be designed at will’; Olsen 460.

that multiple accountabilities result in diverging evaluations of the same decision maker.

Section 3: Identifying what is at stake: the spectre of diverging evaluations between forums

In this section, I critically review the studies of multiple accountabilities that have generated concerns that diverse forums will produce diverging, and even conflicting, evaluations of the same decision maker. I conclude that these studies do not directly address whether multiple forums are likely to evaluate the same decision maker dissimilarly, and hence are not directly relevant to the research questions examined in this thesis. This is because these studies tend to adopt the 1980s re-conception of accountability as a process for “managing expectations”, and thereby examine how decision makers respond to scenarios of multiple *demands* for accountability rather than scenarios involving *evaluations* by multiple forums that follow from an actual accountability process. This thesis’ concern with actual processes of holding to account instead draws on the long-standing tradition of conceiving of accountability as answerability.

Diverging accountability demands and evaluations within multiple accountability regimes

Existing literature on multiple accountability regimes often characterises public decision makers as ‘assailed by competing and conflicting demands for accountability.’³⁸⁶ Decision makers are described as ‘deal[ing] with many different and often conflicting expectations’³⁸⁷ and ‘competing accountability relationships’.³⁸⁸ Importantly, expectations are not only about how the decision maker will ‘be accountable’ but also about how they will ‘achieve many, often conflicting goals.’³⁸⁹ As Lægreid argues ‘accountability in a multi-functional welfare state means being answerable to different stakeholders in order to achieve multiple and often ambiguous objectives’.³⁹⁰

Where accountability is ‘multiple and fragmented’,³⁹¹ it is argued, ‘multiple accountability forums thus assess the same issues and may come up with conflicting demands and have conflicting expectations’.³⁹² This scenario involves ‘complex overlapping accountability relationships’³⁹³ and the decision

³⁸⁶ Langford 521. Similar descriptions are used in Papadopoulos 482; Reiss 113; Bovens and Schillemans (2011) 14; and, Messner 919. The same characterisation is made in the not-for-profit sector; Knutsen and Brower 589.

³⁸⁷ Dooren and Willems 508. Also see Romzek and Ingraham 241.

³⁸⁸ Kim 156.

³⁸⁹ Reiss 113.

³⁹⁰ Lægreid and Mattei 200.

³⁹¹ Sinclair 231.

³⁹² Bovens and Schillemans (2011) 17.

³⁹³ Dooren and Willems 508.

maker faces ‘conflicting demands’ that ‘require the accountable self to speak in “several languages at the same time”’.³⁹⁴

At an aggregate level Dooren argues that:

Governments are being called to account *by many account-holders* in different public forums *for different aspects of their conduct*. The accountability processes are each time arranged differently, involve different actors, demand different information, *apply different criteria to judge* and have different kinds of consequences at their disposal. Usually they take place within different public forums at the same time.³⁹⁵

The multiplication of forums, subject matters and normative standards examined in Chapter One combine to produce this spectre of divergence between accountability forums. Diverse demands equate to an extension of the subject matters that a decision maker can be called to account for, and diverse evaluations equate to an extension of both the subject matters and the normative standards against which accounts are evaluated. Both elements are closely linked, and both contribute to the underpinning assumption that the simultaneous operation of multiple forums will change what public decision makers are called to account for and how their public accountability is constructed by forums.

For example, Behn argues that an ‘accountability dilemma’ results for decision makers from the need to choose which subject matter to prioritise,³⁹⁶ where different ‘expectations’ about the subject matter of accountability

³⁹⁴ Messner 919.

³⁹⁵ Dooren and Willems 510. Also see Fisher (2007) 25.

³⁹⁶ Behn 10. Also see O’Connell 503.

conflict.³⁹⁷ Similarly, Wirth argues a ‘dilemma’ arises from the impossibility of satisfying different forums that assess the decision maker against incompatible standards;³⁹⁸ the decision maker will also be “unaccountable” when assessed against the de-prioritised standards.³⁹⁹

This assumption that ‘being accountable in one form often requires compromises of other sorts of accountability’⁴⁰⁰ underpins a concern that multiple accountability regimes result in diverging or conflicting assessments of accountability. As I set out in the Introduction, studies of conflicting ‘accountability expectations’⁴⁰¹ find that conflicting accountability relationships can lead to dysfunctional decision making—neatly evoked by Koppell’s ‘Multiple Accountability Disorder (MAD)’.⁴⁰²

However, most studies concerned with divergence and conflict fall within a relatively new tradition of accountability scholarship. This tradition re-conceptualises accountability from a state of *being answerable* to being a *strategy for managing expectations*.

³⁹⁷ Dooren and Willems 512.

³⁹⁸ Wirth 618.

³⁹⁹ Mashaw (2005) 15.

⁴⁰⁰ Sinclair 231.

⁴⁰¹ Koppell 99.

⁴⁰² Koppell 95.

Two research strands: public accountability as answerability and as managing expectations

American public administration scholars Romzek and Dubnick first proposed understanding accountability as *managing expectations* in their iconic 1987 article on the Challenger disaster:⁴⁰³

In its simplest form, answerability implies that accountability involves limited, direct, and mostly formalistic responses to demands generated by specific institutions or groups in the public agency's task environment. More broadly conceived, public administration accountability involves the means by which public agencies and their workers manage the diverse expectations generated within and outside the organisation.⁴⁰⁴

Conceived as such, accountability incorporates processes that are focused on 'mobilising and governing mutual expectations, capacities, preparedness and commitments *ex ante*' as well as on 'watching, monitoring, following up and evaluating performance *ex post*.'⁴⁰⁵ As such, 'accountability is more than the actual fact of being held accountable'. This re-conception involved both an ontological and a methodological reorientation of accountability.

The ontological reorientation broadens the understanding of accountability-in-action beyond the traditional focus on accountability processes. Hence, accountability expands to include actions by decision makers to shape the accountability demands that they might be subject to (whether

⁴⁰³ Dubnick and Romzek (1987).

⁴⁰⁴ Dubnick and Romzek (1987) 228. Also see M Dubnick and B Romzek, *American Public Administration: Politics and the Management of Expectations* (Macmillan 1991). This re-conception is now most associated with the influential work of Kearns. For a compelling normative critique see O'Loughlin 280. It is important to note that a managing expectations approach does not deny that answerability is part of accountability, it just views it as only one part.

⁴⁰⁵ Böstrum and Garsten 9.

within an actual accountability process or in anticipation of any such process). For the decision maker, accountability becomes a ‘continuous process of anticipation, identification, definition and responding to pressures’.⁴⁰⁶ Consequently, the focus for an accountability researcher becomes perceived or actual *expectations* of decision makers held by any actors with a stake in public decision making.⁴⁰⁷

The methodological reorientation engendered by this re-conception of accountability is to switch the research focus from accountability forums to decision makers. The unit of analysis shifts from the accountability *process* to the accountability *relationship*.⁴⁰⁸ Hence, ‘accountability relationships constitute the institutional arena where public administrators have to manage diverse expectations’.⁴⁰⁹ For the researcher, accountability as *managing expectations* can be studied whether or not any accountability process—including the forum producing an evaluation of the decision maker’s accountability—actually takes place.

⁴⁰⁶ Dooren and Willems 508. For an analysis of a similar way of understanding legitimacy see Black 146.

⁴⁰⁷ Koppell 99. Also see Romzek and Radin and Kim.

⁴⁰⁸ For example, Klingner, Nalbandian and Romzek 120.

⁴⁰⁹ Klingner, Nalbandian and Romzek 119. As such, these studies consider how decision makers act so as to appear legitimate to various audiences. This is probably the better way of understanding the strand of accountability literature focused on managing expectations, as is suggested by Black in her analysis of how legitimacy is related to various accountability relationships; Black 149. This link between accountability relationships and legitimacy is also suggested in Romzek and Ingraham 241.

Implications for this thesis

This thesis primarily draws upon, and contributes to, the strand of literature that conceptualises accountability as answerability.⁴¹⁰ I have analysed this bifurcation in multiple accountabilities research because, I argue, accountability literature has not sufficiently distinguished between these two research strands. This distinction matters if we are to identify whether the potential for diverging evaluations of the same decision maker in multiple accountability regimes warrants further research. This is because when understood as answerability, accountability usually involves forums actually making assessments, and hence it is possible to examine whether those assessments diverge.

For my project, it is important to analytically distinguish between two scenarios. In the first scenario, the decision maker is subject to multiple (and perhaps conflicting) demands for accountability but does *not* participate in any accountability dialogues that result in a forum evaluating the decision maker's response to those demands. In the second scenario, the decision maker is actually evaluated by different forums against multiple (and perhaps conflicting) normative standards.⁴¹¹ Only by examining the second scenario can

⁴¹⁰ Although my focus on evaluations is a reminder that accountability involves more than the 'softer notion' of answerability; Day and Klein 34.

⁴¹¹ This distinction is made in Messner 931.

we draw conclusions about whether diverging demands can be assumed to result in diverging evaluations.⁴¹²

Separating studies of the two scenarios reveals that researchers interested in how decision makers manage expectations often conflate stakeholders with an interest in a decision with forums to whom the decision maker is *obliged* to account.⁴¹³ Moreover, in such studies, the language of accountability *demands* and *expectations* is often used to ‘represent claims by stakeholders on the actions of public managers and the agencies and programs they manage’.⁴¹⁴ I argue that it is unsurprising that in plural constitutional democracies decision makers may find themselves subject to diverse, diverging and even conflicting expectations about what they should decide. That those expectations may be expressed as demands for accountability is also unsurprising given the greater prominence of accountability in public discourse since circa 1980s.⁴¹⁵

Based on this analysis, I argue that it remains an open question whether the proliferation of accountability forums, and of additional accountability actors, making accountability demands results in multiple forums issuing diverging judgments.⁴¹⁶ Because my research question focuses on evaluations, it

⁴¹² An approach based on accountability processes is advocated in Bovens and Schillemans, (2008) 177 and is also adopted in Harlow (1999) 161.

⁴¹³ For example Page 170.

⁴¹⁴ Page 168.

⁴¹⁵ Klingner, Nalbandian and Romzek 118 and Mashaw (2005) 16.

⁴¹⁶ My approach avoids characterising any actor who makes accountability demands, or otherwise participates in accountability processes, as a forum. As I examined in Section Three, Chapter One, doing so can artificially bolster the presumption that multiple accountability forums will deliver diverging evaluations of the same decision maker.

examines the criteria that are actually used by a forum that evaluates a decision maker *ex post*.⁴¹⁷ The methodological step I reject is that of mapping *ex ante* expectations of what I refer to as forums and additional accountability actors and the step of ‘formalising ... those expectations into [the subject matter and normative standards] elements of accountability’.⁴¹⁸

Nonetheless, the concern that multiple accountability forums may apply different normative standards is not unfounded. As I examine in the following section, ‘a key challenge’ given the pluralisation that underpins multiple accountability regimes ‘is how to handle ... accountability relations embedded in *partly competing institutional logics*’.⁴¹⁹ A further question that I examine is the extent to which accountability expectations are a source that normative standards forums use to evaluate decision makers.

Section 4: Analysing the construction of accountable decision making

In this section, I set out an approach to examining how what accountable decision making means in a given scenario is constructed through the accountability dialogue. This is the third step in developing my analytical framework for examining accountability interactions. I first map the

⁴¹⁷ This reflects the distinction made in Bovens and Schillemans (2008) 229.

⁴¹⁸ Klingner, Nalbandian and Romzek 121.

⁴¹⁹ Lægreid and Mattei 200.

accountability literature that conceptualises accountability processes as a legitimate channel for contesting what accountable decision making is. This, in turn, implicates conceptions of what “good” decision making is, and therefore concerns the normative dimension of public accountability. I argue that the key methodological implication of this literature is that an accountability analysis needs to include an analysis of the political (and therefore normative) debates around the decision making being assessed. I then specify an approach to identifying the generalisations that can be made about the subject matter and normative standards elements from existing literature, particularly typology-based literature.⁴²⁰

The accountability dialogue: rendering account with reference to reason and conceptions of the good

Accountability involves an actor giving an account of their actions by explaining, rationalising, justifying and, sometimes, excusing those actions.⁴²¹ Public accountability is a ‘dialectical’ and ‘communicative’⁴²² practice—a ‘discourse between citizens and governing institutions’⁴²³ about what constitutes accountable decision making. Given my interest in how accountability interactions might influence the accountability dialogue, I draw

⁴²⁰ See Section Five, Chapter One.

⁴²¹ Dubnick and Frederickson xv. See M Scott and S Lyman, ‘Accounts’ (1968) 33 *American Sociological Review* 46.

⁴²² Black 151.

⁴²³ Fisher (2004) 513. Within constitutional democracies, “the people” are the relevant “other” to whom ‘persons with public responsibilities should be answerable’; Dowdle 3. For an excellent historical and contemporary survey of this idea see Borowiak.

on the tradition of scholarship that conceptualises accountability as ‘a dialogic relationship’.⁴²⁴

Schedler pictures accountability as subjecting the powerful ‘to the rule of reason’.⁴²⁵ A normative dimension is quickly added to reason, if, as Giddens argues, ‘to be accountable for one’s activities is both to explicate the reasons for them and to supply the normative grounds whereby they may be justified’.⁴²⁶ So conceived, the accountability dialogue takes place within ‘a community of understanding on questions of the good’⁴²⁷ —in the case of public accountability, the polity. This conception of the accountability dialogue unfolding within a “community of understanding” is captured in the idea that what distinguishes accountability from mere excuses is ‘agreement about the

⁴²⁴ Schedler 15. Also see O’Kelly 257. This conception of accountability processes as a dialogue is found in Kettle 120 and Sinclair 231. Schedler also points out that accountability evokes narrative accounts (as well as book-keeping); Schedler 13. Also see J Butler, *Giving an Account of Oneself* (Fordham University Press 2005) 12. The alternative approach concentrates on accountability as a disciplinary mechanism that will encourage proper behaviour by public decision makers; Dubnick and Frederickson xvi. While accountability is also a means of control, it is only one means: Mulgan (2000b) 563 and Bovens (2007) 453. What is notable about accountability is that it is a ‘virtual’ means of control; P Pettit, ‘Democracy, National and International’ (2006) 89 *The Monist* 301, 302.

⁴²⁵ Schedler 15. Indeed, ‘reason-giving’ can also be understood as central to a democratic conception of the rule of law; D Dyzenahus, ‘Constituting the Rule of Law: Fundamental Values in Administrative Law’ (2002) 27 *Queen’s Law Journal* 445, 501.

⁴²⁶ A Giddens, *The Constitution of Society* (Polity 1984) cited in Ranson 461.

⁴²⁷ This draws on Stephen Darwell’s philosophy; O’Kelly 256. For a thorough review of the connection between dialogue and normativity, see G Lehman, ‘Perspectives on Language, Accountability and Critical Accounting: An Interpretative Perspective’ (2006) 17 *Critical Perspectives on Accounting* 755, especially 771. Dubnick goes further and argues that the very existence of an accountability relationship indicates a normative recognition of ‘a relevant “other”’; Dubnick (1998) 76. Also see Bovens (2007) 350 and Pellizzoni 218.

language of justification, what constitutes *good reasons* for explaining conduct'.⁴²⁸

Yet agreement over what is reasonable cannot be assumed in pluralistic constitutional democracies.⁴²⁹ Consequently, as I introduced in Section Two, accountability dialogues are increasingly understood as an arena in which what it means to be publicly accountable is *contested* as well as constructed.⁴³⁰

This development has brought to the fore the need to analyse the normative dimension of accountability as it is empirically manifested within accountability dialogues, and to understand how this normative dimension might be central to contestation around accountability. Yet analytical approaches that explore the mechanistic side of accountability processes are much more developed.⁴³¹ This is because accountability scholarship often shies away from examining the normative dimension of accountability, on the basis that a normative focus confuses clear, analytical thought about accountability.⁴³² Accordingly, I draw on a minority tradition of accountability

⁴²⁸ Day and Klein 5 (my emphasis). Also see L Marchant, *The Westminster Tradition and Australia* (Hesperian Press 1999) 150.

⁴²⁹ In her review of Harlow's *Accountability in the European Union* and Arnull and Wincott's *Accountability and Legitimacy in the European Union*, Fisher points out that 'both books highlight that living in the age of accountability is less about making governance more secure and far more about challenging and critiquing it'; Fisher (2004) 514.

⁴³⁰ See Mulgan (2000b) 570 and Fox 32.

⁴³¹ Notable examples are set out in Bovens (2007) and Biela and Papadopoulos.

⁴³² A classic example is Bovens' influential proposal that scholars should distinguish between the mechanistic and normative dimensions of public accountability, and separately research each; Bovens 951. On the influence of this proposal see Dubnick and Frederickson xv. For a critique see Harlow 179. Phillip also argues for an 'analytically precise definition' that isolates the normative dimension of accountability; Philip 28.

literature which recognises a normative component as inherent and central to public accountability.⁴³³

Fisher's concept of 'administrative constitutionalism'⁴³⁴ is a good place to begin trying to grasp the nature of contestation within accountability dialogues. Fisher draws attention to 'the more traditional connotations of constitutionalism', as being 'concerned with the constituting and limiting of government so as to ensure its principled operation *where there are divergences of opinion over what this means and entails*'.⁴³⁵ Hence, 'the process of holding a decision maker to account is a process of debating what the standards should be,⁴³⁶ and, as I argued previously, what the subject matter for which the decision maker is accountable should be.⁴³⁷

Given the robustness of both elections and law in developed constitutional democracies, it is notable that accountability scholars do not assume that

⁴³³ Notably Harlow 173; Lindberg 10; Black 149; Davies 81; and, Fisher (2004) 509. Interestingly, this tradition is dominated by scholars from the UK.

⁴³⁴ Fisher 24. Fisher draws on Oliver's earlier idea of public accountability as being 'about constructing a framework for the exercise of state power in a liberal-democratic system'; Oliver (1991) 28. Also see W Funnell, 'Enduring Fundamentals: Constitutional Accountability and Auditors-general in the Reluctant State' (2003) 14 *Critical Perspectives on Accounting* 107, 109. Oliver's work moves beyond the tradition of accountability scholarship focused with limiting discretion; on this tradition, see Pires 44.

⁴³⁵ Fisher (2007) 24 (my emphasis).

⁴³⁶ Fisher (2004) 513. The normative dimension is most associated with the normative standards element; Fisher (2004) 510; Wirth 620; and, J March and J Olsen, *Democratic Governance* (Free Press 1995) 159.

⁴³⁷ See Section Three, Chapter One.

consensus follows from either.⁴³⁸ Mulgan makes this argument within a public accountability-as-dialogue frame:

The contestability and fluidity of public policy place a premium on the rights of citizens, both individual and in groups, to have a say in the ongoing process of policy-making ... *In the absence of clear agreement on objectives ... we seek instead a continuous dialogue between the government and the public mediated through various channels of political accountability* provided by the legislature, policy communities, the media and so on'.⁴³⁹

Hence, in order to be publicly accountable, elected representatives have a 'continuing obligation to explain and justify their conduct in public'⁴⁴⁰ between elections.⁴⁴¹ Specifically, I adopt Pettit's conception of democracy as two-dimensional—containing an electoral and a contestatory dimension—with public accountability fulfilling the latter function.⁴⁴²

If decision makers render account with reference to reason, but in a context where what counts as good reasons is contestable, then what

⁴³⁹ Mulgan (2003) 37 (my emphasis).

⁴⁴⁰ Day and Klein 6.

⁴⁴¹ Notwithstanding that accountability is usually understood to be 'secondary' to other features of democracies that guarantee popular sovereignty, but still a 'salient feature', especially given the breadth of the administrative state; Dubnick (2002) 17. And thereby secure popular control of elected representatives; Mulgan (2000b) 557. Also Bovens 955. Elections are often analysed as public accountability mechanisms, especially where the focus is on the disciplinary effect of accountability; for example, Przeworski, Manin and Stokes (eds). However, elections are better understood as mechanisms for aggregating preferences rather than for evaluating actions as part of an actual dialogue between two parties. Nonetheless, public accountability is connected to conceptions of democracy. For example, dialogic accountability has been linked to the deliberative-democratic tradition in Goodin 155 and the participatory-democratic tradition in Harlow (1997) 11. As Olsen argues 'democratic theory requires a theory of accountability, but no such theory is available'; Olsen 466.

⁴⁴² P Pettit, 'Democracy, Electoral and Contestatory' (2000) 42 *Nomos* 105.

framework do accountability actors draw on to formulate and evaluate reasons? In short, the framework is the conception(s) of good government in a given polity (or regulatory/administrative context). As Fisher argues, the ‘standards’ invoked within accountability dialogues ‘will be grounded in a particular understanding about good administration and the process of holding someone to account is an attempt to enforce those standards’.⁴⁴³ It is for this reason that Fisher argues that the normative standards element of accountability is a particularly significant, and perhaps ‘the most significant’ element.⁴⁴⁴ Hence, the ‘public debate and political contestation’ involved in accountability processes become ‘part of defining “good government and the good society”’.⁴⁴⁵ Within this broader project, accountability processes can also be processes for ‘challenging what is understood to be the nature and role of public law decision makers’.⁴⁴⁶ As Black argues, for organisations accountability processes ‘can be sites of contestation between different conceptions of the role of the organisation’, as I examine in the case analysis.⁴⁴⁷

An important analytical consequence of this characterisation of the role of accountability dialogues is that the construction of what it means for a given decision maker to be accountable cannot be ‘disentangled’ from debate about

⁴⁴³ Fisher (2007) 25. Also Fisher (2004) 510.

⁴⁴⁴ Fisher (2007) 25.

⁴⁴⁵ Olsen 448.

⁴⁴⁶ Fisher (2007) 24.

⁴⁴⁷ Black 151. Hence, Fisher’s point that ‘an argument for more accountability is really an argument about wanting to align governance regimes to a particular normative vision’; Fisher, (2004) 513.

the role of the decision maker and how that decision maker ought to make decisions.⁴⁴⁸ Therefore, an accountability analysis needs to incorporate an analysis of the debates held in or around accountability processes, which will often stray into the political debates around decision making.

This understanding of public accountability's role in constitutional democracies undermines any characterisation of accountability processes as 'neutral, technical instruments'.⁴⁴⁹ It also rejects the 'common assumption that accountability is an autonomous and neutral feature of any governing system'⁴⁵⁰ that plays only 'a secondary or corrective role in governance.'⁴⁵¹ Accountability processes are instead understood as capable of being tightly intertwined with decision making (or governance),⁴⁵² especially when those accountability processes relate to decision making about societal goals, as in this thesis. Moreover, unless there is a pre-existing consensus about how decisions should be made, and therefore about what constitutes accountable decision making, any fusion or overlap between these two discussions is very likely to introduce contestation into accountability processes. This dynamic is an important point that emerges also from the case study.

⁴⁴⁸ Fisher (2004) 511.

⁴⁴⁹ Black's work is an example of this critique; Black 152.

⁴⁵⁰ Fisher excavates the assumption in order to critique it; Fisher (2004) 496.

⁴⁵¹ Dubnick does likewise; Dubnick (2011) 708 & 711. I do not formally analyse the Basin Plan accountability processes in terms of Dubnick's concept of "accountability space", but I endorse Dubnick's analysis of the value of developing this alternative understanding.

⁴⁵² Dubnick (2011) 708.

Analysing the construction of public accountability in an empirical case

Public accountability is 'being continually constructed'⁴⁵³ through accountability dialogues. I have previously established that what it *means* to be publicly accountable reflects the subject matter and normative standards elements of public accountability. These can also be described in terms of the responsibility of the decision maker and the criteria underpinning the forum's evaluation of that decision maker.⁴⁵⁴ Referring to the extreme context dependency of the standards element in particular, Bovens points out that 'there is no general consensus about the standards for accountable behaviour, and they differ from role to role, time to time, place to place, and from speaker to speaker'.⁴⁵⁵ Nonetheless, I argue it is possible to identify some useful approaches that begin to analyse what might influence how public accountability is constructed.

First, as an analytical issue, the subject matter of accountability is comprised of three sources: a decision maker's formal responsibilities; the broad categories of what the decision maker can be called to account for (financial probity, fairness and proper use of power, and performance or results); and, any matters that they are "responsibilised" for.⁴⁵⁶ The normative standards element also has three interconnected sources: any *ex ante* standards

⁴⁵³ Sinclair 231. Also see Morgan 243.

⁴⁵⁴ See Section Three, Chapter One and Section Two, Chapter Two.

⁴⁵⁵ M Bovens, 'New Forms of Accountability and EU-Governance' (2007b) 5 *Comparative European Politics* 104, 106.

⁴⁵⁶ See Section Three, Chapter One.

articulated in internal procedures or laws; the standards conventionally associated with a given accountability institution or forum (especially in case of traditional forums); and, expectations by forums or additional accountability actors. Expectations could be shaped by *ex ante* standards, or simply reflect what actors should like a decision maker to decide given their interests or ideologies. Any of these three sources may be informed by the broader norms and aspirations associated with public accountability within a given polity.

Second, I understand the subject matter and normative standards elements to be shaped both by the institutional traditions attached to certain institutionalised forums and by the accountability actors that take part in accountability processes.⁴⁵⁷ This conception is reflected in Bovens' description of the relationship between the mechanistic and normative dimensions of accountability (the latter of which he refers to as 'accountability as a virtue'):

Accountability forums implicitly or explicitly *formulate* notions of accountability as a virtue when they judge the performance of actors ... Thus, accountability mechanisms can be important sources of norms for accountable governance. Notions of accountability as a virtue are *(re)produced, internalised, and, where necessary, adjusted through processes of account giving*.⁴⁵⁸

⁴⁵⁷ This is suggested by Marshall's analysis of the origins of political conventions; Marshall (1984) 11.

⁴⁵⁸ Bovens (2010) 962 (my emphasis). I reject the validity of Bovens' broader project of separating the research agendas of accountability as a 'mechanism' and as a 'virtue'. I argue this approach obscures the possibility of the very approach I propose here, by characterising research about the normative dimension of accountability as commencing with the *researcher* articulating a normative standard, and then judging the decision maker against that standard; Bovens (2010) 947-948. Although I note that forums will not always explicitly articulate the normative standards they have employed; hence, identifying standards involves some interpretation by the researcher.

While it is fruitless to search for the “essence” of accountable behaviour associated with a particular kind of forum,⁴⁵⁹ typologies that identify the normative standards conventionally associated with a given accountability forum can be a useful pointer to the ‘structural discourses’⁴⁶⁰ that a given dialogue is likely to unfold within. Thus, in my case analysis I use a typology based on the kind of accountability forum I am analysing.⁴⁶¹ I look for political, bureaucratic, legal, professional and social accountability forums and point out where they employ subject matters and normative standards that are commonly associated with those forums in their evaluations.

The literature about various *types* of forums provides insights into the fixity of subject matter and normative standards—or what Oliver and Drewry refer to as ‘clarity of criteria’⁴⁶²—associated with each type. At the inflexible end of the spectrum are legal accountability forums, with principles of judicial review and constitutional interpretation generally evolving only slowly over time. Bureaucratic and political accountability forums assessing a subject matter such as financial probity apply fixed standards of probity and then less-

⁴⁵⁹ B Shapiro, ‘Toward a Normative Model of Rational Argumentation for Critical Accounting Discussions’ (1998) 23 *Accounting, Organizations and Society* 641, 641.

⁴⁶⁰ Sinclair 233.

⁴⁶¹ I do not include market accountability as some forum-based typologies do, because the concept of market accountability (as with electoral accountability) relies on the aggregation of preferences rather than an accountability dialogue. As such, I follow the approach of Mulgan (2003) 88 and Black 151. Scott points out that even market accountability, though not premised on discursive account-giving, reflects particular normative standards, such as value for money and efficiency; Scott (2000) 42 & 49.

⁴⁶² Oliver and Drewry 140.

fixed standards of “value for money”.⁴⁶³ Similarly, professional accountability forums will tend to have some fixed and some flexible standards, usually related to particular disciplines (professional ethics) or formal rules and informal norms within an organisation (organisational ethics).⁴⁶⁴

Most political accountability forums fall at the flexible end of the spectrum with political standards being ‘contestable’.⁴⁶⁵ Perhaps even less clarity attaches to the standards that might be applied by social accountability forums. As Kearns points out, the expectations that can underpin the standards being applied by such forums ‘include implicit performance criteria ... that are subjectively interpreted and sometimes even contradictory’⁴⁶⁶, and, moreover, are often ‘vague, idiosyncratic, and constantly in flux’.⁴⁶⁷

The process of constructing what constitutes accountable decision making in a given scenario can involve contestation—whether between the forum and decision maker, or between accountability actors more generally. In the next section, I introduce “accountability politics” as an analytical heuristic for analysing how contestation can manifest itself in accountability processes.

⁴⁶³ Oliver and Drewry 140.

⁴⁶⁴ Kearns 11.

⁴⁶⁵ Day and Klein 26 & 51 and Mashaw (2006) 130. Although the standards associated with particular mechanisms, such as the doctrine of ministerial responsibility, have greater clarity; Oliver (1999) 79.

⁴⁶⁶ Kearns 9.

⁴⁶⁷ Kearns 2.

Section 5: Accountability politics

In this section, I refine the notion of “accountability politics” as an approach for analysing how contestation can occur within accountability processes, or within the broader public sphere. This is the fourth and final step in the development of my framework for analysing accountability interactions. I draw mainly on the work of two authors: Fox, who develops the idea of accountability politics, and Mulgan, who adopts a similar approach to analyse a case set in the same political context as my own Basin Plan case. I also identify a corpus of work that analyses the “politics of accountability”, and use this to suggest how the political context of decision making and a multiple accountability regime can be incorporated into an analysis of accountability processes. In Chapters Four and Five, I further explore how this political context can prompt and influence accountability interactions.

Accountability politics: contesting what constitutes accountable decision making

There is always the potential for contestation within and around accountability dialogues;⁴⁶⁸ but that potential is more likely to be realised and intensified in the “unsettled” contexts that this thesis examines.⁴⁶⁹ In my case analysis, I am concerned with this more extensive contestation. I argue that

⁴⁶⁸ In principle, such contestation should be understood as a corollary to the dialogic nature of public accountability examined in Section Four.

⁴⁶⁹ Olsen 449.

Fox's idea of 'accountability politics'⁴⁷⁰ provides a strong foundation for an analytical approach to guide empirical research of contestation within, and around, accountability processes.

Fox conceptualises accountability politics as 'the arena of conflict over *whether* and *how* those in power are held publicly responsible for their decisions'.⁴⁷¹ Few public decision makers are entirely unaccountable.⁴⁷² In constitutional democracies, routine accountability arrangements tend to mean that, technically, decision makers are permanently accountable, in the sense of being permanently able to be called to account. Fox's insight is that—*notwithstanding the existence of accountability arrangements*—'the construction of public accountability' can involve 'contestation over what *counts* as accountability'.⁴⁷³

Applied to my focus on the construction of what constitutes accountable decision making, accountability politics can be understood to be about contestation over what counts as accountable decision making. Hence, a public decision maker might find themselves subject to accountability demands—or claims that they are "unaccountable"—that contest whether their existing accountability is sufficient. Given the traditions I reviewed in Section Four, this contestation may also encompass contestation about what constitutes *good* decision making.

⁴⁷⁰ Developed in Fox.

⁴⁷¹ Fox 1-2.

⁴⁷² See Fox 8.

⁴⁷³ Fox 32 (my emphasis).

Fox's idea of accountability politics is a significant contribution to the accountability literature because it reminds us that public accountability is not predetermined by whatever accountability framework currently exists in a given context. Institutions and traditions can be contested and altered by accountability actors, or marginalised as not *truly* counting as accountability. Accountability politics assists us to examine these dynamics of contestation within accountability-in-action. In Fox's words, it enables the researcher to 'account for strategic interaction between multiple actors'⁴⁷⁴ and thereby seek to 'capture the dynamics that construct accountability'.⁴⁷⁵

I conceptualise contestation about public accountability as being a departure from the accepted framework for the accountability dialogue—whether the established accountability relationship and arrangement,⁴⁷⁶ or the 'agreed language' of justification between decision maker and forum.⁴⁷⁷ By "accepted" framework, I refer to the existing state of each of the six elements of public accountability (set out in Chapter One) at the beginning of a study. For analytical purposes, these six elements form the *status quo* that may be contested. I suggest this formalisation of Fox's original idea so that accountability politics can also function as an analytical heuristic that delivers greater precision in identifying challenges to what counts as accountability, and how that is being challenged. Most importantly for this thesis, this greater

⁴⁷⁴ Fox 8.

⁴⁷⁵ Fox 27.

⁴⁷⁶ This picks up on Böström and Garsten 4.

⁴⁷⁷ This aspect picks up on Day and Klein 2.

precision will facilitate analysis of how contestation over certain aspects of accountability might be empirically linked to accountability interactions.

However, it is important to examine how accountability politics might function to shape the assessment of public decision makers more broadly. If contestation is ultimately about what constitutes *accountable* decision making then we would expect contestation within and around public accountability processes to be connected to broader debates about what the regulatory goal of decision making is (or should be) and hence what the decision maker is accountable for achieving. I examine this potential contestation in the case analysis.

Analysing where accountability politics occurs: accountability processes and public spheres

Fox develops his concept of accountability politics to explain how accountability operated in rural Mexico, a context in which institutionalised accountability arrangements are weak, or non-existent.⁴⁷⁸ Fox therefore focuses on ‘the public spheres’⁴⁷⁹ in which accountability demands are made, and accepted or rebuffed by decision makers, given ‘the fact that much of the actual contestation over what counts as accountability takes place outside of formal

⁴⁷⁸ Fox 1. The accountability literature Fox engages with is likewise that which discusses newer democracies, especially in Latin America; Fox Chapter 2 and 353-356. However, Fox himself periodically notes where a concept is relevant to developed constitutional democracies, for example, Fox 44.

⁴⁷⁹ Fox 32 & 33.

[accountability] institutions'.⁴⁸⁰ In this context, Fox understands 'the interaction between levels of government as central to accountability politics'.⁴⁸¹ Fox's conclusion is that 'accountability politics is driven largely by voice and power, mediated rather than determined by formal institutions'.⁴⁸²

In constitutional democracies, we might assume that institutionalised accountability processes would be more significant in shaping contestation about public accountability, an assumption I examine in the case study (along with an analysis of the role of different levels of government). I therefore assume that Fox's "arenas of conflict" in which accountability politics can occur may include accountability processes and/or public spheres. My adoption of this approach draws primarily on Mulgan's analysis of the Australian Wheat Board (AWB) 'scandal'.⁴⁸³ Mulgan develops a similar approach to Fox to analyse a case set within a constitutional democracy (Australia),⁴⁸⁴ recognising that contestation may take place in either arena.

In the AWB case, Mulgan argues that the presence of an 'arena of political contest' in which 'hostile critics engaged in adversarial politics with a vested

⁴⁸⁰ Fox 32.

⁴⁸¹ Fox 34 & 45.

⁴⁸² Fox 33.

⁴⁸³ Mulgan (2009) 334. This scandal arguably prompted the kind of "unsettled" context that Olsen describes; Olsen 452.

⁴⁸⁴ Mulgan does not cite Fox. Mulgan's case analysis focuses on the similarities and differences in accountability in the domestic and international spheres, with the 'comparative weakness' of accountability institutions in the international context being the main variation; Mulgan (2009) 334. Dooren also recognises in a constitutional democratic context that 'individuals or groups (as citizens, professionals or members of interest groups) also hold governments to account directly in a larger societal setting'; Dooren and Willems 510 (my emphasis).

interest in getting dirt on AWB' was important to ensuring that AWB's conduct came to light.⁴⁸⁵ The issue then became whether, and how, the Australian Government would be held to account for what they knew about AWB's conduct.⁴⁸⁶ Mulgan argues that the sufficiency of parliamentary accountability arrangements was contested primarily in the public sphere, through 'media investigations and political dialogue' and 'debate'.⁴⁸⁷ This resulted in the establishment of an additional accountability forum—a Royal Commission—that ensured that decision makers were (partially) called to account through accountability processes.

Mulgan's approach also shows the value in analysing the interplay between both arenas. Mulgan reveals that some accountability demands made in the public sphere were successfully rebuffed by the Australian Government, especially through their control over the terms of reference of the Royal Commission.⁴⁸⁸ This underscores that *how* an actor is called to account, particularly when that actor is a government, can depend on the power of that actor to manipulate the multiple accountability regimes they face.

Analytically, accountability politics also avoids the need to reframe all accountability related actions within the public sphere as accountability

⁴⁸⁵ These actors included international commercial competitors of AWB as well as the Opposition within Australia; Mulgan (2009) 347.

⁴⁸⁶ The case involved a recently privatised national wheat exporter contravening the United Nations sanctions on Iraq. Oversight agencies at an international and national level failed to investigate indications of this illegality. It remains unclear what the Australian Government knew and when; Mulgan (2009) 342 & 346.

⁴⁸⁷ Mulgan (2009) 346 & 348.

⁴⁸⁸ Mulgan (2009) 342.

processes, while recognising that what takes place within that public sphere more broadly can be important for how public accountability operates. I argue that this is a preferable analytical approach to using the label “social” accountability to describe the general accountability role played by civil society and independent media in the public sphere. While civil society actors may forge social accountability relationships with public decision makers in some cases, as I argued in Section Three that not all actions of such actors should automatically be analysed as the actions of “forums”. As such, incorporating accountability politics into my analytical framework is consistent with my approach to typologies of accountability. Fox describes accountability politics as an ‘alternative complementary [analytical] umbrella’⁴⁸⁹ to typologies, one which does not preclude using types to classify in an empirical study but does not place undue reliance on them as an analytical framework.

Analysing the role that actors play in accountability politics

The concept of accountability politics also prompts us to use a political lens that asks how different actors might construct a decision maker’s accountability to further their own interests or ideologies. I assume that actors may engage in accountability processes, or make accountability demands of decision makers in the public sphere, as part of their broader engagement in (political) decision-making processes.⁴⁹⁰ Few accountability actors participate

⁴⁸⁹ Fox 33.

⁴⁹⁰ This is an analytical assumption, and is articulated in the spirit of recognising that ‘any social scientific explanation involves assumptions about why people do what they do or think what they think, a matter of intentions and motivations’; Gerring 70.

in accountability processes solely—or even mainly—because they are concerned about public accountability *per se*.⁴⁹¹ Part of understanding the political dimension of public accountability is to explicitly examine when actors, especially forums, may seek to construct the accountability of the decision maker so as to steer the substance of (as opposed to the propriety or rigour of) subsequent decision making.⁴⁹²

This is to treat actors as reflexive beings capable of strategic action; but it is not to treat them simply as cynical operators.⁴⁹³ As Black argues, ‘those seeking to build accountability relationships that will validate a particular form of normative claim (e.g. constitutional) will contest accountability relationships which seek to validate a conflicting normative claim (e.g. functional)’.⁴⁹⁴ Mulgan’s analytical approach similarly emphasises how the interests actors have in accountability processes can influence the focus of contestation,⁴⁹⁵ and whether an actor’s interest lies in discrediting a decision maker.⁴⁹⁶

⁴⁹¹ The exception is probably “watch dog” accountability forums, such as auditors-general.

⁴⁹² On the non-neutrality of actors see Fisher (2004) 514.

⁴⁹³ As such, my approach differs from Flinders’ influential critique of what he terms ‘the politics of accountability’ in constitutional democracies. Flinders uses this phrase in several of his works, although I draw on his most recent contribution on the subject, because it is framed as a challenge to accountability scholarship more generally; Flinders (2011). For responses to this article see Dubnick (2011) and Tetlock (2011). I do not adopt Flinders’ “politics of accountability” approach. Despite its *prima facie* attractiveness for the highly controversial Basin Plan process, Flinders’ critique operates on a level much more general than is useful for a particular accountability analysis.

⁴⁹⁴ Black 149.

⁴⁹⁵ Mulgan (2009) 342.

⁴⁹⁶ Mulgan (2009) 347.

Various accountability scholars have argued for the need to understand the ‘politics of accountability’ in order to achieve a context-sensitive understanding of public accountability.⁴⁹⁷ This could translate to examining the ‘politics of political order’ more generally;⁴⁹⁸ to examining the kind of politics attached to decision making in a given case, such as “environmental politics”;⁴⁹⁹ or, to examining the ‘relations of power and control’ within a given ‘policy framework’.⁵⁰⁰

Examining the interests, ideas and power of all accountability actors supplements the traditional, more mechanistic focus on the capacities of various accountability forums. Operationalising this approach could include asking questions such as: What interest does a given actor have in constructing the decision maker’s accountability with reference to one normative standard rather than another, or making this decision maker accountable for one subject matter or another? What interest does a given actor have ensuring that the decision maker is obliged to account to Forum A rather than Forum B? What power does a given actor have to influence how the accountability of a decision maker is constructed? I also adopt Strom’s useful classification of actors as ‘veto

⁴⁹⁷ Newell and Wheeler 2; Keohane 142; and, O’Kelly 256.

⁴⁹⁸ Olsen 448.

⁴⁹⁹ Manring 71. Also see Chan and Pattberg.

⁵⁰⁰ See Fitz 239.

players, decisive players, and merely powerful players' throughout the accountability analysis.⁵⁰¹

However, the accountability analysis should not be reduced to simply an analysis of who has power in a given decision making context. Public accountability processes can also involve the powerless calling the powerful to account, and, can potentially transform power relations. As Fox concludes: 'constructing accountability involves challenging the state, but also transforms the state'.⁵⁰²

Conclusion

In this chapter, I argued that accountability interactions warrant further research as a distinct and potentially significant aspect of how multiple accountability regimes operate in constitutional democracies. In particular, I argue that focusing on interactions between forums allows us to scrutinise the validity of the concern in existing literature that multiple accountability regimes result in decision maker's being subject to diverging demands and evaluations by different forums. In order to facilitate such a research focus, I developed an analytical framework for examining interactions between forums based on a focused and critical review of relevant accountability literature.

⁵⁰¹ K Strom, W Muller and T Bergma, 'Challenges to Parliamentary Democracy' in K Strom, W Muller and T Bergma (eds), *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press 2003) 739.

⁵⁰² Fox 2.

This analytical framework has four main parts. The first part is a conception of accountability interactions, which encompasses a broader and archetypal manifestation of interactions and a step-based methodological approach for empirically examining these manifestations. The second part is a series of methodological assumptions about what aspects of accountability are endogenous to accountability processes, and can therefore be changed within those processes.

The third part of my analytical framework is to identify an approach to examining how the meaning of accountable decision making is forged through accountability dialogues. This approach draws on the analytical parsing of accountability processes I undertook in Chapter One in order to identify the various potential inputs into the subject matter and normative standards elements of accountability. The fourth and final part is to refine Fox's idea of accountability politics into an analytical approach for examining the contestation about what counts as accountable decision making. Incorporated into this approach are ways of examining the political context of an accountability regime and the actors within that regime. Given the contextually bound nature of accountability, and particularly of conceptions of accountable (and good) decision making, I argue that understanding this broader context is essential.

In this chapter, I also continue my task of identifying the traditions within accountability literature that this thesis builds on in order to be transparent about how this thesis relates to the broader field of accountability studies.

Specifically, I identify that my focus on accountability *processes* builds on the accountability-as-answerability tradition. I also identify that my focus on the construction of public accountability—or more particularly of accountable decision making—builds on traditions that emphasise that accountability is a dialogue conducted with reference to reason and conceptions of the “good”.

In the next chapter, I begin my empirical case study analysis by setting out the broader political, legal and regulatory context in which the multiple accountability regime operated in the Murray-Darling Basin Plan case. While I do not systematically apply the analytical framework developed in this chapter until Chapters Four and Five, in the following chapter I build the foundation for my subsequent analysis by identifying the interests and ideologies of actors and the distribution of power and information between actors. I also identify the tensions within the political debates around the Basin Plan, and the manifold regulatory objectives that the two decision makers were given responsibility to achieve.

Chapter Three: The Murray-Darling Basin Plan Case (2008-2012)

Introduction

In this chapter, I introduce the case of the Murray-Darling Basin Plan. The development and adoption of the Basin Plan was a major exercise of environmental regulation in Australia from 2008 to 2012 (see timeline at Appendix C). The Basin Plan's development became a very complex and contentious regulatory exercise, with both decision makers—an independent expert agency called the Murray-Darling Basin Authority (“the Authority”) and the Commonwealth Minister for Water (“the Minister”)—being called to account by multiple accountability forums.

In this chapter, I examine how the controversy that became characteristic of the decision making in this case originated in the political, legal and regulatory context in which the Basin Plan was developed. I thereby lay the foundation for the accountability analysis in the subsequent chapters, where I examine how the public accountability of both decision makers was constructed through a multiple accountability regime characterised by accountability politics. In order to gain a regime-level perspective of the dynamics of the multiple accountability regimes I analyse, it is important to understand the political debates around the decision making and how those debates might contribute to different constructions of accountable decision making.

I analyse the Basin Plan's development as a regulatory exercise that involved significant political choices but was framed as an exercise in technocratic decision making. I show how the federal context and the entrenched political power of irrigation interests created an aspiration to design a regulatory process that would be evidence-based and insulated from politics. Yet this aspiration was undermined, I argue, by the failure of elected governments to explicitly establish a clear and democratically legitimated legal framework for the key decisions underpinning the Basin Plan. By negating the political dimension of the Basin Plan's development in their design of the Basin Plan process, governments and Parliament created the conditions for the intense controversy around decision making. This controversy contributed to the political context becoming "unsettled" mid-way through the process, as I examine in Chapter Four.

This chapter establishes what the Basin Plan is and why the ongoing over-allocation of water from the Murray-Darling Basin and failings of inter-jurisdictional regulation made the Plan necessary. I identify the key decisions and the key decision makers. This forms the basic analytical foundation for the accountability analysis in subsequent chapters and constitutes much of the "status quo" that is later contested. I map the interests, ideologies and power of the key actors, which underpin my subsequent analysis of accountability actors operating within the multiple accountability regime in the Basin Plan case given that many of these actors became involved in accountability processes. These include the Commonwealth Government and Parliamentarians, the

Basin States, and the Basin communities. I finish this Chapter by explaining the failure to establish a clear legislative framework for decision making through the *Water Act 2007 (Cth)*. This failure was due to a weak political consensus about how to prioritise the different interests in the Basin's resources and the ongoing significance of the federal context of the case. The fragility of consensus, in their case was integral to the subsequent politicisation of the decision making and accountability processes in the Basin Plan case.

Section 1: What is the Basin Plan and why was it necessary?

Water is very valuable in dry and drought-prone Australia. The Basin Plan, once implemented, is intended to sustainably regulate Australia's most significant river system, the Murray-Darling Basin. The Murray-Darling Basin covers over a million square kilometres of Eastern Australia, the size of France and Spain combined. It supports diverse ecosystems and a variety of mainly agricultural communities, including directly supporting three million people and functioning as Australia's "food bowl".⁵⁰³

⁵⁰³ For an overview of its natural and human history see J Williams and Goss K, 'Our Difficult Bequest: The Collision of Biophysical and Economic Reality, Cultural Values and Public Policy' in D Connell (ed), *Uncharted Waters* (Murray-Darling Basin Commission 2002). The Basin produces A\$15 billion annually, or 39% of Australia's total agricultural production; MDBA, *Guide to the Proposed Basin Plan: Volume 1* (Australian Government, Canberra, 2010) 13.

The Murray-Darling Basin includes 24 major rivers, with hundreds of tributaries, and extensive groundwater systems;⁵⁰⁴ as a result, the Basin Plan is the biggest exercise of river regulation seen anywhere in the world.⁵⁰⁵ The Basin crosses four States (Queensland, New South Wales (NSW), Victoria and South Australia) and one territory (the Australian Capital Territory),⁵⁰⁶ where the national capital, Canberra, is located. (See map at Appendix D). While the Basin is a connected hydrological system, there are different levels of connectivity between its many rivers and between the rivers and groundwater systems. The Northern Basin (including the Darling River) covers Queensland and northern NSW and only contributes a small amount of water to the Southern Basin⁵⁰⁷ (including the Murray River), which covers southern NSW, Victoria and South Australia and sees most of its water come from the Victorian and NSW Alps.⁵⁰⁸ Hence, the “upstream” States are Queensland, NSW and Victoria and the “downstream” State—entirely reliant on water crossing its state borders—is South Australia.

⁵⁰⁴ P Crabb, *Murray-Darling Basin Resources* (Canberra Murray Darling Basin Commission 1987), 2.

⁵⁰⁵ MDBA, *Guide*, 37.

⁵⁰⁶ Territories have a different constitutional status to States, and the Commonwealth can compel Territories. This power was not exercised during the Basin Plan process and it is Commonwealth policy not to do so; *Commonwealth of Australia Constitution Act* s122.

⁵⁰⁷ 17 per cent. This is contrary to the popular myth that the problems of South Australia begin with Queensland farmers taking too much water.

⁵⁰⁸ The Basin’s hydrology substantially underpins the different bargaining positions of each state. The major natural in-flows are fed by snow falls in the Victorian Alps, with some water also transferred artificially from the NSW Alps. By the time the Murray reaches South Australia, it is entirely reliant on flows from rivers in upstream states.

Why was the Basin Plan necessary?

The Basin Plan was necessary because the Basin's water had been historically over-allocated⁵⁰⁹ to water users (mainly farmers) and more water was needed to support the Basin's eco-systems and the "eco-system services" it provided.⁵¹⁰ This over-allocation, and the environmental devastation that it created, was the result of multiple, conflicting interests in the Basin's resources following European settlement; a mismatch between Australia's unique natural environment and imported farming practices; and, the difficulties of collaborating regulation given the decentralised power to regulate the Basin within Australia's federal system.

Conflicting interests in the Basin

From the nineteenth century onwards, creating a food bowl and other industries in the Basin was central to Australia's European settlement.⁵¹¹ Each State government prioritised economic development in its own State above the interests of other States. Even prior to the building of major dams, diversions

⁵⁰⁹ "Over-allocation" is repeatedly referred to in the document that launched the process: The Hon John Howard MP 'A National Plan for Water Security' (Australia Day Address, Canberra, January 2007) 1, 3 & 4. Also see Water Act 2007 ss21(2)(a) & (5). Over-allocation is broadly defined as extractions which exceed environmentally sustainable levels; COAG, *Intergovernmental Agreement on a National Water Initiative* (2004) Schedule B. There is no agreed definition of what this means; A Gardner, 'Water Reform and the Federal System' in P Kildea, A Lynch and G Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (The Federation Press 2012) 280.

⁵¹⁰ Howard (2007) 10-11 and Water Act 2007 s21(2). A pre-existing principle recognised the environment as a legitimate water user; *National Water Initiative* (2004) paragraph 23iii & 35.

⁵¹¹ Of course, this settlement was premised on the dispossession of traditional custodians. The relationship of traditional custodians to the Basin has received increased attention during the Basin Plan's development; J Weir, *Water Planning and Dispossession* in D Connell and

J Quiggin *Basin Futures: Water Reform in the Murray-Darling Basin* (ANU ePress 2011). For an excellent timeline of development in the MDB see MDBA *Guide* 25. On this history see D Connell, *Water Politics in the Murray-Darling Basin* (The Federation Press 2007) 14 and Crabb 100.

by Victoria and NSW were significant enough to affect downstream South Australia's shipping industry in the nineteenth century.⁵¹²

Throughout the twentieth century, State governments continued their economic development of the Basin's resources apace, despite mounting evidence of environmental problems from the 1960s.⁵¹³ The ecological status of the Basin as a connected natural system was a secondary concern for State Governments when allocating water.⁵¹⁴ At the time of the Basin Plan's inception, nearly half of the available surface water in the Basin was being diverted, with 83 per cent going to agriculture,⁵¹⁵ which was 'a very high relative level of use'.⁵¹⁶

One of the reasons why addressing over-allocation is so politically fraught is that government actions, particularly at a State level, were central to creating the problem: this is not primarily a case of government regulation addressing the over-consumption of private individuals.⁵¹⁷ Government was essential to the development of the Murray-Darling because government backing was needed

⁵¹² Connell (2007) 14.

⁵¹³ When salinity problems emerged; Connell (2007) 105-108.

⁵¹⁴ By 1965, consumptive water use was exceeding sustainable diversions, and diversions increased extensively in the 1970s and 1980s; Wentworth Group of Concerned Scientists and others, *Submission to Senate inquiry into the urgent provision of water to the Coorong and Lower Lakes* (The Senate 2008) 7.

⁵¹⁵ MDBA *Guide* 21. The Basin Plan was always about the trade-off between production and the environment, as water for 'critical human needs' accounts for only around 2% of use; Water Amendment Act 2008 86A & 86B.

⁵¹⁶ CSIRO, *Water availability in the Murray-Darling Basin: A Report from CSIRO to the Australian Government* (CSIRO 2008) 28. Or about 11,000GL of a total 31,800GL. Also see MDBA *Guide* 15 & 26.

⁵¹⁷ This distinction is made clear in Senator Simon Birmingham, *Disallowance Speech – Murray Darling Basin Plan* (The Senate, 28 November 2012).

to build the vast network of dams, weirs and irrigation channels that irrigated farming relies upon. The water entitlements allocated to farmers by State governments, often for only nominal fees in order to stimulate development,⁵¹⁸ were essentially a promise by those governments to maintain a secure water supply through irrigation infrastructure.⁵¹⁹

The Basin's biophysical limits and European farming

Irrespective of natural conditions, over-allocation of the Basin's water created conditions of drought much of the time, especially in the lower Basin.⁵²⁰ The re-engineering of the Basin to support irrigated agriculture further compromised its water quality and ecosystems. Extensive irrigation systems were needed to water crops that evolved in the Northern hemisphere but which were now being grown in a very different environment. The southern Murray-Darling had to be re-engineered in order to deliver reliable water at the times that the crops needed it.

The Murray-Darling is one of the driest catchments in the world; rain comes in Winter and Spring—if it comes at all—and produces minimal run-off due to high evaporation rates.⁵²¹ Rain is irregular in this 'land of drought and

⁵¹⁸ L Crase, 'An Introduction to Australian Water Policy' in Lin Crase (ed), *Water policy in Australia: The Impact of Change and Uncertainty* (Resources for the Future 2008) 2.

⁵¹⁹ Thus governments underwrote the development of Basin communities; R Kingsford, 'Ecological Impacts of Dams, Water Diversions and River Management on Floodplain Wetlands in Australia' (2000) 25 *Austral Ecology* 109, 110. In the northern Basin, irrigation has been developed privately, although still with government-granted licences; MDBA, *The Socio-Economic Implications of the Proposed Basin Plan* (MDBA 2012) 37.

⁵²⁰ Crabb 44 and S Green, 'Surface tension' *The Age* (Melbourne, 6 August 2011).

⁵²¹ Connell 10. It is estimated that 6 per cent of average rainfall within the Basin runs off into rivers, with only half again available for consumptive use; MDBA *Guide* 15. This compares with

flooding rains⁵²² and so rivers vary widely between minimum and maximum flows,⁵²³ spilling over into vast wetlands and flood plains when water is abundant, but on average producing low levels of run-off.⁵²⁴ Infrastructure often cuts rivers off from their flood plains and wetlands, where water is filtered and enriched before it returns to the main channel. When the Basin Plan process commenced, the mouth of the Murray was closed around 40 per cent of the time, compared with one per cent prior to development, depriving the river of its ability to flush out pollutants, including Australia's enormous reserves of salt.⁵²⁵

Australia has a more fragile natural environment than many of the other continents where river systems are over-allocated. Consumptive practices that are relatively sustainable elsewhere in the world have proved to be exceedingly, and often irreversibly, damaging in Australia.⁵²⁶ Beyond the loss of environmentally iconic sites and species, the Basin's ecological functions that supported ongoing human activities were rapidly diminishing. Since European

an average run-off rate of 39% in Europe and 52% in North America; A Wahliquist, *Thirsty Country: Options for Australia* (Allen and Unwin 2008) 8 & 15.

⁵²² This line comes from an iconic Australian poem *My Country*, by Dorothea MacKellar; it was used as the title for the major parliamentary report on the process; House of Representatives Standing Committee on Regional Australia, *Of Drought and Flooding Rains: Inquiry into the Impact of the Guide to the Murray-Darling Basin Plan* (2011). Alternating between more extreme droughts and floods is likely to be more common in the future due to climate change. For example, the Millennium Drought was followed by the largest annual rainfall on record in 2010/2011; CSIRO, *Climate and Water Availability in South-East Australia: A Synthesis of Findings from Phase 2 of the South Eastern Australian Climate Initiative* (2012) 5.

⁵²³ When compared with other great river systems of the world; Crabb 7. This is because rainfall tracks the multi-year *El Nino* (less rain) and *La Nina* (more rain) Southern Oscillation cycle.

⁵²⁴ R Letcher and S Powell, 'The Hydrological Setting' in L Crase (ed) 19.

⁵²⁵ MDBA *Guide* 30.

⁵²⁶ Williams 27.

settlement, a fundamental tension has existed in the Murray-Darling Basin between people's aspirations for using the Basin's resources and the unique biophysical constraints of this river system.⁵²⁷ A Basin Plan that took those biophysical constraints as its foundation was necessary because, by the beginning of the twenty-first century, the tension between aspirations and reality had become too great. That in turn required a Basin Plan which overcame the century-long institutional problem of six different governments regulating a connected natural resource.

State-based regulation within Australia's federal system

In Australia, water is a gift for governments to give—specifically State governments. Those governments assumed ownership over water in the late 19th century (superseding the preexisting common law framework) and began to regulate access to water through issuing water licences.⁵²⁸ Over-allocation in the Murray-Darling Basin can be understood as an example of the over-exploitation of 'open access resources which lack any effective overarching institutional framework able to control and regulate the behaviour of would-be

⁵²⁷ This framing of the problem comes from John Williams, Member of Wentworth Group of Concerned Scientists, interview by author, Canberra, 3 November 2011.

⁵²⁸ J McKay, 'The Legal Frameworks of Australian Water' in L Crase (ed) 45.

users *as a group*'.⁵²⁹ In this case, the lack of an effective institutional framework stems from 'ongoing dysfunctional federalism'.⁵³⁰

All Basin States have historically over-allocated water, albeit with varying levels of culpability.⁵³¹ Interstate disputes over the Basin were a major source of conflict prior to the Australian colonies federating in 1901.⁵³² Yet federation failed to produce the desired cooperative regulation of the Basin because each State retained constitutional responsibility for regulating the Basin within its borders, and therefore had a veto power over any national schemes. Unlike comparable countries such as the United States, Australia's regulatory tradition around water resources treats access and distribution as a matter of public

⁵²⁹ D Connell, 'Water Reform and the Federal System in the Murray-Darling Basin' (2011) 25 *Water Resources Management* 3993, 3998 (my emphasis). Also see L Bouilly and K Maywald, *Basin Bookends, the Community Perspective* in Connell and Quiggin (eds) 104. While the Basin sits within a single country, it involves some of the difficulties of regulating an area too large for local norms to apply; E Ostrom and others, 'Revisiting the Commons: Local Lessons, Global Challenges' (1999) 284 *Science's Compass Review* 278.

⁵³⁰ Wallis and Ison 4082. C.f. J Briscoe, 'Submission to the Standing Committee on Legal and Constitutional Affairs of the Senate' (The Senate, 2011).

⁵³¹ Crase 5 and Connel (2011) 3997. Historically, NSW over-allocated more than Victoria, and both over-allocated more than South Australia, which by necessity has capped diversions since the 1970s. Queensland had historically low levels of diversions, but over-allocated in the 1990s well after the need to reduce diversions was recognised. Justice based arguments about who should have to give up water, particularly from South Australia, are premised on this varying historical culpability for over-allocation but are complicated by the fact that no State is without blame. See, for example, Paul Caica MP, *Covering Letter: South Australian Government Submission on the Draft Basin Plan* (MDBA 2012).

⁵³² On this early history see A Pye, 'Water Trading Along the Murray: A South Australian Perspective' (2006) 23 *Environmental and Planning Law Journal* 131 and S Clark, 'The Murray-Darling Basin: Divided Power, Cooperative Solutions' (2003) 22 *Australian Resources and Energy Law Journal* 5.

policy;⁵³³ outcomes are a product of inter-State negotiation (and bureaucratic planning)⁵³⁴ rather than a determination of legal rights.⁵³⁵

Despite Australia's status as a world leader in water management,⁵³⁶ successive attempts at redressing over-allocation through inter-governmental agreement failed.⁵³⁷ For decades, governments have collectively failed to overcome intractable disputes between the five sub-national jurisdictions that legally controlled sections of the Basin, as well as the many competing interests in the Basin's resources.⁵³⁸ The collective responsibility for this regulation also undermined clear lines of public accountability.⁵³⁹ While the Basin Plan process was meant to establish clear accountability for decision making, this backdrop of collective failure meant that historical arguments about which State/government/community/interest group was to blame for over-allocation would continue to complicate discussions about how to address over-allocation.

⁵³³ Connell (2007) 48.

⁵³⁴ Crase 9.

⁵³⁵ D Fisher, 'Water law, the High Court and Techniques of Judicial Reasoning' (2010) 27 *Environmental and Planning Law Journal* 85, 97.

⁵³⁶ Crase 2. For this reason, Australian water regulation tends to be internationally significant; *Briscoe* 2.

⁵³⁷ This complex history is the subject of Connell (2007).

⁵³⁸ The Basin Plan process is the eighth major attempt by Australian governments to redress over-allocation; D Connell, *The Role of the Commonwealth Environmental Water Holder* in Connell and Quiggin (eds) 327. On the Basin Plan's significance given this history see Gardner 283.

⁵³⁹ The public accountability "regime" of this period could probably be described as a 'network accountability' regime because of the lack of centralised and hierarchical power; Mulgan (2003) 189. On the problems this can cause see Stewart 452.

The genesis of the Basin Plan

A devastating drought known as the Millennium Drought,⁵⁴⁰ which lasted from 1997 to 2010, then starkly exposed tensions between upstream and downstream interests, and between human consumption and environmental sustainability. Between 1999 and 2009 there was a 40 per cent decline in water availability.⁵⁴¹ Coming on top of decades of over-use of water for agriculture, this drought threatened tens of thousands of wetlands and river gum forests throughout the Basin. Many of these wetlands and forests are national environmental icons and some are internationally protected. Ecological collapse was imminent, if not already taking place, in various Basin ecosystems.⁵⁴² Many farmers struggled to maintain their farms.⁵⁴³

Against this backdrop, the Prime Minister, John Howard, used his 2007 Australia Day address to announce what would become the Murray-Darling Basin Plan. Australians were told by their Prime Minister that ‘in the face of

⁵⁴⁰ The extent of this drought was unprecedented; CSIRO (2008) 5.

⁵⁴¹ MDBA *Guide* 30.

⁵⁴² The Authority’s 2010 audit of the Basin concluded that 20 of the Basin’s 23 major river valleys were in ‘poor to very poor ecological condition’; *Guide* 13 & 18-19. It also found that many key environmental sites had already been irretrievably ‘lost’, including 90 per cent of the Gwydir Wetlands, 75 per cent of the wetlands of the Lower Murrumbidgee floodplain and 40-50 per cent of the Macquarie Marshes; *Guide* 31. Biodiversity had also been severely compromised; R Kingsford and R Thomas, ‘Destruction of Wetlands and Waterbird Populations by Dams and Irrigation on the Murrumbidgee River in Arid Australia’ (2004) 34 *Environmental Management* 383.

⁵⁴³ See Wentworth Group (2008).

this protracted drought and the prospect of long-term climate change we need a radical and permanent change in our water management practices'.⁵⁴⁴

The Australian (Commonwealth) Government would assume responsibility for developing a plan that would sustainably regulate the Basin and would be implemented by the States.⁵⁴⁵ The heart of the Basin Plan was an enforceable, evidence-based cap on water extraction, which would be set for the entire Basin⁵⁴⁶ and then implemented by spending billions of dollars on recovering water that had been allocated by governments in excess of that cap.⁵⁴⁷ This would involve the world's biggest market-based environmental water recovery program.⁵⁴⁸ The water recovered would be redirected to support environmental sites and ecosystem functions throughout the Basin.⁵⁴⁹

⁵⁴⁴ Howard (2007) Foreword. There is significant evidence that climate change is having, and will have, a major impact on the Basin, much of which is in arid or semi-arid climatic zones; CSIRO (2008) and D Adamson, T Mallawaarachchi and J Quiggin, 'Declining Inflows and More Frequent Droughts in the Murray-Darling Basin: Climate Change, Impacts and Adaptation' (2009) 53 *Australian Journal of Agricultural and Resource Economics* 345.

⁵⁴⁵ It was not direct Commonwealth regulation of the Basin, which would have been 'inconsistent with the basic tenets of our federal system'; Gardner 270. Instead, the Commonwealth set the broad regulatory standards that State water plans would then need to comply with; Water Act 2007 s25.

⁵⁴⁶ As was envisaged in Australia's inter-governmental framework for water regulation; *National Water Initiative* paragraph 23(2).

⁵⁴⁷ Howard (2011) 12-13. A key difference between the Basin Plan and previous regulatory efforts was the significant funding that would be available for implementation. Eventually A\$11 billion was allocated to water recovery between 2008-2024; Senator Sarah Hanson-Young, *Disallowance Speech: Murray Darling Basin Plan* (The Senate, 28 November 2012).

⁵⁴⁸ Marsden Jacob Associates, *Survey of Water Entitlement Sellers under the Restoring the Balance in the Murray-Darling Basin Program* (Australian Government 2012) i.

⁵⁴⁹ On the ecological difficulties of reintroducing elements of natural flow to the Basin see A Foerster, 'Managing and Protecting Environmental Water: Lessons from the Gwydir for Ecological Sustainable Water Management in the Murray Darling Basin' (2008) 25 *Environmental and Planning Law Journal* 130, 41. On the limitations of the purchase of water rights as a means of restoring environmental flow see M Young and J McColl, 'Robust Reform:

The Basin Plan's premise was that only a centralised, expert and independent regulatory process could address the long-standing political dynamics that had encouraged over-allocation originally and thwarted subsequent attempts to address it. The fundamental change that the Basin Plan was intended to create was that, for the first time, the Murray-Darling Basin would be regulated nationally as a connected natural system, without reference to State borders.

Equally fundamentally, limits on water extraction were to be based on scientific assessments of environmental sustainability. Previously, "limits" were based on political assessments of what Basin communities would tolerate, given that the economic viability of some of those communities was premised on the over-allocation of water. This shift to sustainable regulation of the Basin was to be permanent because it was intended to be premised on a renegotiation of the federal compact pertaining to inter-governmental co-ordination in the Murray-Darling Basin.⁵⁵⁰

The Commonwealth has played an increasing role in water regulation since the 1980s,⁵⁵¹ but has never previously attempted to develop an enforceable regulatory regime like the Basin Plan. This is partly because under the

The Case for a New Water Entitlement System for Australia' (2003) 36 *The Australian Economic Review* 225.

⁵⁵⁰ Gardner 269. This replaced the model of 'cooperative federalism' in the Basin, which had operated from the 1890s to 2000s, and relied on inter-state negotiation with the Commonwealth playing some sort of facilitative role; Connell(2007) 48. On inter-governmental coordination see P Kildea and G Williams, 'The Constitution and the Management of Water in Australia's Rivers' (2010) 32 *Sydney Law Review* 595, 602.

⁵⁵¹ G Carney and A Gardner, 'The Constitutional Framework for Water Resources Management' in A Gardner, R Bartlett and J Grey (eds), *Water Resources Law* (LexisNexis 2009).

Australian Constitution there is no specific constitutional head of power that would provide the basis for the whole Basin Plan (although the Commonwealth could regulate aspects of the Basin under other heads of power).⁵⁵² The Australian Constitution leaves the constitutional power to comprehensively regulate the Basin with the States. Commonwealth actions that impinge on such areas ‘are in truth intrusions into the area of responsibility left to the States by the Constitution’;⁵⁵³ as such, they give a State standing to challenge the Commonwealth in Australia’s constitutional court.⁵⁵⁴ The Commonwealth’s only option for gaining the necessary power to develop the Basin Plan arose from State legislatures referring “matters” to the Commonwealth,⁵⁵⁵ which

⁵⁵² Australian Government Solicitory, *Swimming in New Waters: Recent Reforms to Australian Water Law* (2009) 18, cited in Legal and Constitutional Affairs References Committee (Senate), *A Balancing Act: Provisions of the Water Act 2007* (The Senate 2011) 22. Neither of the two constitutional provisions referring to water were used to enact the *Water Act 2007*, as both are framed around the pre-Federation conflict between Basin States. Section 98 was intended to protect South Australia’s major interest in the Basin in the 1890s—shipping—prior to railways superseding river boats within a decade; Kildea and Williams 601. Section 100 was intended to protect New South Wales and Victoria’s agricultural interests given s98, providing that the Commonwealth shall not ‘abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation’; Commonwealth of Australia Constitution Act s100. Note the original meaning of “conservation” was conserving water in dams; C Hammer *The River: A Journey Through the Murray-Darling Basin* (Melbourne University Press 2008) 222. Connell argues that a ‘legal consensus’ exists that s100 prevents the Commonwealth from regulating in a way that impinges on irrigation (but that this was contrary to the intention at Federation); Connell (2007) 48. This is supported by the single judicial interpretation of s100; *Commonwealth v Tasmania* (1983) 158 CLR 1. Nonetheless, Kildea and Williams argue that s100 might cease to protect State rights if water use could be established to be ‘unreasonable’; Kildea and Williams 610. Likewise, Carney and Gardner conclude it is ‘arguable’ that a Commonwealth attempt to regulate for environmental sustainability would be found to ‘provide for the “reasonable use” of the river water’ under s100; Carney and Gardner 93.

⁵⁵³ Mason J, *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 401.

⁵⁵⁴ Gummow and Bell JJ (French CJ, Hayne, Crennan and Keifel JJ expressly agreeing), *Williams v Commonwealth* (2012) 86 ALR 713; [2012] HCA 23 at [112].

⁵⁵⁵ Under 51(xxxvii) of the Constitution.

effects a ‘transfer’ of the States’ ‘legislative capacity’ with respect to a particular issue.⁵⁵⁶

The premise of the Basin Plan, therefore, was that Basin State governments would agree to trade their constitutional powers to regulate the Basin in return for the Commonwealth assuming the substantial financial (and political) costs of retrieving the water that scientists had consistently concluded was needed for environmental sustainability,⁵⁵⁷ and therefore needed for the long-term viability of all the human interests in the Basin. The unstated assumption was that the Commonwealth would be less beholden than Basin States to the entrenched political power of irrigation interests and might be able to make politically fraught but essential decisions in the national interest. The optimism that accompanied the Basin Plan’s announcement stemmed from the assumption that a confluence of legal power, financial resources and bipartisan political support⁵⁵⁸ were finally coming together to regulate this vital natural resource.

The failure of the many previous attempts to address over-allocation pointed to the sustainable regulation of the Murray-Darling Basin being a complex, controversial, expensive, and politically fraught undertaking. Yet at the outset of the Basin Plan’s development there was tremendous optimism

⁵⁵⁶ D Fisher, *The Law and Governance of Water Resources: The Challenge of Sustainability* (Edward Elgar 2009) 156.

⁵⁵⁷ This link is made implicitly and explicitly in Howard (2007) 5 and B McCormick, *Budget Review 2007-2008* (Australian Parliamentary Library 2007) 103.

⁵⁵⁸ Both major parties at the 2007 and 2010 elections committed to supporting the Basin Plan process, including funding all necessary water recovery; Gardner 269.

that these problems and political dynamics would be overcome. In the next section I identify what was required to develop such a centralised regulatory approach, before turning to why the initial optimism for the Basin Plan proved misplaced.

Section 2: What were the key decisions and who were the decision makers?

In this section, I identify two key decisions⁵⁵⁹ that were required to develop the Basin Plan and begin to show why both decisions involved substantial political choices. I then identify how two decision makers—an independent expert agency called the Murray-Darling Basin Authority⁵⁶⁰ and the Commonwealth Minister for Water⁵⁶¹—were delegated responsibility for these two decisions. I argue that regulatory process was designed to try to politically insulate the Basin Plan’s development. This insulation was incorporated into the

⁵⁵⁹ This is reflected in the analysis of, for example, Gardner 284. While these were the key decisions to develop the Basin Plan, other reforms made at the same time may prove to be of longer-term significance if the Basin Plan is never (properly) implemented, as occurred with the *National Water Initiative*; National Water Commission, *The National Water Initiative - Securing Australia's Water Future: 2011 Assessment* (National Water Commission 2011) 4.

⁵⁶⁰ I treat the Authority as a unitary actor and do not distinguish between different individuals within the Authority. The formal decision makers within the Authority are the permanent Chair plus four part-time board members; Water Act 2007 s177. The Chair is directed by the Authority with respect to the development of proposed SDLs, which can be inferred from Water Act 2007 s208.

⁵⁶¹ Two elected officials occupied the office of Water Minister during Basin Plan process. The Hon Penny Wong, Senator for South Australia, was Minister for Climate Change and Water from 3 December 2007 to 14 September 2009. The Hon Tony Burke MP was the Minister for Sustainability, Environment, Water, Population and Communities from 14 September 2009. This thesis generally adopts the masculine pronoun because the most significant decision making fell under Minister Burke’s term.

institutional design primarily through the delegation of decisions about SDLs to an independent Authority. In this way, the picture of accountable (and therefore “good”) decision making regarding setting SLDS that was established by the Act was of an independent, expert decision maker. Finally, I identify the distribution of power between the decision makers, Parliament, the Basin States and the Basin communities. This analysis establishes the basis for assessing whether this distribution of power was altered through the accountability processes examined in subsequent chapters.⁵⁶²

The two key decisions necessary to develop the Basin Plan

The objective of the Basin Plan was never to recreate a pristine “natural” river basin. It was instead to ensure that the Murray-Darling would become and remain a “healthy working river”.⁵⁶³ This concept embodies a particular trade-off between ecological and human interests, the outcome of which is ‘a managed river in which the natural ecosystem has been altered by the use of water for human benefit, but in which the altered system retains its ecological integrity while continuing to support strong communities and a productive economy’.⁵⁶⁴ By 2007, the Murray-Darling was a (mostly) working but unhealthy river that was threatening to cease working in the near future.

⁵⁶² See Section Two, Chapter Two.

⁵⁶³ This objective is reflected in the final *Basin Plan*; Water Act 2007—Basin Plan 2012 5.02(2). This concept is essentially that of ecologically sustainable development; D Fisher, *A Sustainable Murray-Darling Basin: The Legal Challenges* in Connell and Quiggin (eds) 221.

⁵⁶⁴ MDBA, *Delivering a Healthy Working Basin: About the draft Basin Plan* (MDBA, Canberra, 2011) 3 (original emphasis). This concept was developed by a group of Australian scientists; G Jones, *Setting Environmental Flows to Sustain a Healthy Working River* (Cooperative Research

Addressing over-allocation required setting a limit on the amount of water that could be diverted from rivers and groundwater reserves. Setting this limit rested on deciding how many gigalitres could be diverted from the Basin each year for consumptive (human) use while still preserving the Basin's 'environmental health'.⁵⁶⁵ Deciding where to set this regulatory standard—referred to as the Sustainable Diversions Limits (SDLs)⁵⁶⁶—was the first key decision.

The second key decision was to determine how to retrieve enough previously allocated water to be returned to the environment as “environmental water”⁵⁶⁷—the essence of implementing the SDLs. Water recovery was initially pursued through two methods that Australian governments have previously used to recover over-allocated water.⁵⁶⁸ The first

Centre for Freshwater Ecology 2002) 1. It can be defined slightly differently as ‘a managed river in which there is a sustainable compromise, *agreed to by the community*, between the condition of the natural ecosystem and the level of human use’; J Wittington, *Working Rivers* (Cooperative Research Centre for Freshwater Ecology 2012) 3 (my emphasis). The concept was previously adopted in Basin Plan’s major precursor, *The Living Murray* (2004-2009) initiative; Murray-Darling Basin Commission, *The Living Murray* (MDBC, 2008). It is not included in the *Water Act 2007* but was widely accepted as the regulatory objective of the Basin Plan.

⁵⁶⁵ MDBA *Guide* xxxi, which includes improving water quality; *Water Act 2007* Item 4(b) and 10 in the table included in s 22 & s22(10). On the limitations of a volumetric focus see L Crase and B Gawne, ‘Coarse-coloured Glasses and Rights Bundling: Why the Initial Specification of Water Rights in Volumetric Terms Matters’ (2011) 30 *Economic Papers: A Journal of Applied Economics and Policy* 135.

⁵⁶⁶ *Water Act 2007* s23A and *Murray-Darling Basin Agreement* (2008) 3.2.2.

⁵⁶⁷ This water would be reallocated to environmental sites or devoted to supporting sufficient flows in rivers to flush out pollutants. On “environmental flows” see M Acreman and M Dunbar, ‘Defining Environmental River Flow Requirements - A Review’ (2004) 8 *Hydrology and Earth System Sciences* 861. On the difficulties of achieving ecological outcomes with environmental flows see J Pittock and M Finlayson, ‘Australia’s Murray-Darling Basin: Freshwater Ecosystem Conservation Options in an Era of Climate Change’ (2010) 62 *Marine and Freshwater Research* 232.

⁵⁶⁸ 500GL was recovered under *The Living Murray* initiative; D Connell and Q Grafton, ‘Planning for Water Security in the Murray-Darling Basin’ (2008) 3 *Public Policy* 67, 72 and Commission. However, the Australian Government had not previously purchased

is funding infrastructure that improves the efficiency of human water use (either “on farm”, in the dams and irrigation systems used to deliver water, or by “retiring” inefficient irrigation areas).⁵⁶⁹ The second is purchasing water entitlements from willing sellers through Australia’s water markets (“water buyback”).⁵⁷⁰

Subsequently a third method was used, which is funding infrastructure known as environmental “works and measures”. This improves the efficiency of environmental water use so that (in principle) the same environmental outcomes can be achieved with less water.⁵⁷¹ An example is pumping water directly into a wetland, rather than raising the level of a river sufficiently for the water to flow over the river-bank and into the wetland. (The first two methods reduce the water allocated for human use in order to increase the proportion of environmental water; the third method reduces the proportion of environmental water in order to maximise the ongoing allocation to human use.)

environmental water in its own right; Water Department of the Environment, Heritage and the Arts, *Annual Report 2007-2008* (Australian Government 2008) 142.

⁵⁶⁹ The official term for this method became “efficiency measure”. For examples see note attached to *Basin Plan* 7.04.

⁵⁷⁰ On various buyback approaches see Productivity Commission, *Market Mechanisms for Recovering Water in the Murray-Darling Basin: Final Report* (Australian Government 2010). Water markets were established in the 1980s, when land and water title were separated. Tradable water access entitlements give owners ‘a perpetual or open-ended share of the consumptive pool of a specified water resource’; *National Water Initiative* paragraph 28. On this reform see McKay 53. Institutional limitations on water markets remain, particularly for out-of-catchment or out-of-state trades; V Waye and C Son, ‘Regulating the Australian Water Market’ (2010) 22 *Journal of Environmental Law* 431 and M Qureshi and others, ‘Removing Barriers to Facilitate Efficient Water Markets in the Murray Darling Basin—A Case Study from Australia’ (CSIRO Working Paper Series 2009). The Basin Plan includes new water trading rules; *Basin Plan* chapter 12.

⁵⁷¹ The official term for this method became “supply measure”. For examples see note attached to *Basin Plan* 7.03.

The link between the Basin Plan's SDLs and water recovery was described as 'bridging the gap' between existing allocations and the final SDLs.⁵⁷² Logically, setting a regulatory standard is a prerequisite to implementing that standard. In fact, the decision making around setting SDLs and water recovery occurred simultaneously throughout the case study. Beginning the recovery of water before the SDLs were set was intended to 'soften the blow' of the final SDLs for irrigators and make environmental water available to ameliorate the drought earlier than the Plan's original 2014 implementation date.⁵⁷³ This simultaneous decision making became significant for accountability because the political controversy about each decision transferred into the decision-making process for the other. This magnified the overall level of controversy attached to the Basin Plan's development, and that controversy was a prompt for the advent of an active multiple accountability regime, as examined in the following chapter.

The political components of the two decisions

Setting SDLs required establishing regulatory standards, which necessitated a series of political decisions to be made first.⁵⁷⁴ Most basically,

⁵⁷² Environment Department of Sustainability, Water, Population and Communities, 'Water policy and programs' (*Australian Government*, 2013) <Department of Sustainability, Environment, Water, Population and Communities> accessed 2/8/13.

⁵⁷³ Productivity Commission XXVI. Water was allocated to environmental sites from 2009; Water Department of the Environment, Heritage and the Arts, *Annual Report 2008-2009* (Australian Government 2009) 174.

⁵⁷⁴ My analysis draws on Hay 1. It has long been recognised that bureaucratic decision making can have a political dimension, in the sense of involving negotiations and bargaining between different bureaucratic, political and interest-group actors with varying values and interests. For reviews of "bureaucratic politics" see J Rosati, 'Developing a Systematic Decision-Making Framework: Bureaucratic Politics in Perspective' (1981) 33 *World Politics* 234, 236 and R

setting SDLs required decisions to be made about how communal resources should be used and distributed, especially between human users of water and the environment. More conceptually, setting SDLs involved establishing the (high-level) collective goals about the level of environmental health in the Basin, and quantum of production supported by that environment, that Australia aimed to secure in perpetuity. This meant deciding how much the Australian polity valued environmental sustainability and the future viability of Basin communities.

Setting SDLs also involved political decisions about the impact that the preferences or actions of some individuals should be allowed to have on others:⁵⁷⁵ *whether* the impact of upstream water users (and States) on downstream users (and States); the impact of irrigators on other farmers and industries; the impact of all water consuming industries on communities and indigenous custodians; and the impact of current water users on future generations. All of these decisions involved making substantial *political* choices, few of which were decisively made by Parliament through the new *Water Act 2007* that occurred at the outset of the process, as I establish in Sections Four and Five.

As I examine in greater detail in the following section, recovering water involved selecting between two—and later three—methods that had

Waterman, A Rouse and R Wright, *Bureaucrats, Politics and the Environment* (University of Pittsburg Press 2004) 43.

⁵⁷⁵ The Basin Plan binds States and private actors: *Water Act 2007* ss35A & 40A and *Water Amendment Act 2008* ss86H & 250.

substantially different costs and benefits (or at least were perceived to). Simply, water buybacks are the most efficient method to recover the large amount of water needed to implement the SDLs in terms of the unit cost per gigalitre, and therefore the collective goals incorporated into the SDLs would be achieved with fewest national resources.

Infrastructure, whether it aims to make the human or environmental use of water more efficient, is much more expensive than water recovery. However, infrastructure is commonly assumed to support the economic viability and social coherence of Basin communities. There is also a significant choice involved in choosing to improve environmental health by additionally engineering the Basin through environmental “works and measures”, instead of by trying to replicate more of the natural flows of the Basin’s river and groundwater systems. Therefore, recovering water involved substantial political choices about how to value the variable costs, and social or environmental impacts, of the different available methods.

The decision makers responsible for the two key decisions

The *Water Act 2007* vested two decision makers with the public power to make these key decisions. The Authority, a new administrative actor,⁵⁷⁶ was

⁵⁷⁶ The Authority was established through an intergovernmental agreement between Basin jurisdictions, which was then incorporated into the Act as a schedule; *Water Act 2007* s18E. The creation of such agencies often occurs ‘in tandem’ with regulatory reform; T Christensen and P Laegreid, ‘Introduction’ in T Christensen and P Laegreid (eds), *Autonomy and Regulation: Coping with Agencies in the Modern State* (Edward Elgar 2006) 3 & 31. The Authority was not an entirely new body, it subsumed some technical roles of the previous Murray-Darling Basin Commission; *Water Amendment Act 2008* Part 10A. On the problems that arose from creating a new agency to develop the Basin Plan see Wallis and Ison 4089.

given responsibility for developing a proposed Basin Plan,⁵⁷⁷ including setting proposed SDLs.⁵⁷⁸ The Authority was required to provide the proposed Basin Plan to the Minister,⁵⁷⁹ a political decision maker, who was responsible for adopting or rejecting the proposed Basin Plan. The Minister was therefore the ‘decision maker’ on whether any proposed SDLs should be adopted.⁵⁸⁰ The Minister was also responsible for deciding how and when to recover water.

While not a decision maker, Parliament ensured its veto player status by designating the Basin Plan a legislative instrument.⁵⁸¹ This gave either house of Parliament the power to disallow any Basin Plan the Minister adopted,⁵⁸² effectively making the Plan subject to parliamentary approval. In practice, this veto player status ensured that Parliament became an influential accountability forum during the Basin Plan process, as I examine in subsequent chapters.

The Basin States were relegated to playing an ‘advisory role’,⁵⁸³ formally losing their previous veto player status over regulating the Basin.⁵⁸⁴ Formally,

⁵⁷⁷ Water Act 2007 s41.

⁵⁷⁸ Interestingly, in the original policy announcement by Prime Minister Howard the equivalent of SDLs were also to be established, but to be determined by Australia’s national science body, Commonwealth Science and Industrial Research Organisation (CSIRO), within one year; Howard (2007) 10. CSIRO did complete its Sustainable Yields Project and this work became the basis for much of the Authority’s work, which is why CSIRO become an important accountability actor. See Section Two, Chapter Five.

⁵⁷⁹ Water Act 2007 s41.

⁵⁸⁰ *Intergovernmental Agreement on Murray-Darling Basin Reform* (2008) 3.3.1 and Water Act 2007 s44. The Minister cannot delegate this decision making; Water Act 2007 s251(2)(a)

⁵⁸¹ A legislative instrument is a specific form of subordinate legislation; Water Act 2007 33A.

⁵⁸² Legislative Instruments Act 2003 42. On the relevant parliamentary procedure see H Evans (ed) *Odgers’ Australian Senate Practice* (12th edn, Department of the Senate 2008) chapter 15.

⁵⁸³ MDBA, *Murray-Darling Basin Authority Annual Report 2008-2009* (Murray-Darling Basin Authority 2009) xvi.

Basin States exercised power through a Ministerial Council⁵⁸⁵ (comprised of the Commonwealth and Basin State Water Ministers) and through the Basin Officials Committee⁵⁸⁶ (comprised of senior public servants from all Basin jurisdictions). As I examine in the case analysis, the Basin States were influential accountability forums at various points and remained decisive decision making actors. I argue that the Basin States retained at least a decisive, and probably a *de facto* veto player status.⁵⁸⁷ Notwithstanding the centralisation of decision making, the Basin States remained crucial to the implementation of any Basin Plan, and so their broad agreement to any Basin Plan was effectively required.⁵⁸⁸ A Basin Communities Committee was also

⁵⁸⁴ See 'MDBA Governance Structure' MDBA (2009) XV. The Ministerial Council is a political entity, while the Basin Officials Committee and Basin Communities Committee are administrative entities. On this distinction, see Wettenhall 47.

⁵⁸⁵ This Council is established under the Council of Australian Governments (COAG) and is Chaired by the Commonwealth Minister; Water Act 2007 Schedule 1. It was renamed the Legislative and Governance Forum on the Murray-Darling Basin in 2011, but this thesis uses the original name; MDBA, 'Murray-Darling Basin Ministerial Council' (MDBA, 2010) <<http://www.mdba.gov.au/about-mdba/governance/legislative-and-governance-forum>> accessed 18/8/2013. Previously, the Council was the forum for most intergovernmental decision making and it retains that role for matters under the *Murray-Darling Basin Agreement (2008)*, including determining each State's share of SDL-related water reductions; see Water Amendment Act 2008 s239A.

⁵⁸⁶ This Committee has senior water officials from all Basin jurisdictions, with the Authority's Chair and executive head as non-voting members, and provides advice to the Ministerial Council. It was established in 2008, although existed in previous incarnations; Water Act 2007 s201 and Schedule 1. It has an 'advisory' role in relation to the Basin Plan; MDBA (2009) xvi.

⁵⁸⁷ A reflection of this power is the (unusual) incorporation of the *Murray-Darling Basin Agreement (2008)* as Schedule 1 of the Act. The Commonwealth is required to amend that Schedule in line with any amendments to the Agreement agreed by Ministerial Council; Water Act 2007 s18C. This unusual set up reflects the complex legislative history of the Act, set out in The Senate (2011) 7.

⁵⁸⁸ Fisher (2010) 87 and Connell (2011a) 3994. Implementation agreements will be negotiated between the Authority and individual States; *Basin Plan* 1.12.

established with an ‘advisory’⁵⁸⁹ role, in order to facilitate consultation with Basin communities.⁵⁹⁰

Independent, expert decision making to set Sustainable Diversion Limits

The Authority was established to be an ‘independent, expert body ... report[ing] to the Commonwealth Minister [for Water]’.⁵⁹¹ The Authority is what most literature refers to an “independent agency”,⁵⁹² understood as:

... those governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials.⁵⁹³

Independence means a lack of substantial control of the agency by any actor and a lack of substantial responsiveness on the part of the agency to any actor.⁵⁹⁴ The Authority’s grant of specialised public authority pertained to

⁵⁸⁹ *Intergovernmental Agreement on Murray-Darling Basin Reform (2008)* 3.7.3.

⁵⁹⁰ This was an appointed committee established by the Authority and comprised of Basin Community members; Water Act 2007 s18F and s202. It advises the Ministerial Council; Water Act 2008 Schedule 1, 16. The Authority was required to consult this Committee; Water Act 2007 s42(1)(c) and MDBA (2009) xvii.

⁵⁹¹ Malcolm Turnbull MP, *Second Reading Speech (Water Bill 2007)* (The House, 4 August 2007) 5. Also see MDBA, *Strategic Plan 2012-2015* (Murray-Darling Basin Authority 2012) 2.

⁵⁹² Formally, the Authority is a ‘prescribed agency’; Financial Management and Accountability Act 1997 s5 and Schedule 1. In Australian Government terms, it is also a ‘statutory agency’, within the Public Service Act 1999 s7. However, this is not specified in the legislative provisions establishing the Authority; Water Act 2007 Part 9. In UK literature the term “Qango” (quasi-autonomous non-governmental organisation) tends to be used, although the official British term is “non-departmental public body”.

⁵⁹³ C Koop, ‘Explaining the Accountability of Independent Agencies: The Importance of Political Salience’ (2011) 31 *Journal of Public Policy* 209, 216. There is no accepted definition because these bodies differ so much between jurisdictions; C Talbot, ‘The Agency Idea: Sometimes Old, Sometimes New, Sometimes Borrowed, Sometimes Untrue’ in C Pollitt and C Talbot (eds), *Unbundled Government: A Critical Analysis of the Global Trend to Agencies, Quangos and Contractualisation* (Routledge 2004) 273.

⁵⁹⁴ For an excellent breakdown of issues of autonomy and control in an Australian context see Aulich, Batainah and Wettenhall. On the European context see F Gilardi, *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe* (Edward Elgar 2008) 56.

preparing the proposed Basin Plan, which was its ‘primary responsibility’,⁵⁹⁵ and for which the Authority was not subject to direction from the Minister during preparation.⁵⁹⁶ The Authority was also formally separate to its “parent” department, the Department for Water.⁵⁹⁷

The Authority was the only decision maker with the power to draft the Basin Plan: the Minister could not personally do so,⁵⁹⁸ and Parliament had no power to alter the Basin Plan laid before it.⁵⁹⁹

The establishment of independent agencies can aim to ‘insulate’ difficult decision making from ‘political influence’,⁶⁰⁰ especially from ‘electorally oriented politics’,⁶⁰¹ and the Basin Plan should be understood as a regulatory process that was designed thus.

Addressing over-allocation in the Murray-Darling is to the Commonwealth’s long-term advantage (financially, socially and ecologically), but may be contrary to the short term advantage of governments (politically) and some parliamentarians (electorally). Elected representatives may agree to reduce their control over decision making in order to bind their future

⁵⁹⁵ Malcolm Turnbull MP, *Second Reading Speech (Water Bill 2007)* (The House, 4 August 2007) 5.

⁵⁹⁶ See Financial Management and Accountability Act 1997 s5 and Schedule 1. The Minister does have some power to give directions to the Authority regarding its other functions; Water Act 2007 s175.

⁵⁹⁷ I refer to the Department as such throughout, although its exact name varied.

⁵⁹⁸ Water Act 2007 s44A.

⁵⁹⁹ As a disallowable instrument, Parliament’s only power was to disallow the Basin Plan.

⁶⁰⁰ Flinders (2004) 898 & 902.

⁶⁰¹ M Shapiro, ‘A Comparison of US and European Independent Agencies’ in S Rose-Ackerman and P Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2011) 305.

decisions so that they are compelled to accept (good) policy proposals even if they are politically fraught.⁶⁰² Independent agencies can be a way to make politically fraught decisions because they may shift responsibility for difficult decisions onto non-elected officials or “experts”.⁶⁰³ This is particularly useful when there are a number of ‘veto’ players who have conflicting interests, a scenario when ‘it is more difficult for politicians to make decisions and to come to policy compromises’.⁶⁰⁴

Delegating decision making to an agency such as the Authority places a decision ‘at one remove from the political character of decision making’, but it does not—and cannot—make the decision an ‘apolitical’ one.⁶⁰⁵ As I examine in Sections Four and Five, Parliament did not only delegate technical decision making with political *implications*, it delegated most of the political decisions themselves. It is for this reason that I argue that the Basin Plan case supports Flinders and Buller’s argument that the use of independent agencies can result in ‘arena shifting’ rather than ‘depoliticization’.⁶⁰⁶ In the following chapter, I argue that this arena shifting included a shift of political controversy into accountability processes. I further argue that the delegation of decisions

⁶⁰³ For an extensive analysis of the success of this approach see C Hood, ‘The Risk Game and the Blame Game’ (2002) 37 *Government and Opposition* 15. Majone recognises this point, but argues other factors are more important; G Majone, ‘The Regulatory State and its Legitimacy Problems’ (1999) 22 *West European Politics* 1, 4. Also see T Christensen and P Laegreid, ‘Agentification and Regulatory Reforms’ in Christensen and Laegreid (eds) 35 and Flinders and Buller 68.

⁶⁰⁴ Koop 229.

⁶⁰⁵ Flinders and Buller 55 (references omitted).

⁶⁰⁶ Flinders and Buller 54

involving substantial political choices to an independent agency prompted accountability politics around the accountability forums to whom the Authority should account.⁶⁰⁷

Setting proposed SDLs was designed as an evidence-based regulatory process with an independent decision maker, whose decisions were subject to democratic approval but somewhat shielded from political interference. An aspect of this institutional design was the implicit construction of “good” decision making, regarding SDLs at least, as independent from political interference. Why such a shield might have been thought necessary relates to the interests, ideologies and (political) power of the Basin communities and irrigation interest groups, which I examine in the next section.

Section 3: What were the interests affected by the Basin Plan process?

The Murray-Darling Basin is an enormous national resource in which a myriad of actors have different interests. It is important to understand the different human interests in the Basin in order to understand the politicisation of decision making and to be able to analyse how actors pursued those interests and ideologies through accountability processes, both key features of the case analysis that follows. The basic reason for politicisation in the Basin Plan case is

⁶⁰⁷ Sections Two and Three, Chapter Four.

that there were multiple conflicting interests, or at least perceived interests, at stake in the short term.

In this section, I map the interests most affected by the Basin Plan and show how a lack of clarity about the effects of the Basin Plan facilitated a conflation between the perceived interests of irrigators and the interests of Basin communities. However, I argue that it was the absence of substantial financial and practical support for communities—as distinct from the funding that flowed to individuals, States and irrigation trusts through water recovery—that created the conditions for that politicisation that I examine in Chapter Four to become a notable feature of the Basin Plan process.

The actors whose interests were affected by setting SDLs

The Basin Plan commenced with a broad political and community recognition that the *status quo* regarding water allocations could not—and should not—continue.⁶⁰⁸ The Basin Plan meant permanently reducing by between a fifth to a third the amount of water available for farming, industry and mining.⁶⁰⁹ Understanding the economic, and therefore the social, impact of that reduction in water involved answering two questions. First, what would be the consequence for economic activity and social outcomes of removing a fifth to a third of water from its existing use? Second, what would be the

⁶⁰⁸ Former CEO of the National Farmers Federation, interview with the author, (Canberra) April 6 2011; Former Director, Victorian Office of Water, interview with author, Melbourne, July 7 2011.

⁶⁰⁹ MDBA *Guide* 75.

consequence for economic activity and social outcomes of returning that same amount of water to the rivers and environmental sites of the Basin?

The “national” interest

Ensuring that the Murray-Darling Basin is environmentally sustainable, and is capable of supporting viable communities, is a significant issue for Australia’s national interest. To take the crudest measure, the costs of ameliorating the poor ecological condition of the Basin have been enormous and will only rise in future;⁶¹⁰ likewise unviable Basin communities require significant cross-subsidisation through government services and welfare payments.⁶¹¹ The Basin’s production is important for Australia’s economy, particularly its agricultural exports, although it is a small enough proportion of national economic activity that any short-term reduction in production due to the Basin Plan is insignificant. Less materially, the Basin’s ecology and farming communities form a key part of Australia’s national identity, even if fewer Australians actually live in the “bush” than ever.

For all these reasons, it was in the interests of both the Commonwealth and State governments to ensure the Basin was regulated sustainably. However, setting SDLs was the kind of regulatory reform that in the short term will create

⁶¹⁰ These costs are quantified, to the extent possible, in CSIRO, *Assessment of the Ecological and Economic Benefits of Environmental Water in the Murray-Darling Basin* (Murray-Darling Basin Authority, 2012). The Australian Conservation Foundation (ACF) argues that nearly \$25 billion dollars has been spent —much of it by governments--over the last twenty years to address the Basin’s environmental problems; P Sinclair, ‘Weaning off the drip-feed (opinion)’ *The Age* (Melbourne, 25 October 2010).

⁶¹¹ Some of the most socially disadvantaged communities in Australia are in the western Basin. These communities became unviable due to environmental degradation some decades ago. These costs tend to be absorbed by both Commonwealth and State governments as part of larger social policy budgets, and so are difficult to disaggregate.

economic and social dislocation as communities and individuals adapt, albeit that in the longer term it should be to the advantage of nearly all stakeholders. As a result, addressing over-allocation had majority support from those with a general interest in the future sustainability of the Basin, but was opposed by a minority with specific and current interests who assumed they had more to lose (and more reason to resist) than the majority had to gain. It was therefore not necessarily in the short-term interests of governments, or individual parliamentarians, to be viewed as responsible for setting SDLs.

The interests of Basin communities

Basin communities are comprised of individuals whose livelihoods, for the most part, depend on the Basin's resources in some way (as well as on cross-subsidisation nationally in the form of government services). The political debate generally assumed that this kind of reduction of water would have a devastating impact on existing economic activity and rarely addressed the potential economic (and social) benefits of returning water to the Basin.⁶¹² Yet the socio-economic evidence-base, once it was developed, would point to very different answers to those questions.⁶¹³ It showed that the short-term costs of the Basin Plan for most Basin communities were modest, and the benefits for

⁶¹² Although a lack of economic modelling of the benefits of returning water to the Basin prior meant that the Commonwealth's interests were not well quantified. The ACF repeatedly called for the Authority to model the economic benefits of returning more water to the river; L Wilson, 'Hit list reveals towns with most to lose' *The Australian* (18 October 2010).

⁶¹³ M Fyfe, 'Struggle to be heard in water tug-of-war' *The Age* (3 December 2011) and G Lloyd, 'Great dividing rage over water' *The Australian* (23 October 2010). This section mainly cites the Authority's final assessment of the socio-economic effects of the Basin Plan, which draws on multiple studies; MDBA (2012).

most communities and industries were likely to be significant over the longer term.⁶¹⁴

Irrigated agriculture was the main economic activity potentially threatened by the reduction of water able to be diverted for human use.⁶¹⁵ This is because irrigated agriculture was the main user of diverted water.⁶¹⁶ Yet the answer to the first question about the economic consequences of setting SDLs is that the viability of most irrigators was probably not threatened by setting SDLs. Consistently over time farmers, especially irrigators, have become more efficient in their water use in response to less water being available.⁶¹⁷ For example, during the Millennium drought a seventy per cent drop in water resulted in only a one per cent reduction in the value of farm production.⁶¹⁸ That is why the modelling of the available water eventually proposed by Authority showed the 19 per cent reduction to have only a negligible impact on irrigated agricultural output, given the likely adaptations.⁶¹⁹

Even if irrigated agriculture did significantly decrease, the impact on the Basin economy overall would not be devastating. That is because irrigated agriculture only accounts for around 40 per cent of agriculture (mainly rice,

⁶¹⁴ See analyses cited in MDBA (2012) 17.

⁶¹⁵ MDBA (2012) 9.

⁶¹⁶ MDBA (2012) 38-39.

⁶¹⁷ MDBA (2012) 10-11.

⁶¹⁸ G Lloyd, 'High price for making water into a political currency of convenience' *The Australian* (16 October 2010).

⁶¹⁹ The Authority's modelling predicted a 5-10 per cent reduction in irrigated agricultural output over 2007-2019, which amounted to less than 1 per cent reduction per annum and minimal employment impacts; MDBA (2012) ii.

cotton, horticulture, dairy) and a third of the value of agricultural production, in the Basin.⁶²⁰ The future of all types of agriculture will not be determined over the longer term by SDLs, but rather by trends in agricultural markets, which are the primary determinant of the profitability of different forms of farming.⁶²¹ Finally, the economic impact of the likely Basin Plan would be mitigated by the fact that only 15 per cent of total economic output in the Basin comes from agriculture.⁶²²

Turning to the second question about the economic consequences and social outcomes of returning water to the environment, the answer further points to the value of the Basin's Plan development for Basin communities. All industries, including irrigators, would also benefit from reduced costs of ameliorating the environmental effects of an unhealthy river and funding substitutes for eco-system services.⁶²³ Dry cropping agriculture (which relies on rainfall) would be largely unaffected by setting SDLs; and floodplain agriculture would benefit from the more frequent flooding that would result from less water being diverted to irrigation.⁶²⁴

Beyond agriculture, industries such as recreational and commercial fishing, recreational boating, and tourism all stood to benefit significantly from

⁶²⁰ Or A\$5 billion of A\$15 billion; MDBA (2012) 8 & 17.

⁶²¹ This was the conclusion of MDBA (2012) 12. Also see R Puddy, 'Hopes rise and fall on Murray's fortune' *The Australian* (7 November 2011) and Green 'Surface tension'.

⁶²² MDBA (2012) 17.

⁶²³ MDBA (2012) 27-31,

⁶²⁴ MDBA (2012) 27; G Lloyd, 'Rain and key buybacks bring fresh life back to the marshes' *The Australian* (23 October 2010); and, GHD, *Assessment of the Benefits of the Basin Plan for Primary Producers on Foodplains in the Murray-Darling Basin* (MDBA 2012).

increased water quantity and quality. This was especially significant because these industries proved to be much more important to the Basin economy than previously recognised.⁶²⁵ Turning to social interests, communities would reap the lifestyle benefits of a healthy environment, or in the case of the indigenous custodians, the enhanced capacity to fulfil cultural obligations.⁶²⁶ If this assessment is correct, setting SDLs would also secure the long-term viability of communities.

But this assessment of the interests of Basin communities addresses the overall impacts over the longer term. For some communities heavily dependent on irrigation there were likely to be significant economic and social costs of reducing the water available for production. For all communities, it must be recognised that adaptation to reduced water would take time, and in the short term the transition was likely to involve job losses and declining incomes for at least some individuals, as well as community anxiety about unknown impacts.

This potential short-term impact dominated the political debate. The dominant message to the Authority and the Minister from Basin communities, and irrigator representatives such as the National Irrigator Council, was that

⁶²⁵ Tourism employs twice as many people as irrigation in the Basin; Lloyd, 'High price'.

⁶²⁶ See S Jackson, B Moggridge and C Robinson, *Effects of Changes in Water Availability on Indigenous People of the Murray-Darling Basin: A Scoping Study* (MDBA 2010) 8. The Basin Plan incorporated 'cultural flows' into the Basin's management for the first time, which is water owned and used by indigenous people; see MDBA, 'Indigenous Communities' (MDBA, 2012) <www.mdba.gov.au/explore-the-basin/communities/indigenous-communities> accessed 28/09/2012. However, the lack of recognition of an economic interest in the Basin for indigenous communities meant that their interests were relegated to 'spiritual/cultural' interests.

the proposed SDLs would devastate their communities.⁶²⁷ The argument was that by reducing economic activity, the Basin Plan would lead to depopulation and the loss of public services. The Basin Plan's development was understood by many Basin communities as a zero-sum game, a game in which their futures were being sacrificed for the environment. It is important to examine the reasons for the disparity between Basin communities' perceived interests and the evidence-base about those communities' actual interests.

The perceived interests and values of Basin communities

The Authority recognised when it released much of the evidence-base cited above that the conclusion would be 'counter-intuitive to the expectations of communities'.⁶²⁸ A basic reason for this was the inadequate pre-existing social and economic evidence-base; most of the research cited above was only available towards the end of the process.⁶²⁹ This lacuna in socio-economic data made it difficult for the Authority and Minister to address the concerns of communities (and political claims of interest groups claiming to represent communities) during the Basin Plan process, especially given that Basin communities often had access to local-level knowledge of both the ecology and the socio-economic characteristics of the Basin unavailable to the decision

⁶²⁷ I examine this debate in detail in Section Two, Chapter Four.

⁶²⁸ MDB (2012) 17.

⁶²⁹ Most studies, especially those which showed the benefits of the regulatory reforms, were not available until later 2011 or even 2012; see list at MDBA, 'Social and Economic Analysis—Key Reports' (MDBA, 2012) <www.mdba.gov.au/draft-basin-plan.socioeconomic--analysis/social-and-economic-analysis-key-reports> accessed 28/09/2012. This reflects a more general inadequacy in the use of socio-economic evidence in water regulation; G Syme and B Nancarrow, 'The Social and Cultural Aspects of Sustainable Water Use' in Crase (ed) 236. Gaps in evidence-base required to underpin the Basin Plan should be viewed as a structural barrier to reform; Professor Richard Kingsford, 'River may flow, but that is not enough', Opinion, *The Age* (6 November 2009).

makers. This distribution and epistemic quality of information becomes relevant to the accountability analysis when, as suggested by Olsen, both factors can be changed through the course of accountability processes.⁶³⁰

In this context, irrigators and their representative groups were highly effective at equating their (perceived) interests with the interests of Basin communities at large. The most significant protests about proposed SDLs and water recovery were in those few smaller, highly irrigation-dependent communities that would find it difficult to transition to a future with less water,⁶³¹ yet the protests came to symbolise the response of Basin communities at large. Partly this was because the dominant national media narrative was shaped by these protests, as I examine in the following chapter.

An important factor in the pre-existing power relations within the Basin Plan case is that irrigator interest groups have been politically powerful ever since governments promoted the development of irrigation communities. Irrigator interest groups are especially influential within Basin States and farmer peak organisations,⁶³² but also became decisive at a national level and at times functioned as additional accountability actors.⁶³³

⁶³⁰ See Section Two, Chapter and Section Two, Chapter Four.

⁶³¹ On those communities most affected see MDBA (2012) 21. The Authority also identified these towns when it first proposed SDLs in 2010; ABC News, 'Basin authority lists vulnerable towns' ABC News (20 October 2010).

⁶³² Connell, 'Water reform and the federal system in the Murray-Darling Basin' 4000.

⁶³³ See Section Two, Chapter Four and Section Two, Chapter Five.

Yet the fact that these pre-existing power relations came to shape so crucially the Basin Plan process was due to the inadequate government response to the communities' concerns about their future viability. The Basin Plan process did not contain significant financial or practical support for Basin communities to identify how they could adjust to a future with less water by making the economic and social changes that might be needed to diversify economically. This absence of a substantial "structural adjustment" program or "change management" process⁶³⁴ has been described as the 'missing' component of the policy framework for the Basin Plan.⁶³⁵ It was necessary because Basin communities were already relatively vulnerable, or at least felt vulnerable, at the outset of the process.⁶³⁶

The Australian Government seemed to assume that the approximately A\$10 billion being spent on water recovery would be sufficient assistance for Basin

⁶³⁴ There were some programs, but they were small enough that this criticism is justified. Programs did exist to assist individual irrigators and groups of irrigators to exit farming from 2008; Department of the Environment, Heritage and the Arts, *Annual Report 2008-2009* (Australian Government 2009)

170 & 179. Programs also existed to assist communities and irrigation trusts to 'plan for a future with less water', with linked infrastructure funding; 164 & 177-178 and Environment Department of Sustainability, Water, Population and Communities, *Annual Report 2010-2011* (Australian Government 2011) 236.

⁶³⁵ Former CEO of the National Farmers Federation, interview with the author and Bouly and Maywald 109 & 111. A key recommendation of the Windsor Committee was for this to be rectified; House Standing Committee (2011) xix. All Governments committed to assisting communities to adjust in the *National Water Initiative* principle 94. The lack of understanding of structural adjustment generally in Australia has been criticised in National Water Commission, *Australian Water Reform 2009: Second Biennial Assessment of Progress in Implementation of the National Water Initiative* (National Water Commission 2009) 218.

⁶³⁶ MDBA (2012) v. While actual community vulnerability differed across the Basin, the experience of drought probably increased subjective perceptions of vulnerability (hence the Authority's explicit rejection of the analogy between the effects of the Basin Plan and the millennium drought); MDBA (2012) 19.

communities to adjust to a future with less water.⁶³⁷ This was made explicit in Mr Howard's original announcement. The A\$5.8 billion allocated to 'modernising irrigation'⁶³⁸ included funding for 'the retirement of unviable parts of irrigation schemes', and funding for 'structural adjustment' to support some farmers to exit irrigated agriculture.⁶³⁹ Similarly, the A\$3 billion of funding to address over-allocation in the Basin was to identify 'unviable or inefficient parts of [irrigation] schemes' in order to buyback water and provide structural adjustment funding to assist those irrigators 'to exit the industry'.⁶⁴⁰

Importantly, however, neither method of water recovery directly supported adaptation on the part of communities (as distinct from individual farmers or irrigation trusts). In considering why the Government would not have established more substantial financial support and advice for Basin communities to adapt to a future with less water, the simple answer may be that they had already spent their available budget "compensating" individuals, irrigation trusts and States through water recovery.

⁶³⁷ General Manager, Water Markets and Efficiency Group, National Water Commission, interview by author, Canberra, Friday 18 March 2011. C.f. NRM Manager, National Farmers Federation (NFF), interview by author, Canberra, 14 April 2011.

⁶³⁸ This funding was over ten years; Howard (2007) 4.

⁶³⁹ Howard (2007) 8. This was predicted to yield 2,500-3600GL of water through more water-efficient infrastructure, half of which would be returned to irrigators and half to the river as environmental water; Howard (2007) 4.7 & 8-9.

⁶⁴⁰ Howard (2007) 11. All water saved through this investment would be returned to the environment, although no estimates were included, reflecting the Coalition's reticence to say how much water it intended to recover through buybacks.

Perhaps the assumption was that this money would also buy the political support of irrigators and Basin States;⁶⁴¹ if it was, the Australian Government significantly miscalculated. Both irrigators and Basin states proved adept at accepting significant funding through the Basin Plan process while simultaneously criticising nearly every aspect of that process. The Commonwealth's decision to omit significant financial and practical support for communities in the original regulatory design can also be interpreted as denying the considerable social and economic impact that setting SDLs would have, at least in the short term.

Either way, the lack of substantial structural adjustment support was exacerbated by the decision of the new Labor Government following the 2007 election to prioritise water buybacks that (beyond some small programs) did not strongly link those buybacks to irrigators exiting from unviable irrigation areas.⁶⁴² While buyback is to the advantage of individual entitlement holders who decide to sell, often at premium prices,⁶⁴³ it potentially removes income from communities if it results in a decline in overall economic activity in a given catchment or if entitlement holders spend the profits outside of the local community (for example, to reduce debt or to support retirement

⁶⁴¹ The then Minister, Mr Malcolm Turnbull MP subsequently presented the infrastructure funding as the political price for the support of irrigation communities for the Basin Plan; Malcolm Turnbull MP, *Second Reading Debate (Water Amendment (Water for the Environment Special Account) Bill)* (The House, 28 November 2012) 13795.

⁶⁴² This approach is supported by the Productivity Commission, which argued that water buyback should not be used to achieve other goals as it compromised its 'efficiency and effectiveness', and direct programs would be preferable; Productivity Commission XXII.

⁶⁴³ S Neales, 'Burke puts on a tough face as figures show water recovery gaining pace' *The Australian* (23 June 2012).

elsewhere).⁶⁴⁴ It also creates the potential for ‘stranded irrigation assets’ if some but not all entitlement holders in the same irrigation area decide to sell their water, and may thereby increase the costs of maintaining infrastructure for the remainder.⁶⁴⁵ A similar issue pertains to farms that might be abandoned.⁶⁴⁶

As a result, water buyback was tremendously controversial within communities during 2008-2012.⁶⁴⁷ Even ‘willing sellers’ of water were ambivalent: almost half of farmers who sold water entitlements to the Commonwealth disagreed with the environmental objectives of water recovery, with higher proportions disagreeing in upstream States.⁶⁴⁸

The controversy around water buybacks also reflected a broader dynamic underpinning the community response to the Basin Plan. General acceptance that water had been over-allocated did not translate to agreement from Basin communities or Basin State governments to “losing” water from *their*

⁶⁴⁴ A popular misconception was that farmers primarily sold their entitlements to retire away from their communities. In fact, most continued to farm or retired within their communities; J Cheesman and S Wheeler, *Survey of Water Entitlement Sellers Under the Restoring the Balance in the Murray-Darling Basin Program* (Australian Government 2012). On lost community income see M Wilkinson, *Backlash in the Basin—Four Corners* (ABC Television, 3 July 2011).

⁶⁴⁵ House Standing Committee (2011) 1.21 & 5.2.

⁶⁴⁶ These concerns have been raised in surveys over the past decade, and therefore should have been familiar to the Commonwealth; H Bjornlund, S Wheeler and J Cheesman, *Irrigators, Water Trading, the Environment and Debt: Buying Water Entitlements for the Environment* in Connell and Quiggin (eds) 295.

⁶⁴⁷ See D Jopson and D Snow, ‘Buybacks drain life from towns’ *The Sydney Morning Herald* (13 September 2010) and D Snow and D Jopson, ‘Liquid gold’ *The Sydney Morning Herald* (4 September 2010). The Basin Plan process tapped into ‘long-term distrust’ about water buyback disadvantaging communities; Bjornlund, Wheeler and Cheesman 295 & 300. Such concerns are not evidence-based; Marsden Jacob Associates (2012) ii.

⁶⁴⁸ Marsden Jacob Associates (2012) iii. The hypocrisy in the stance by much of the farming community, namely that they should be able to sell water to other areas of the Basin but that the Government should not be able to buy that water, was critique by Tony Windsor MP, *Disallowance Speech: Murray Darling Basin Plan* (The House, 29 November 2012) 14005.

catchment⁶⁴⁹ or State,⁶⁵⁰ especially to water downstream environmental sites rather than ones in their own local environment.⁶⁵¹

There was a significant community backlash mid-way through the Basin Plan process, which I examine in the next chapter. Miller contends that the absence of a coordinated structural adjustment program for Basin communities resulted in concerns about the future of Basin communities transmuting into concerns about SDLs and water buyback.⁶⁵² I argue that the absence of systematic support for community adjustment also encouraged those who identified with the interests of Basin communities (whether genuinely or opportunistically) to challenge the credibility of the decision makers and contest what how accountable decision making was framed—with some success, as I examine in Chapters Four and Five. This task was made easier by the legislative framework for decision making, which I examine in the following section.

⁶⁴⁹ Inovact Consulting, *Community Well-Being and Water Reform—Headlines Report July 2010* (MDBA 2010) 15 and Bjornlund, Wheeler and Cheesman 296.

⁶⁵⁰ For example, in 2008 Victoria prohibited water trades out of irrigation districts. This prompted a legal challenge (later settled) by South Australia, and retaliatory restrictions from NSW. The situation was partially resolved through Commonwealth infrastructure funding in Victoria. See P Ker, 'Vic bows to pressure on water trade' *The Age* (30 May 2009).

⁶⁵¹ NRM Manager, National Farmers Federation (NFF), interview by author; Former director of the Victorian Office of Water, interview by author.

⁶⁵² C Miller, *The Future of the Basin: Thriving or Dying Communities?* in Connell and Quiggin (eds) 195.

Section 4: What criteria for making the key decisions were set out in the *Water Act 2007*?

In this section, I examine the legislative requirements contained in the *Water Act 2007* for making the key decisions in the Basin Plan. This establishes the *status quo* regarding the decision maker's responsibility that was contested. This also provides the legal context for the disagreement between the Minister and the Authority regarding the criteria for setting SDLs and recovering water,⁶⁵³ which I examine in Chapter Four. That disagreement, and the broader controversy around the Act which prompted it, was grounded in the lack of legislative direction given to both decision makers by Parliament. In the case of setting SDLs, the presence of multiple, broad criteria created the scope for substantially different interpretations of the correct basis for decision making; in the case of water recovery, the legislative direction was minimal.

Minimal and potentially ambiguous legislative direction for setting SDLs

The *Water Act* defines SDLs as 'the maximum long-term annual average quantities of water that can be taken, on a sustainable basis, from' the Basin as a whole and each catchment within it.⁶⁵⁴ Section 23 sets out a single criterion for setting these SDLs: 'A long-term average sustainable diversion limit must

⁶⁵³ As such, it is not a comprehensive statutory analysis. For the most thorough reading see Fisher (2011). Also see Australian Government Solicitor, *The Role of Social and Economic Factors in the Basin Plan* (Parliament 2010) and G Williams and P Kildea, 'The Water Act 2007 and the Murray-Darling Basin Plan' (2011) 22 Public Law Review 9.

⁶⁵⁴ Water Act 2007 22(1).

reflect an environmentally sustainable level of take'.⁶⁵⁵ This gave decision makers minimal guidance given the ambiguity around "sustainability" as a concept and what constitutes a sustainability assessment.⁶⁵⁶ It was the interplay between section 23 and the provisions giving directions for how the Basin Plan should be developed, and the objectives it should achieve, that became significant in the controversy about what the Act required.

The Act sets out the 'basis on which Basin Plan [is] to be developed',⁶⁵⁷ requiring that the Authority and Minister 'must, in exercising their powers and performing their functions' ⁶⁵⁸ 'take into account the principles of environmentally sustainable development',⁶⁵⁹ and, 'act on the basis of the best available scientific knowledge and socio-economic analysis'.⁶⁶⁰ Furthermore, the Minister must approve the proposed Basin Plan from a Basin wide perspective,⁶⁶¹ which was meant explicitly to include benefits to the Basin as a whole as a criterion for decision making.⁶⁶² These directions to the decision makers are 'subject to' three other provisions that require the 'Basin Plan to

⁶⁵⁵ Water Act 2007 s23

⁶⁵⁶ See W Alley and S Leake, 'The Journey from Safe Yield to Sustainability' (2004) 42 *Groundwater* 12, 13 and T Hacking and P Guthrie, 'A Framework for Clarifying the Meaning of Triple Bottom-Line, Integrated, and Sustainability Assessment' (2008) 28 *Environmental Impact Assessment Review* 73, 76.

⁶⁵⁷ Water Act 2007 s21.

⁶⁵⁸ As well as having regard to ten other extremely broad uses of, and interests in, the Basin and the *National Water Initiative*; Water Act 2007 s21(4).

⁶⁵⁹ Water Act 2007 s21(4)(a).

⁶⁶⁰ Water Act 2007 s21(4)(b).

⁶⁶¹ Water Act 2007 s44.

⁶⁶² The difficulty in making this a criterion under previous intergovernmental decision making was identified by the former head of the Murray-Darling Basin Commission as a significant flaw in the previous institutional arrangements; see Connell and Grafton 70.

implement international agreements⁶⁶³—all of which seek to protect the Basin’s environment.⁶⁶⁴

The Act’s directions about developing the Basin Plan are interpreted with reference to the purpose of the Plan, being ‘to provide for the integrated management of the Basin water resources in a way that promotes the objects (or objectives) of this Act.’⁶⁶⁵ The decision maker must therefore also consider those objects; meaning the decision maker must consider *four* layers of legislative “direction” for setting SLDs. The Australian Government Solicitor’s (“Government Solicitor”) commentary on the purpose of the Basin Plan is worth extracting at some length, in order to explain the relationship between these layers and illustrate the complexity of the legislative criteria:⁶⁶⁶

This general purpose is elaborated by reference to particular ways in which the Plan should provide for the purpose. These ‘sub-purposes’ include:

- a) giving effect to relevant **international agreements**;
- b) the establishment of **environmentally sustainable limits** on the quantities of surface and ground water that may be taken from Basin water resources;
- c) Basin wide **environmental objectives** for water-dependent ecosystems and water quality and salinity objectives;
- d) the use and management of the Basin water resources in a way that optimises **economic, social and environmental outcomes**; and
- e) improved **water security** for all uses of Basin water resources.

⁶⁶³ These provisions all sit within section 21 ‘General basis on which the Basin Plan to be developed’; Water Act 2007 s21(1). This emphasis was not changed by Water Amendment Act 2008 s47. See Fisher (2009) 156 and Fisher (2011) 218.

⁶⁶⁴ Namely, the *Convention on Biological Diversity* (1992) and the *Convention on Wetlands of International Importance (Ramsar Convention)* (1971), as well as other treaties listed under Water Act 2007 s4. These agreements include a number of bilateral agreements with China, Japan and Korea to protect migratory birds that travel across the Asian flyway.

⁶⁶⁵ Water Act 2007 s20.

⁶⁶⁶ Australian Government Solicitor (2010) paragraphs 4-5 (original emphasis, references omitted).

These 'sub-purposes' of the Plan to a large extent parallel provisions in the objects of the Act relating to:

- a) giving effect to relevant **international agreements**;
- b) in giving effect to those agreements, promoting the use and management of the Basin water resources in a way that optimises **economic, social and environmental outcomes**;
- (c) ensuring a return to **environmentally sustainable levels** of extraction for overallocated or overused water resources; and protecting, restoring, and providing for the ecological values and ecosystem services of the Murray-Darling Basin. This object does not limit the previous two objects relating to implementation of international agreements and optimising outcomes;
- d) maximizing the **net economic returns** to the Australian community from the use and management of the Basin water resources. This object is subject to the previous provisions relating to environmentally sustainable levels of extraction for overallocated and overused resources and protecting, restoring and providing for ecological values and ecosystem services, and
- e) improving **water security** for all uses of Basin water resources.

The establishment of the SDLs and the optimisation of economic, social and environmental outcomes were the two key purposes of the Basin Plan that became central to the public debate around its development. As Fisher points out, these purposes 'are expressed in such a way that they are tantamount to obligations', with the SDLs constituting 'in effect a specific obligation' and the optimisation of economic, social and environmental outcomes being 'formulated as a goal or a result'.⁶⁶⁷ These are familiar principles within water planning:⁶⁶⁸ it is determining how these principles should be applied in practice that 'is an extremely difficult task, which is replete with conflicting interests'.⁶⁶⁹

⁶⁶⁷ Fisher (2011) 220.

⁶⁶⁸ For example, *National Water Initiative* paragraph 36.

⁶⁶⁹ Fisher (2011) 223.

The lack of direction from Parliament to the Authority and Minister stems from the legislative silence about how these broad principles should be applied.

The *Water Act 2007* is best understood as having an ‘overall but formally unstated goal [of] ecologically sustainable development’.⁶⁷⁰ What matters for decision making around ecologically sustainable development is the specific environmental, social and economic outcomes that a polity aims to achieve—the “ends” the decision maker pursues—and therefore the trade-offs they are willing to make between different interests. In enacting the Act, Parliament omitted to articulate such outcomes Parliament also omitted to give direction to the Authority about key aspects of setting SDLs such as how ‘key’ environmental assets should be identified.⁶⁷¹

The alternative legislative approach is best illustrated by citing a subsequent amendment to the Act that the Greens Party proposed, which does articulate specific environmental outcomes:

The Minister must not adopt the amendment unless the Minister is satisfied that, if the amendment is made:

(c) the long-term average sustainable diversion limit will maintain or improve the following environmental outcomes:

(i) in relation to average daily salinity levels for Lake Alexandrina—less than 1500EC at all times and less than 1000EC for 95% of the time;...

(iv) in relation to the mouth of the River Murray—the mouth to be open to an average annual depth of 1 metre or more for at least 95% of years and to an average annual depth of 0.7 metres or more for at least 95% of years;

⁶⁷⁰ Fisher (2011) 221.

⁶⁷¹ Australian Government Solicitor (2010) paragraph 25. Also see Productivity Commission XXXI.

(v) the environmental outcomes met under an integrated, Basin-wide, fit for purpose model run based on the levels of extraction contained in the BP-3200-RC model run and the 112 hydrologic indicator targets.⁶⁷²

Parliament therefore left the Authority to undertake the inherently political task of defining these outcomes and the ‘trade-offs’ that would be required,⁶⁷³ as well as determining the technical approach that would achieve whatever objectives were chosen.⁶⁷⁴ This has led to the Act being labelled a ‘political deception’, because of the way that it falsely implied that setting SDLs was a technocratic task to be accomplished on the basis of interpreting scientific evidence.⁶⁷⁵ In short, Parliament delegated most of the political choices required for setting SDLs to the Authority and left the Authority with manifold and ambiguous ends to pursue in its decision making.

Understood in terms of the analytical approaches I developed in Chapters One and Two, I do not analyse the legislative criteria as *ex ante* standard-setting given the “standards” incorporated into the Act were too vague to form the incontestable basis of an evaluation. Instead, the legislative criteria

⁶⁷² This proposed amendment was to a provision, section 23B(6), proposed amendment to the Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012 .

⁶⁷³ This delegation is made clear in Senator Simon Birmingham, *Disallowance Speech – Murray Darling Basin Plan* (The Senate, 28 November 2012). It is contrary to Shapiro’s observation that most American independent agencies are governed by relatively prescriptive legislation; M Shapiro, ‘The Problems of Independent Agencies in the United States and the European Union’ (1997) 4 *Journal of European Public Policy* 276, 277. It instead accords with Day and Klein’s description of bureaucracies engaging in political objective setting also because out political process does not articulate the kind of clear criteria that would make the criteria for assessment in bureaucratic accountability truly non-contestable; Day and Klein 28.

⁶⁷⁴ This was criticised by the (independent) Productivity Commission; Productivity Commission XXXI.

⁶⁷⁵ Briscoe is a key proponent of the view that these legislative inadequacies led to many of the subsequent problems in the Basin Plan process; Briscoe 5.

generated conflicting expectations by various actors about the Authority's responsibility, and therefore accountability, especially regarding the ends it was supposed to pursue. This created, I argue, greater scope for politicisation of the decision-making process, and for the scope of the Authority's responsibility to be contested.⁶⁷⁶ I argue in Chapter Four that it also enabled the "responsibilisation" of the Authority by the Minister.

Legislative criteria for water recovery

The *Water Act* 2007 only briefly addresses how the Minister should recover water in order to implement the SDLs. It stipulates that water must be acquired, or purchased, 'on just terms',⁶⁷⁷ rather than recovered by administrative fiat, and further prevents purchases through compulsory acquisition.⁶⁷⁸ Beyond that, deciding how to recover water was the prerogative of executive decision making by the Government. Whilst this gave the Minister substantial discretion, it also left the Minister solely responsible for justifying the methods of water recovery he chose. As with the Authority setting SLDs, leaving important decisions to be made with minimal legislative direction left that decision making without the democratic legitimacy it might otherwise have had.

To understand why Parliament adopted this course, I now examine the political context of enactment.

⁶⁷⁶ General Manager, National Water Commission, interview by author.

⁶⁷⁷ Water Act 2007 s254.

⁶⁷⁸ Water Act 2007 s225.

Section 5: How were the criteria set out in the *Water Act 2007* shaped by its political and constitutional context?

Clear legislative criteria for setting SDLs and water recovery would have required a greater level of political consensus than existed at the time of the Act's enactment (or, indeed, at any time before or since). The Millennium drought created broad community support, including within Basin communities, to redirect water towards the environment,⁶⁷⁹ which in turn created political support for taking action (or at least being *seen* to be taking action). The *Water Act 2007* was therefore enacted with the support of both major parties, as well as the minor parties,⁶⁸⁰ following a referral of constitutional matters from all Basin States.⁶⁸¹

Yet an examination of the two political processes leading up to the *Water Act's* enactment reveals that this consensus was thinner than simply those two

⁶⁷⁹ Former director of the Victorian Office of Water, interview by author and Former CEO of the National Farmers Federation, interview with the author. Also see Bouilly and Maywald 101. Support for change was strong in surveys conducted prior to the release of the first proposed SDLs; see Inovact Consulting. However, support among irrigators for increased environmental flows has declined over the past decade; Bjornlund, Wheeler and Cheesman 297.

⁶⁸⁰ Bouilly and Maywald 101. Mr Tony Windsor MP was the single member not to support the Act; see Tony Windsor MP, *Disallowance Speech: Murray Darling Basin Plan* (The House, 29 November 2012) 14005.

⁶⁸¹ *Intergovernmental Agreement on Murray-Darling Basin Reform* 4.2.1(a).

stylised facts reveal. To the extent that there was a political consensus, it existed at the level of abstract principle more than practical agreement.⁶⁸²

The constitutional context: negotiating with Basin States for centralised regulation of the Basin

The Act's requirement to prioritise environmental sustainability when setting SDLs stemmed from the Commonwealth's failure to convince all Basin States to refer the matter of regulating the Basin to the Commonwealth.⁶⁸³

When Prime Minister Howard's Coalition Government failed to secure Basin State agreement, it passed the *Water Act 2007* anyway, ahead of the November 2007 election in what was widely viewed as an attempt to gain environmental credentials.⁶⁸⁴ The Act relied on a 'hotchpotch' of constitutional powers.⁶⁸⁵ The provisions to set SDLs relied on the Commonwealth's power to give effect to international agreements,⁶⁸⁶ relevantly for the Basin Plan, to give effect to those agreements made to protect the Basin's eco-systems. It is for this

⁶⁸² This consensus on the need for a Basin Plan in principle, and lack of consensus on most of its particulars, remains in the submissions made to the Authority in 2011; MDBA, *Proposed Basin Plan—Consultation Report* (MDBA 2012) 8.

⁶⁸³ All States agreed except Victoria; see Williams and Kildea 10. Victoria has most water and the least to gain from Commonwealth involvement, for historical and political reasons; see Hammer 29. In 2008, Victoria continued to be reticent, which is why it received additional concessions. Note that Prime Minister Howard's original announcement was made without prior discussion with any of the key stakeholders, including the Basin States; Former Director, Victorian Office of Water, interview with author.

⁶⁸⁴ The Basin Plan 'was not so much about the Murray-Darling; it was about the environmental vote'; Tony Windsor MP, *Second Reading Debate (Water Amendment (Water for the Environment Special Account) Bill 2012)* (The House, 28 November 2012) 13796.

⁶⁸⁵ A Twomey, 'Aspirational Nationalism or Opportunistic Federalism?' (2007) 51 *Quadrant* 38, 40 and *Water Act 2007* 9(a).

⁶⁸⁶ Australian Constitution s51(xxix). Since the 1970s, this power has often underpinned Commonwealth legislation for environmental protection; Kildea and Williams 603.

reason that it was assumed by most actors that the SDLs must be set at a level that prioritised environmental sustainability, and optimised social and economic outcomes only as a secondary consideration.⁶⁸⁷

The successor Labor Government of Prime Minister Kevin Rudd was able to secure some agreement from Basin States,⁶⁸⁸ in part because all Basin jurisdictions were governed by the Labor Party⁶⁸⁹ and also because the Commonwealth committed additional funding for water recovery.⁶⁹⁰ The Basin States referred specific matters to the Commonwealth,⁶⁹¹ which provided a constitutional basis for the Authority⁶⁹² to develop a Basin Plan that was

⁶⁸⁷ This is evident in the Australian Government Solicitor paper on the Act, which states: ‘where a discretionary choice must be made between a number of options the decision maker should, having considered the economic, social and environmental impacts, choose the option which optimises those outcomes’; Australian Government Solicitor (2010) paragraph 4. On the circumstances of its public release, see Section One, Chapter Five.

⁶⁸⁸ Reflected in three intergovernmental agreements on the Basin in 2008. See *Murray-Darling Basin Reform: Memorandum of Understanding* (26 March 2008); *Intergovernmental Agreement on Murray-Darling Basin Reform*; and, *Murray-Darling Basin Agreement (Schedule 1, Water Act 2007)*. For an outline of this history, see Legal and Constitutional Affairs References Committee (2011) 9. The final agreement was immediately subject to review—another complex process that occurred simultaneously to the Basin Plan’s development, but is outside this theses’ scope.

⁶⁸⁹ A new era of “cooperative federalism” was proclaimed, reflected in the broader framework set out in the Council of Australian Governments, *Intergovernmental Agreement on Federal Financial Relations* (2008).

⁶⁹⁰ An additional \$2.9 billion. The Commonwealth also agreed to significant changes regarding which government bore the risk of future changes in the Basin’s resources; Legal and Constitutional Affairs References Committee (2011) 18.

⁶⁹¹ Full referrals are rare, as States retain greater control over how the Commonwealth can act on the basis of limited referrals. Matters can be referred for a specific period, and can be revoked. The possibility of revocation or amendment of the referral underpinning the Act is made express at Water Act 2007 s18B(5). On referrals generally, see J Arditi, *Industrial Relations: The Referral of Powers* (NSW Parliamentary Library Research Service 2009) and A Lynch, ‘After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s51(xxxvii)’ (2010) 32 Sydney Law Review 363.

⁶⁹² *Intergovernmental Agreement on Murray-Darling Basin Reform* 4.2.1(a).

nationally enforceable⁶⁹³ and could provide for critical human water needs.⁶⁹⁴ This resulted in the *Water Amendment Act* of 2008,⁶⁹⁵ but the provisions directing how the Authority should set SDLs remained unchanged and continued to be based on the Commonwealth's own constitutional powers.

The failure to gain Basin State agreement to refer the entire matter of regulating the Basin to the Commonwealth reflects the pattern of federal relations in the Basin since the 1980s, whereby the Commonwealth has 'steadily grown more powerful but the [States] have continued to find effective ways to frustrate its intentions'.⁶⁹⁶ These federal dynamics are a relevant contextual feature for the accountability analysis in the following chapters.

Had the Basin States genuinely supported the aim of establishing an enforceable, centralised regulatory standard for water extraction from the Basin, presumably they would have referred sufficient powers to give a consensus foundation to that enterprise. Had the Basin States done so, it is likely that the Commonwealth would have changed the legislative direction for

⁶⁹³ *Intergovernmental Agreement on Murray-Darling Basin Reform* 4.2.1(c). By making the Basin Plan the operable law for the Basin; Carney and Gardner 101 and Kildea and Williams 605.

⁶⁹⁴ Such provision was uncontentious; *Intergovernmental Agreement on Murray-Darling Basin Reform* 4.2.1(c). This is the highest priority use of water under the Basin Plan; see *Water Act* 2007 s86A and s86B.

⁶⁹⁵ *Water Amendment Act* 2008. The amendments based on these referrals are set out in Schedule 1.

⁶⁹⁶ Connell (2011a) 3996. As such, Australia's federal system and constitutional particularities remained a structural barrier to reform; Gardner 273 and D Fisher, *Water Law* (LBC Information Services 2000) 61.

setting SDLs.⁶⁹⁷ Given that Basin States are generally viewed as more influenced by agricultural interests than environmental concerns, it is interesting that they left the SDL related provisions of the 2007 Act —giving primacy to environmental sustainability—to stand.⁶⁹⁸

The political context: the composition of the Parliaments that enacted the *Water Act 2007* (and *Water Amendment Act 2008*)

Notwithstanding that the prioritisation of environmental sustainability in setting SDLs was constitutionally necessary, it needs to be explained why Parliament did not seek to direct the Authority about how to achieve that prioritisation.

The Coalition Government that enacted the *Water Act 2007* represented virtually all the rural Basin communities, being a coalition of the Liberal Party (the equivalent of the British Conservative Party) and the National Party (formerly known as the Country Party).⁶⁹⁹ Many of the Coalitions constituents, and some of its parliamentarians, would not have agreed with the prioritisation of environmental sustainability. Indeed, some Coalition parliamentarians

⁶⁹⁷ See Tony Burke MP, Disallowance Speech: Murray Darling Basin Plan (The House, 29 November 2012) 14001.

⁶⁹⁸ Especially as Victoria's refusal to refer powers in 2007 appears to have assumed that the Commonwealth would not go ahead on its own basis; see Malcolm Turnbull MP, *Second Reading Debate (Water Amendment (Water for the Environment Special Account) Bill)* (The House, 28 November 2012) 13795.

⁶⁹⁹ M MacCullum, 'Labor has little to lose by going hard on Murray-Darling' *Crikey* (11 October 2010).

continued to argue for the Act's amendment through the Basin Plan process.⁷⁰⁰ Given the Commonwealth's constitutional limitations, it was probably more politically fraught to specify what that would mean for setting SDLs than to leave the specific SDLs-related provision minimal and abstract. The inclusion of other principles in the general provisions of the Act was likely an attempt to ameliorate the impact of the SDLs-specific provision. Indeed, the inclusion of the requirement to optimise social and economic outcomes reflected successful lobbying by agricultural stakeholders.⁷⁰¹

Major concessions were also made to the rural constituencies the Coalition represented in the approach to water recovery. Under Australia's pre-existing blueprint for water planning, the *National Water Initiative* (2004), entitlement holders could have lost a proportion of their entitlements as a result of any Basin Plan without full compensation.⁷⁰² Yet the Coalition Government committed to recovering all water through either water buyback or funding infrastructure at the very outset of the process,⁷⁰³ and allocated most funding to the more politically palatable option of funding infrastructure.

⁷⁰⁰ Indeed a Senate inquiry controlled by Coalition members recommended such amendments in Legal and Constitutional Affairs References Committee (2011) ix. This should be viewed as a populist move, given the constitutional context.

⁷⁰¹ NRM Manager, National Farmers Federation (NFF), interview by author.

⁷⁰² *National Water Initiative* paragraph 46. While water entitlements are property, the High Court of Australia has held that the entitlements to a volume of water that those licences confer is amenable to administrative change without compensation; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 and *Arnold v Minister Administering the Water Management Act 2000 (NSW)* (2010) 240 CLR 242. For analysis see Gardner 279 and Fisher, (2010) 91.

⁷⁰³ See Howard (2007) 4. The Authority subsequently confirmed that the Commonwealth would be responsible for all reductions to existing diversions; *Basin Plan* 6.13(4). Also see Gardner 290.

What is important for the purposes of understanding the Act is that this points to a lack of political consensus even within the political party that drafted it. This explains why the Act does not specify the environmental (and indeed social and economic) outcomes it seeks to achieve. It also explains why the Act refers to a myriad of objectives and relevant considerations without explaining how the decision maker should make trade-offs when they arise. Finally, it explains why the Act does not provide a more extensive legislative basis to water buyback, the only method of water recovery that would feasibly enable to implementation of the SDLs.

When the successor Labor Government failed to secure a referral that would have enabled SDLs to be set according to broader criteria, and given the absence of Labor constituencies in the Basin, the issue of providing a clearer legislative basis for decision making was buried. It would re-emerge in a spectacular fashion two years later, for a newly elected minority Labor Government, led by Prime Minister Julia Gillard, to confront.

Conclusion

In this chapter, I have introduced the two key decisions and two key decision makers—the Minister for Water and the Murray-Darling Basin Authority—that are the subject of my accountability analysis. I have also analysed the political, legal and regulatory context of the Basin Plan. While I did not attempt to systematically employ my analytical framework in this chapter, I identified

where aspects of this case context are relevant to the approaches I set out in Chapters One and Two and to my subsequent accountability analysis. This included setting out the interests and ideologies of most the key actors in the Basin Plan case, and identifying how the distribution of power between these actors related to that constitutional, legislative and political context. This informs the regime-level perspective I adopt in subsequent chapters regarding how the various accountability actors interact within the multiple accountability regime operating in the Basin Plan case.

My central argument, however, related to the failure to recognise and reconcile the many interests in the Basin's resources, and values relevant to its regulation, through the *Water Act 2007* or the associated policy framework. Instead of the Basin Plan being recognised as a significant social and economic regulatory exercise, as well as environmental reform, the Basin Plan's development was inaccurately treated as though it required largely technocratic decisions. I argue that this was central to the politicisation of the Basin Plan's development, and therefore the way that the broader political context would shape the dynamics within the accountability processes—and the accountability regime—that I examine in Chapter Four and Five.

I identified some specific implications of this legislative and policy framework for the construction of accountable decision making in the Basin Plan case. I argued that the Act implicitly constructs accountable or “good” decision-making regarding setting SDLs as independent, expert decision making. It is this construction of accountable decision making that become

contested. I also argued that the manifold and ambiguous ends that the Authority and Minister were meant to pursue in setting and adopting SDLs undermined the clarity around the decision maker's responsibility. This generated the scope for the Authority's responsibilities, in particular, to be substantially reshaped through various accountability processes.

In the next chapter, I move to analysing how the politicisation that I have foreshadowed in this chapter prompts the Basin Plan case to become an "unsettled" political order mid-way through its 2008-2012 timeframe. This resulted in the emergence of accountability politics regarding the forums to whom the Authority, in particular, should be obliged to account and also around what the decision makers were understood to be accountable for.

Chapter Four: Acting in concert to reshape how decision makers are held to account

Introduction

In this chapter, I begin my analysis of accountability interactions in the Basin Plan case. I present an analytical, narrative account of the events that reshaped accountability in the Basin Plan case, notably the community backlash and change in the Authority's leadership. I describe these events in terms of the actions and responses of different actors within the multiple accountability regime overseeing the Authority and the Minister, analysed at the regime-level. I thereby establish that the Basin Plan case involved accountability actors acting in concert to reshape the accountability of both decision makers.

The findings of this chapter accord with the broader conception of accountability interactions I set out in Chapter Two, while the findings of Chapter Five accord with my archetypal, narrower conception of accountability interactions. I employ the analytical approach I developed to examine contestation: accountability politics. I examine contestation about whether the decision makers should be obliged to account directly to Basin communities and their political representatives. This contestation challenges the original composition of the multiple accountability regime and, to some extent, the original construction of accountable decision making.

I commence my accountability analysis by establishing the Basin Plan case as an example of a case where the political order is settled for the first tranche of decision making (October 2008 - October 2010) and switches to being unsettled for the second tranche of decision making (October 2010 - November 2012). I therefore divide the decision making into two phases for analytical purposes. I also set out the formal decision-making process and accountability regime, and describe the approaches adopted by the decision makers during the first half of the case. When combined with the delegated responsibilities I set out in Chapter Three, this becomes the *status quo* that was so successfully contested in the second phase of the case. I then extend this account to the backlash against the decision makers that occurred in October 2010. I argue these events prompted a switch to an unsettled political order when they coincided with the election of a minority Parliament at the Federal level in Australia.

The backlash against the Authority and Minister also resulted in the intense politicisation of decision making in the Basin Plan case. I argue that this politicisation can be explained by the salience and controversy of the issues being decided, but was magnified by the perception of policy failure and administrative deviance that arose in the case. I argue that this politicisation was transferred into the accountability processes that operated during the second phase of the Basin Plan case and that accountability politics becomes a feature of the case. Importantly, I find that actors acted in concert to generate the accountability politics, and specifically to create the pressure for the

decision makers to account to additional (political) forums. In doing so, actors were contesting what counted as accountability by contesting the adequacy of the formal accountability relationships. I also find that actors contested the *de jure* responsibilities of the decision makers in order to render them accountable for different subject matters, and therefore for being assessed against different standards. It is through this contestation that demands were made for both decision makers to be accountable for the social and economic impact of the Basin Plan.

Finally, I examine the role that the Authority played in the backlash. I find that the Authority acted to create a scenario in which Basin communities could demand accountability directly from the Authority for the Basin Plan's presumed socio-economic impact. This surprising finding leads me to conclude that all three kinds of accountability actors can be understood to have acted in concert to reshape the accountability regime in the Basin Plan case.

Section 1: The first phase of decision making in a “settled” political order

In this section, I set out the formal design of the decision-making process and accountability regime in the Basin Plan case. Through my description of this formal design, and the Authority and Minister's approach to their decision making during the first phase of the case, I establish the *status quo* that was so successfully contested in the second phase of the case. I argue that during this

first phase the Basin Plan case was a “settled” political order, with routinised accountability processes that did not involve any accountability interactions. During most of this first phase, the Authority and the Minister’s approach to decision making was technocratic and involved minimal public or Basin State input. While the tensions identified in Chapter Three were not resolved, I find this decision making approach meant that tensions were effectively suppressed from public view.

I take the first phase of decision making as being from the commencement of the Authority’s work on the Basin Plan on 8 September 2008⁷⁰⁴ to the Authority’s release of the first indicative Sustainable Diversion Limits (SDLs) in the *Guide to the Basin Plan*⁷⁰⁵ (“the *Guide*”) on 8 October 2010.⁷⁰⁶ The first phase also includes the first tranche of water recovery. As designed, the decision making to set proposed SDLs largely occurred in isolation from decision making relating to water recovery.⁷⁰⁷ The decision makers were situated within a broader institutional context that intentionally fragmented responsibility between different public actors.

⁷⁰⁴ MDBA, *Murray Darling Basin Authority Annual Report 2007-2008* (Department of the Environment, Water, Heritage and the Arts 2008) 144.

⁷⁰⁵ MDBA, *Guide*.

⁷⁰⁶ MDBA, *Press release: Basin Plan Guide Released for Public Discussion* (8 October 2010) <<http://www.mdba.gov.au/sites/default/files/mr/2010/Media-release-Basin-Plan-Guide.pdf>> accessed 10/10/2010.

⁷⁰⁷ On this separation see Gardner 284. The lack of coordination that resulted from each agency/department having separate mandates seems to have been one of the problems with the process; a classic problem of agencies with discreet mandates; Shapiro (1997) 282.

A settled political order and routinised accountability processes

I argue that the Basin Plan case should be characterised as a settled political order during the first phase of decision making. Olsen describes settled political orders as stable polities and decision making contexts in which ‘well-understood situations [are] confronted repeatedly’.⁷⁰⁸ During the first phase of the Basin Plan case Australia was a stable constitutional democracy, and the Basin Plan’s development had (nominal) bi-partisan support. The decisions required for the Basin Plan’s development were complex and in many ways unprecedented; but the technical side of the setting SDLs and recovering water was based on well-established regulatory techniques for addressing the over-allocation of water. The salient point is that setting SDLs and recovering water were treated by most actors as though they were significant but routine.

Hence, during the first phase of the Basin Plan case, decision making followed the decision-making process set out in the *Water Act 2007*, which I outline below. The decision makers operated within the legislative and policy framework described in Chapter Three, and acted in accordance with the roles set out in the Act, which in the Authority’s case meant operating as an independent, expert agency.⁷⁰⁹

The Act had formally established a multiple accountability regime, which I also set out below. Within this regime, the Authority’s primary accountability relationships were with the Minister, Parliament and the Ministerial Council.

⁷⁰⁸ Olsen 464. On “settled” and “unsettled” political orders, see Section Five, Chapter One.

⁷⁰⁹ See Sections Two and Four, Chapter Three.

Those relationships were based on the ethic that ‘an independent but accountable agency performs its tasks without political interference, but its decisions are scrutinised afterwards, so that it operates under the shadow of possible sanctions’.⁷¹⁰ Hence, accountability was *ex post facto*. The Minister’s primary accountability relationship was with Parliament, under the usual conventions of ministerial responsibility.

Given this, it is unsurprising that I find that accountability operated through ‘standardised situations [which] routine[d] accountability’⁷¹¹ during the first phase of the Basin Plan process. Neither decision maker was held to account by a significant forum nor was evaluated for the key tenets of their decision making. I also find that there was no evidence of additional, informal or horizontal public accountability relationships during this period.⁷¹² Within routine and depoliticised accountability processes, forums acted relatively autonomously.

The formal decision-making process

The *Water Act 2007* sets out a detailed decision-making process for the Authority to set proposed SDLs as part of developing a proposed Basin Plan. The Act effectively divided decision making into two phases: the first phase

⁷¹⁰ Biela and Papadopoulos 6.

⁷¹¹ Olsen 451.

⁷¹² This conclusion is based on the assessment of interviewees representing multiple state governments (including members of the Ministerial Council), peak organisations, and other Commonwealth agencies who might have had *de facto* accountability relationships with the Authority during this period. I did not have the access to personally observe meetings between the Authority and these parties that would allow me to independently verify those assessments.

during the preparation of a proposed Basin Plan involved minimal outside input; the second phase—following the proposed Plan’s preparation and public release—involved structured opportunities for input, with attempts to render that input transparent.⁷³ This process was established to protect the Authority’s independence during its development of a proposed Basin Plan, especially regarding its scientifically-based decision making.

Such a structure is not unusual for decision making by an independent, expert agency. But it was unusual in the Basin context, where decision making had previously involved inter-jurisdictional collaboration and extensive public engagement.⁷⁴ The departure from convention reflects the deliberate attempt to insulate the Authority’s expert decision making from political influence during the first phase. This was the period that most actors assumed was the most significant period of decision making. The distinction between different phases of decision making is an important backdrop to the backlash I examine in the following section, because much of the community response was premised on the assumption that any “proposed” Basin Plan was actually a

⁷³ Rendering outside influence transparent is meant to protect independence. Both the need for consultation and independence were emphasised in the second reading speech; Malcolm Turnbull MP, *Second Reading Speech (Water Bill 2007)* (The House, 4 August 2007).

⁷⁴ Former Chair of Murray-Darling Basin Commission, interview with author, Canberra, 28 March 2011.

near-final Plan.⁷¹⁵ Ergo, if the communities were not happy with it, they needed to bring overwhelming political pressure to bear.⁷¹⁶

Public consultation requirements

The Authority had no formal requirement to publicly consult during its preparation of the proposed Basin Plan, although it was empowered to consult and publish such information as it ‘thought appropriate’.⁷¹⁷ In contrast, following the public announcement of a proposed Plan, including proposed SDLs, the Act required the Authority to seek submissions from the public during a lengthy consultation period.⁷¹⁸ It also required the Authority to consider those submissions and account to the Minister for (and publish) how it addressed them and ‘altered’ the Basin Plan in response.⁷¹⁹ These arrangements rendered the Authority publicly accountable for how it incorporated public submissions into its decisions, while falling short of establishing a direct accountability relationship with the public or with particular stakeholders.

Basin State consultation requirements

The Authority was required to consult throughout its deliberations (thus, in both stages of decision making) with Basin States, the Ministerial Council

⁷¹⁵ NRM Manager, National Farmers Federation (NFF), interview by author.

⁷¹⁶ Indeed, the Labor Party did promise in the 2010 election to adopt any SDLs the Authority proposed, which would have effectively neutered Parliamentary scrutiny in a usual majority Parliament; T Arup, ‘Labor wades in water buying for Murray-Darling’ *The Sydney Morning Herald* (11 August 2011).

⁷¹⁷ Water Act 2007 s42.

⁷¹⁸ Water Act 2007 s43(10).

⁷¹⁹ Water Act 2007 s43(11). This document is (MDBA 2012a).

and/or the Basin Officials Committee. However, these consultation requirements had limited formal meaning prior to the development of the proposed Basin Plan and SDLs,⁷²⁰ and Basin States uniformly felt cut out of the development process.⁷²¹ Following the public announcement of proposed SDLs, the Authority was required to formally consult with the Basin States and the Ministerial Council during the public consultation period, with the same requirements to consider feedback as applied to public submissions.⁷²²

The Authority's requirements to respond to suggestions and directions from the Minister

The most significant formal attribute distinguishing independent agencies is that the Minister has limited powers of direction.⁷²³ The Minister's limited capacity to direct the Authority was rendered meaningful through provisions in the *Water Act 2007* that set out the Minister's formal role in decision making around the Basin Plan. Crucially, the Act gave the Minister no power to prepare the Basin Plan personally.⁷²⁴ The non-delegable responsibility to prepare a proposed Basin Plan, and decide upon proposed SDLs, rested with the Board of

⁷²⁰ There was little detail about what this consultation required prior to the public release of proposed SDLs; *Water Act 2007* s42(1)(a).

⁷²¹ South Australian Minister for the River Murray, interview with author, Adelaide, Friday 29 April 2011; Director, NSW Office of Water, interview by author, Sydney, 21 April 2011.

⁷²² *Water Act 2007* s43(3); Former Director, Victorian Office of Water, interview with author.

⁷²³ The extent to which Minister can formally direct agencies will vary, but few agencies are entirely independent from direction (not central banks and some justice related authorities as the exceptions). It has been argued that even with departments ministers increasingly rely more on post facto accountability rather than directions; Strom, Muller and Bergma 746. It should be remembered that the Authority was staffed mostly by career public servants, who are likely to have previously worked in contexts where they were subject to Ministerial direction, and would intend to do so again.

⁷²⁴ *Water Act 2007* ss 41& 44(1)

the Authority.⁷²⁵ Moreover, the Minister had no discretion to reject the proposed Basin Plan in its entirety once it was prepared.⁷²⁶

As a result, the Minister could only alter the Basin Plan through separate suggestions and directions to the Authority, with a multi-step process outlined in the Act.⁷²⁷ To alter any part of the proposed Basin Plan, the Minister had to make a suggestion to the Authority. The Authority would then be required to investigate the suggestion and consult publicly, but retained the discretion to reject it with reasons and resubmit the proposed Basin Plan to the Minister in its original form.⁷²⁸

The Minister could then direct the Authority to alter the proposed Plan, and the Authority was required to comply.⁷²⁹ But because the Minister had no discretion to reject the Plan entirely, s/he was required to alter each section of the proposed Basin Plan through separate suggestions or directions, and then adopt the Basin Plan as altered by the Authority.⁷³⁰ Importantly for an accountability analysis, the Minister had to disclose any directions—although *not* any suggestions—that s/he gave to the Authority (with reasons) when the

⁷²⁵ Water Act 2007 s177. These decision making powers and functions are the only powers and functions that the Board cannot delegate; Water Act 2007 s200. Decisions are made on by majority voting; Water Act 2007 s194.

⁷²⁶ Water Act 2007 s44(1).

⁷²⁷ Water Act 2007 s44(1).

⁷²⁸ Water Act 2007 s44A(1) & (2).

⁷²⁹ Water Act 2007 ss44A(3) & (6).

⁷³⁰ Water Act 2007 s44(1) and s44(6)(b).

Basin Plan was laid before Parliament, rendering formal Ministerial influence semi-transparent.⁷³¹

Crucially, Ministerial directions could not be made regarding aspects of the Plan that were of ‘a factual or scientific nature’.⁷³² This limitation encompassed most of the Authority’s decision making around SDLs, including its assessment of the scope and variability of Basin resources: ‘the risks to the condition, or continued availability of, Basin resources’⁷³³ (including as a result of climate change); and the ‘social and economic circumstances of Basin communities’.⁷³⁴ It further included ‘limitations on the state of knowledge on the basis of which estimates about matters relating to Basin water resources are made’,⁷³⁵ meaning that the Minister could not alter the Authority’s decisions about the veracity of the evidence underpinning the proposed SDLs.

This limit on directions did not exclude a Ministerial direction about the level of SDLs themselves, as that figure also includes policy judgments.⁷³⁶ However, a Minister being publicly seen to alter SDLs would likely be viewed as

⁷³¹ Water Act 2007 s44(7). The Chair was also required to provide an annual report to the Minister that included any Ministerial directions given to the Authority, which increased the transparency of direction-giving during the process because the Minister could be asked about it in Parliament or the report itself might have been subject to Freedom of Information requests. There is no evidence on the public record of any Ministerial directions being given.

⁷³² Water Act 2007. This restriction includes, but is not limited to, ‘the matters referred to in:

(i) items 1, 2, 3 or 8 of the table in subsection 22(1); or (ii) subsection 75(1); or (iii) subsection 81(2) or (3)’.

⁷³³ Water Act 2007 item 3 of the table in ss22(1).

⁷³⁴ Water Act 2007 item 1 of the table in ss22(1).

⁷³⁵ Water Act 2007 item 3 of the table in ss22(1).

⁷³⁶ This can be inferred from the matters that the Basin States and Ministerial Council were able to comment upon, which could not include matters the Minister was not able to issue directions about (and did include SDLs); see Water Act 2007 s43A(4).

compromising the Authority's independence and undermining the validity of the evidence-based process. Throughout the case, this is likely why the Minister, and most accountability forums, focused their critiques on the methodology adopted by the Authority to set SDLs, or the rigour of its analysis, rather than the SDL figures themselves. This contrasts notably with the public and media discussion of the Basin Plan process, in which the SDLs figures were used as a proxy for tracing the influence of various actors on the Authority.

In practice, the Minister had much greater input into the Authority's decision making than this formal process foreshadows. I find that this influence stemmed from the Minister being able to reshape the multiple accountability regime overseeing the Authority and to "responsibilise" the Authority, as I analyse in this Chapter and Chapter Five. Despite the detailed provisions in the Act designed to curtail Ministerial influence, the Minister did significantly shape the kind of Basin Plan the Authority proposed in the second phase of the case, but without making any directions and making only limited suggestions.⁷³⁷

The Act set out a two-step process, with avenues for input and change following each point at which the Authority made decisions about SDLs. In practice, the Authority exercised its discretion to make this a three-step process

⁷³⁷ See Decision making coda in the Conclusion. This finding cannot be definitive, because not all Ministerial suggestions were made public. However, I judge that there was a high likelihood that any suggestions that significantly altered the Basin Plan were likely to have been leaked, given the politicisation around the process. More fundamentally, there were many ways in which the Minister could make his preferences clear to bureaucratic actors without even needing to resort to these formal systems; Dr Daniel Connell, Crawford School of Government, Australian National University, interview with author, Canberra, 4 May 2011.

by issuing the *Guide* in October 2010.⁷³⁸ It did so to trigger public consultation earlier than designed.⁷³⁹ As such, the Authority acted to challenge the formal decision-making process, which effectively minimised political and public debate about the proposed SDLs, with motives I explore in Section Five. The Authority then made decisions about SDLs on three subsequent occasions: in a *Proposed Basin Plan* on 28 November 2011 and a *Proposed Basin Plan - A Revised Draft* on 28 May 2012, and in the final *Basin Plan* as adopted by the Minister on 22 November 2012.⁷⁴⁰

The Act sets out no formal decision-making process for water recovery. The formal process around water recovery was determined by the Minister's department and inter-governmental negotiations, with some public consultation. In practice, however, the decision-making processes around SDLs and water recovery became intertwined in the second half of the case.

The formal multiple accountability regime

The *Water act 2007* sets out the Authority's accountability relationships and arrangements in some detail. The Act does not establish any specific

⁷³⁸ The Authority was not required to prepare the *Guide* under the Act, but instead was required to prepare a *Proposed Basin Plan*. The decision to do so was a discretionary exercise of power by the Authority; see MDBA, *Press Release: Additional Consultation on Draft Murray-Darling Basin Plan* (28 June 2010) < www.mdba.gov.au/files/Early-August-release-MR-Final.pdf > accessed 28/09/2012. This decision was made in order to bring forward public consultation within the process, prior to proposed SDLs being settled; First Chair, Murray-Darling Basin Authority, interview by author, Melbourne, 9 July 2011.

⁷³⁹ First Chair, Murray-Darling Basin Authority, interview by author.

⁷⁴⁰ All these documents, interestingly with the exception of the *Guide*, are available at MDBA, 'Steps in the development of the Basin Plan' (MDBA, 2012) <<http://www.mdba.gov.au/what-we-do/basin-plan/development/steps-in-the-development-of-the-basin-plan>> accessed 22/7/2013.

accountability relationships or arrangements pertaining to the Minister's decision making about water recovery over and above the usual ministerial responsibility to Parliament. With respect to the Minister's decision to adopt proposed SDLs, the main accountability arrangement was the need to lay the Basin Plan before both houses of Parliament. The only other accountability arrangements that pertain to the Minister are a flip side of the decision making arrangements that render Ministerial influence over the Authority semi-transparent. Therefore, this analysis focuses on the multiple accountability regime overseeing the Authority.

The formal multiple accountability regime established by the *Water Act 2007* has one noteworthy feature relevant to a study of accountability interactions: the institutional design attenuates the autonomy of a number of forums by channelling the accountability dialogue through the Minister. At a number of points during the case analysis, we see the Minister shaping the accountability relationship between the Authority and another forum. While I do not find that this institutional design directly triggered the accountability interactions I examine, it does make it more likely that individual forums and additional accountability actors will use multiple accountability arrangements to hold the same decision maker to account.⁷⁴¹ It also underscores the need to

⁷⁴¹ See Section Three, Chapter One.

adopt a regime-level perspective in order to identify how different relationships and arrangements might be related to others.⁷⁴²

As an executive agency within a Westminster political system, the Authority's most direct accountability relationship was with the Minister.⁷⁴³ This accountability relationship included an *ex ante* element, which was the Ministerial power to appoint members of the Authority's board.⁷⁴⁴ However, formally, the Minister's powers to hold the Authority to account for its setting of proposed SDLs were for *ex post* review.⁷⁴⁵ As part of this *ex post* accountability relationship, the Authority had relatively extensive reporting

⁷⁴² See Section Five, Chapter One.

⁷⁴³ For example, the executive head of the Authority is responsible for the management of the Authority 'under the Agency Minister'; Public Service Act 1999 s66(1)&(3).

⁷⁴⁴ The board members include a Chair, CEO and four part-time board members; Water Act 2007 s177. The Minister's power was only constrained by the need for appointments to have relevant expertise; Water Act 2007 s178(2). Formally these appointments were made by the Governor-General; Water Act 2007 s178. Under the principles of responsible government, which Australia inherited from the UK, the Governor-General takes such actions only on ministerial advice; see G Winterton, *Parliament, the Executive, and the Governor-General: A Constitutional Analysis* (Melbourne University Press 1983) 14. Board members are appointed for a fixed term (not exceeding four years); Water Act 2007 s179.

⁷⁴⁵ Indeed, the Authority's formal status as a 'prescribed agency' mean that the CEO only has direct accountability to the Minister only for financial management (with the Authority having financial autonomy); Financial Management and Accountability Act 1997 s5 and Schedule 1. In practice, there was probably stronger informal channels of accountability from the Authority to the Minister for the Basin Plan's development; Former Director, Victorian Office of Water, interview with author. There is some evidence that the Authority's relationship with the Minister was mediated by the Department of Water; General Manager, National Water Commission, interview by author. Unless this is on the public record, however, it is beyond the scope of this thesis. Note that the Authority only met the second Minister (who had been appointed following the election in August) once, two days prior to *Guide's* release; L Wilson and S Rintoul, 'Murray-Darling probes gush' *The Australian* (29 October 2010).

and information obligations to the Minister regarding its preparation of the Basin Plan.⁷⁴⁶

The Authority can be subject to relatively few formal sanctions from the Minister. The *Water Act 2007* does give the Minister the strongest sanction available, namely to dismiss the members of the Board (including the executive head of the Authority). However, this can be used only in instances of ‘misbehaviour’ or if the Minister ‘is satisfied that the performance of the member is unsatisfactory’.⁷⁴⁷ The Minister does not have the power to take ‘corrective measures *vis-à-vis*’ the Authority short of dismissing the Board.⁷⁴⁸

The Authority was also in an accountability relationship with Parliament, or more accurately with various parliamentary forums.⁷⁴⁹ The relationship between independent agencies, the Minister, and Parliament can be conceptualised as a ‘triangular (three-way) relationship’⁷⁵⁰ because the Authority’s accountability to Parliament was often through the Minister.⁷⁵¹ For example, the Authority’s annual report was given to the Minister, who was

⁷⁴⁶ MDBA, *Murray Darling Basin Authority Annual Report 2010-2011* (Murray-Darling Basin Authority 2011) 27. The Chair was also obliged to keep the Minister informed of ‘the general operations of the Authority’ and provide information to the Minister, including documents, on request; *Water Act 2007* s184.

⁷⁴⁷ Formally, the Governor-General exercises this power on the advice of the Minister; *Water Act 2007* s189.

⁷⁴⁸ Koop 217.

⁷⁴⁹ Parliament can be understood as a unitary accountability fora which can call the Authority to account through multiple accountability mechanisms or as an institution that encompasses multiple potential accountability fora. In this thesis I uses the latter conception, in order to reveal the distinct accountability roles that different actors within Parliament played in calling and holding the Basin Plan decision makers to account.

⁷⁵⁰ Wettenhall 50.

⁷⁵¹ *Public Service Act 1999* s66(2).

required to table it in Parliament (and provide a copy to the Basin states).⁷⁵² However, the Authority also had direct accountability to the Senate, through committees⁷⁵³ and through a biannual budget-related process called “Senate Estimates”.⁷⁵⁴ Beyond these ongoing accountability arrangements, Parliament’s capacity to disapprove the Basin Plan (once adopted by the Minister) constituted a specific *ex post* accountability arrangement,⁷⁵⁵ which could be utilised by either chamber.⁷⁵⁶

⁷⁵² Water Act 2007 214 (4). Annual reports are basis of an agency’s accountability to Parliament ‘in particular’, as well as to the public; Department of Prime Minister & Cabinet, *Requirements for Annual Reports: For Departments, Executive Agencies, and FMA Act Bodies* (Department of Prime Minister & Cabinet 2012) paragraph 5. There are criticisms of the extent to which it is read by the public, given the limited or technical nature of the information often provided; M Herawaty and Z Hoque, ‘Disclosure in the Annual Reports of Australian Government Departments’ (2007) 3 *Journal of Accounting & Organizational Change* 147, 149.

⁷⁵³ The relevant Senate committee examined the Authority’s annual reports, and had the capacity to report to the Senate if the report was unsatisfactory, thereby triggering questions to the Minister; the Environment and Communications Legislation Committee. See Department of Senate, *Senate Standing Orders* (Department of Senate 2009) provisions 25(20)(a) & (g). No such reports were made during this case study, although it was noted in successive Committee reports that the Authority missed the deadlines for providing their annual reports; see Environment and Communications References Committee, *Annual Reports (No 2. of 2010)* (The Senate 2010) 1.17; Environment and Communications References Committee (Senate), *Annual Reports (No 2. of 2011)* (The Senate 2011) 1.17; Environment and Communications Legislation Committee (Senate), *Annual Reports (No. 1 of 2012)* (The Senate 2012) 1.17. The relevant House of Representatives Committee also has the power to examine an agency’s annual report, however, this was not invoked as part of this case study; House of Representatives, *Standing Orders of the House of Representatives* (Department of the House of Representatives 2010) 215c.

⁷⁵⁴ Department of the Senate, *Senate Brief No. 5: Consideration of Estimates by the Senate’s Legislation Committees* (Department of the Senate 2012). All these hearing must be conducted in public, and any documents tabled are made public; Senate 25(2). Public servants are not required to comment on policy during these hearings, and so any questions regarding policy are referred to the Minister. Senate Estimates has been described as the ‘best accountability mechanism of any Australian parliament’ because it involves agency officials directly explaining their actions to parliamentarians; Senator John Faulkner, quoted in Department of the Senate, *Senate Brief No. 4: Senate Committees* (Department of the Senate 2012).

⁷⁵⁵ See discussion of a veto over ‘critical agent decisions’ as an *ex post* accountability arrangement; Strøm 272. Cf Curtin 525, who characterises final approval as an *ex ante* accountability arrangement.

⁷⁵⁶ As parliamentarians were well aware in the minority parliament. For example, L Wilson, ‘Windsor queries Murray buyback’ *The Australian* (14 October 2010).

The Act also established an ongoing accountability relationship between the Authority and the Ministerial Council⁷⁵⁷ (which was chaired by the Minister).⁷⁵⁸ The Ministerial Council could require the Authority to report to it on any of the Authority's functions⁷⁵⁹ and approved the Authority's annual plan and budget.⁷⁶⁰ However, these formal accountability arrangements were less significant than the ability to make suggestions,⁷⁶¹ described above. In practice, individual Basin States made themselves accountability actors in the second phase of decision making, outside these formal arrangements.

The Authority's decision making to set the first proposed SDLs⁷⁶²

The Authority's decision making during the first phase occurred according to the mainstream interpretation of the policy and legislative framework set out in Chapter Three. The Authority assumed that the *Water Act 2007* required it to ensure environmental sustainability as the first priority and then, once

⁷⁵⁷ Water Act 2007 Schedule 1. I include this forum as a public accountability forum because it issued public communiqués after its meetings. These communiqués could be a means for the Council to sanction the Authority, as well as record their evaluations, should they choose; MDBA, 'Murray-Darling Basin Ministerial Council'.

⁷⁵⁸ Water Act 2007 Schedule 1. Note that the Commonwealth Minister does not control this Council, whose decisions are usually made by consensus.

⁷⁵⁹ Water Act 2007 Schedule 1, s12.

⁷⁶⁰ Water Act 2007 Schedule 1, s9(c) & s34. The individual Basin states also receive a copy of the Authority's annual report, although there is no accountability process allowing the Basin States to individually ask questions of the Authority about the report or evaluate it.

⁷⁶¹ Director, Murray-Darling Basin Agreement, South Australian Department of Water, interview with author, Adelaide, 2 May 2011.

⁷⁶² For clarity, the SDL figures cited in most (although not all) Authority and media publications, and used in this thesis, are the reductions in *current annual* diversions that would be necessary to achieve the SDLs, rather than the SDLs themselves; MDBA *Guide* xvii and MDBA, *Proposed Basin Plan* (MDBA 2011) 6.04(1). However, since the SDLs for ground water ended up being an increase on current annual diversions, those figures are actual SDLs. It was in the discretion of the Authority how the SDLs would be expressed (i.e., a figure, a formula or some other way); Water Act 2007 s23(2). In the *Guide*, proposed SDLs for surface water were expressed as a range; all other proposed SDLs were pinpoint figures.

sustainability had been secured, to optimise social and economic outcomes.⁷⁶³ This interpretation was based on legal advice from the Australian Government Solicitor (“Government Solicitor”) ⁷⁶⁴ and reflected the near-universal interpretation of the Act.⁷⁶⁵ Nonetheless, the Act’s requirements would prove to be the most significant point of controversy, as I narrate in the following Section.

The Authority’s decision making, reflected in the *Guide*, was based on a two-step, high-level methodology.⁷⁶⁶ First, it determined that aggregate diversions of surface water needed to be reduced by between 3000GL and 7600GL to ensure environmental sustainability. The Authority then decided that aggregate diversions should be reduced by between 3000GL and 4000GL to ensure socio-economic optimisation.⁷⁶⁷ (The Authority also recommended aggregate diversions of groundwater be reduced by 186 GL.)⁷⁶⁸ Although the environmental outcomes secured by this recommended range of 3000-4000GL

⁷⁶³ My analysis here is based on aggregate assessment of the primary source document (being the *Guide*) and secondary sources and interviews. The *Guide* is a long (223 pages), often repetitive and at times confusing document within which individuals quotations could be used to support a range of interpretations, and should not be solely relied upon as a clear indication of the Authority’s decision making. I therefore cite the relevant sections of the *Guide*, but do not extensively quote from it.

⁷⁶⁴ Solicitors from the Australian Government Solicitor were seconded to the Authority throughout the *Guide*’s development.

⁷⁶⁵ By the Act’s supporters and detractors alike.

⁷⁶⁶ For further detail, see diagram of stages of decision making at MDBA, *Guide* 103.

⁷⁶⁷ The Authority modelled three scenarios in the *Guide* of reductions in surface water diversions of 3000, 3500 and 4000 GL, which represents a reduction of between 22% and 29% of current diversions. Because publishing the *Guide* was a discretionary action by the Authority, it did not need to recommend particular SDLs and instead published a range of indicative SDLs.

⁷⁶⁸ MDBA *Guide* Chapter 9. Note that the SDLs for groundwater were not significant in the public conversation around the Basin Plan until they unexpectedly increased significantly in the second phase.

were relatively poor, the Authority decided that any higher SDLs would have too great a socio-economic impact on Basin communities.⁷⁶⁹

When it publicly released the *Guide*, the Authority emphasised that setting SDLs did not automatically follow from a simple analysis of the data; it was a decision-making process that required ‘informed policy judgment’.⁷⁷⁰ The Authority stated that the evidence-base it relied upon was peer-reviewed and represented ‘the best available (biophysical and social) science’ available.⁷⁷¹ However, the Authority also repeatedly emphasised that existing evidence was insufficient to assess localised socio-economic impacts, and that more research was needed.⁷⁷²

The Minister’s decision making to recover the first tranche of water

The Minister began recovering water through both water buyback and infrastructure investment programs from February 2008⁷⁷³ through the *Water*

⁷⁶⁹ MDBA *Guide* xx-xxiii.

⁷⁷⁰ MDBA *Guide* 36.

⁷⁷¹ MDBA *Guide* 37 & Chapter 4. The Authority states it has a medium-level of confidence in most of the evidence-base available, and states that the hydrological evidence was the most extensive and reliable, followed by the environmental science and then the social and economic evidence; MDBA *Guide* 37-38 & 197. All these evidence-bases were expanded during the Basin Plan’s development, with the Authority commissioning vast amounts of research. Interviews indicated that environment and socio-economic research that was commissioned during the first phase, was not necessarily incorporated into the SDLs due to lack of time; Consultant Social Scientist, ABARE-BRS, interview with author, Canberra, 17 January 2011. The lack of footnotes in the *Guide* made it impossible to trace the exact evidence-base for different aspects of the decision making, and significantly undermine the utility of the Authority’s commitment to make its evidence-base available; see MDBA *Guide* 37.

⁷⁷² MDBA *Guide* xxviii. For an excellent analysis of the Authority’s treatment of socio-economic evidence, see Miller 193.

⁷⁷³ See Department of the Environment, *Annual Report 2007-2008* 141.

for the Future (2008) initiative.⁷⁷⁴ In the only significant shift from the Coalition Government's original design of the Basin Plan process, the Minister prioritised water buyback during this first phase of decision making.⁷⁷⁵ Water could be purchased from any 'willing sellers' in the Basin.⁷⁷⁶ The resulting water buyback involved thousands of farmers selling water entitlements to the Commonwealth.⁷⁷⁷ By the time of the *Guide's* release in 2010 the Government had purchased 920GL, or between one quarter and one third of the indicative SDLs.⁷⁷⁸

⁷⁷⁴ Penny Wong, *Press Release*; Rudd *Government to invest \$12.9 billion in water* (2008) and Water Department of Environment, Heritage and the Arts, *Securing Our Water Future* (Australian Government 2010).

⁷⁷⁵ A first round of buyback with a A\$50 million budget took place via tender in February-June 2008. Buyback was accelerated at the beginning of 2009 with A\$250 million expenditure brought forward as part of the Rudd Government's fiscal stimulus response to the global financial crisis; Department of the Environment, *Annual Report 2008-2009* 179. This occurred after an independent South Australian Senator made the passage of the entire stimulus package for the response to the global financial crisis contingent on accelerating water recovery to address the impact of the drought; P Hudson, '\$42b stimulus package: Rudd cuts a deal with Xenophon' *The Sydney Morning Herald* (13 February 2013). A further round of buyback was announced after the *Guide's* release, to purchase water from those catchments identified as most over-allocated; T Arup, 'Further buybacks in the pipeline' *The Sydney Morning Herald* (19 November 2010).

⁷⁷⁶ See Environment Department of Sustainability, Water, Population and Communities, 'Restoring the Balance in the Murray-Darling Basin' (Australian Government, 2013) <<http://www.environment.gov.au/water/policy-programs/entitlement-purchasing/index.html>> accessed 2/8/13.

⁷⁷⁷ Around 15% of entitlement owners had sold water to the Commonwealth between 2008-2011; Marsden Jacob Associates i.

⁷⁷⁸ A Wahliquist, *The Media and the Guide to the Basin Plan* in Connell and Quiggin 123. The Department of Water's figures are based on financial years, which end in June. At 30 June 2010 water purchases under the program had secured 863 gigalitres of water entitlements worth \$1.262 billion; Water Department of the Environment, Heritage and the Arts, *Annual Report 2009-2010* (Australian Government 2010) 191.

Despite some concerns about the socio-economic impact of water buyback being raised at public consultations around *Water for the Future*,⁷⁷⁹ the Minister did not establish a separate process to address how the communities would adjust to a future with less water. Nor did the Minister use water recovery funding for community-focused infrastructure that might have assisted communities (as distinct from irrigators) to adapt to the implementation of SDLs. Indeed, the Government went to the 2010 election promising to cover the full cost of purchasing all necessary water to implement whatever proposed SDLs the Authority recommended.⁷⁸⁰

Water efficiency projects technically began to be funded from July 2008, but were slower to finalise given the due diligence and planning involved in infrastructure funding.⁷⁸¹ This made it appear that the Government was prioritising buyback to the exclusion of infrastructure-based water recovery, which given the analysis of these respective methods in Section Three, Chapter Three, partly explains the community backlash that followed. Hence, by 2010 and the *Guide's* release, concerns about the Minister's decision making around

⁷⁷⁹ Public consultations were first held in July 2008. Department of the Environment, *Annual Report 2008-2009* 171. On the concerns raised, see Department of the Environment, *Annual Report 2007-2008* 142. A Water Recovery and Environmental Use Stakeholder Reference Panel was established; Department of the Environment, *Annual Report 2008-2009* 164 & 171. The Government also commissioned an inquiry by the independent Productivity Commission into the best methods of water recovery.

⁷⁸⁰ This resulted in additional funding of up to A\$310 million per annum from 2014-15; T Arup, 'Labor wades in water buying for Murray-Darling' *Sydney Morning Herald* (11 August 2010). This was likely in response to public concerns, such as by the Wentworth Group, that the existing methods of water recovery would not 'bridge the gap' without significantly more funding. See Wentworth Group of Concerned Scientists, *Sustainable Diversions in the Murray-Darling Basin* (2010) 4.

⁷⁸¹ See G Lloyd, 'Big ideas for our rural lifeblood' *The Australian* (29 October 2010).

water recovery had been growing in Basin communities and States for two years.⁷⁸²

Section 2: Backlash in the Basin: politicisation in an “unsettled” political order

In this section, I describe the “backlash in the Basin”⁷⁸³ that followed the Authority’s release of the *Guide*—and establish it as the crucial event that reshaped the political context for the accountability processes analysed in this and the following Chapter. I argue that this backlash, which coincided with the election of a minority government in the Australian Parliament, prompted a switch to an unsettled political order in the Basin Plan case. Beyond these events, I identify some of the central attributes of the Basin Plan case that explain its politicisation: the salience and controversy of the issues being decided, and the perception of policy failure and administrative deviance.

The switch to an unsettled political order in the Basin Plan case

Olsen postulates that a settled political order can switch to being an unsettled order in response to ‘unprecedented situations’,⁷⁸⁴ which include

⁷⁸² P Ker, ‘Victorian in the deep over water buyback regime’ *The Age* (Melbourne, 13 October 2010).

⁷⁸³ This is the term most frequently used in Australian media; Wilkinson *Backlash in the Basin*.

⁷⁸⁴ Olsen 464.

‘exceptional events’ and ‘performance crises’.⁷⁸⁵ I argue that the community backlash to the *Guide* that I describe below, and the chain of events that followed, constituted both an exceptional event and a performance crisis, at least with respect to the Authority. Moreover, they coincided with the election of a minority Government in the Australian Parliament,⁷⁸⁶ which was treated by the Opposition, and a proportion of the Australian media and population, as illegitimate.⁷⁸⁷ As a result, Australia became a less stable polity during the second half of the case.⁷⁸⁸ These two events combined, I argue, to prompt a switch to an unsettled political order for the purposes of an accountability analysis.

The implications of this switch were that the dynamics of the multiple accountability regime overseeing the Minister and Authority changed in ways that Olsen identifies as characteristic of unsettled orders. Politicisation was evident in both decision-making and accountability processes in the second phase of the Basin Plan case: the merits of the Minister and Authority’s actions *and* their accountability became controversial. We also see the multiplication of accountability demands, with competing and contested demands of both decision makers through different accountability processes and in the public sphere. These demands extended to subject matters that were not formally the

⁷⁸⁵ Olsen 452.

⁷⁸⁶ In August, 2010.

⁷⁸⁷ A Summers, ‘The sexual politics of power’ 72 *Meanjin* 1, 1.

⁷⁸⁸ R Gittins, ‘Don’t think you can keep on neglecting me, Darling’ *Sydney Morning Herald* (Sydney, 10 October 2010). MacCullum “Labor has little to lose”.

responsibility of the decision makers, and appeals to different normative standards, as I examine in the following section.

The most tangible implication of the switch to an unsettled political order was the reshaping of the multiple accountability regime in the case. This reshaping of the regime involved the establishment of additional, mostly political forums and the reconstruction of the responsibilities of the decision makers. The other implication is that, as Olsen argues, forums are less likely to act autonomously in unsettled political orders. As I examine in this Chapter, following the backlash we see orchestration between the actions of different accountability actors and an echoing of demands made by one accountability actor by others.

In unsettled political orders, Olsen argues, ‘accountability relations and processes evolve through political debate and struggle and in response to events’.⁷⁸⁹ The backlash, I argue, should be ultimately understood as part of the broader political struggle about whether the Authority, the Minister or Parliament (and perhaps ultimately the Basin States) ought to be responsible for the inevitable socio-economic impact of addressing over-allocation in the Basin—and hence ought to be held to account for the impact of the final Basin Plan. That struggle partly took place through the accountability processes, and calling to account in the public sphere, that I describe in this Chapter.

⁷⁸⁹ Olsen 452.

Backlash in the Basin

Immediately following the *Guide's* release, the Authority held large public information sessions.⁷⁹⁰ These sessions were the first significant opportunity for Basin communities to voice their concerns about both SDLs and water buyback. Community concerns had been stoked by well-organised irrigation and local council interests, which had filled the vacuum left by the dearth of official information during the first phase of decision making.⁷⁹¹

The 'backlash' was substantial and theatrical.⁷⁹² The format of the public information sessions made it easy for protesters to hijack them (perhaps

⁷⁹⁰ For a list of these sessions, see MDBA, *Press Release: Basin Plan Guide released for public discussion*. 20,000 people attended these information sessions across 23 towns; these information sessions across 23 towns; MDBA, *Murray Darling Basin Authority Annual Report 2010-2011* 11.

⁷⁹¹ Wahliquist (2011) 117 & 129. On the early organisation of the irrigator lobbies see ABC News, 'Irrigators use copycat website to slam Murray plan' (ABC, 2010) <<http://www.abc.net.au/news/stories/2010/10/11/3035432.htm>> accessed 7/10/2010 and A Crook, 'Murray-Darling authority losing the spin war with councils' PR flacks' *Crikey* (9 November 2010). This including setting up a website that looked very similar to the Authority's; ABC (PM), 'Irrigators rip off official website for PR campaign' (11 October 2010).

⁷⁹² (Wilkinson *Backlash in the Basin*: Archival footage, MDBA Griffith meeting, October 2010) GRIFFITH RESIDENT: Governments couldn't give a sh** about what happens to us people here.

...
GRIFFITH RESIDENT 3: We are going to take you to the biggest law suit in the land! (Crowd cheers) If I was you I wouldn't wait till 3 o'clock. I'd get in your friggin' cars and get the f*** out of here now!
(Crowd laughs and cheers)
MEETING MC: Okay the man up there with the mike. Okay there's a question at the back of the room.
(Audience member 4 approaches podium and tosses costume horse head at Mike Taylor)
GRIFFITH RESIDENT 4: Get out of here, it's been sh**. F*** off.
MEETING MC: Okay, up the back.
GRIFFITH RESIDENT 5: God help you - in particular you because you're the head of that Murray-Darling Basin Authority - if somebody does the wrong thing and kills themselves, I hope you sleep well at night sir.
(Crowd cheers)
...

intentionally, as I examine in Section Five).⁷⁹³ In irrigation-dependent communities, thousands of people turned out to register their protest.⁷⁹⁴ There were highly publicised incidents in which farmers burnt copies of the *Guide*, blockaded towns with tractors, threw a (replica) horse-head at the Chair of the Authority, Mr Mike Taylor AO, in a rapine town with a history of mafia activity, and held a coffin above the head of the Minister, Mr Tony Burke MP.⁷⁹⁵ The process was later described in Parliament as ‘a farce’.⁷⁹⁶ As if to underscore the Authority’s difficulties, it was trying to defend reducing water allocations just as spectacular floods hit the Basin in Queensland and Victoria.⁷⁹⁷

(Archival footage, outside MDBA Griffith meeting, October 2010)
GRIFFITH RESIDENT 7: Give me another one. This is what you can do with your plan. Burn the Plan! Burn the Plan!

⁷⁹³ This article suggests that this design was intentional; A Stevenson, ‘Newsmaker: Mike Taylor’ *The Sydney Morning Herald* (11 December 2010).

⁷⁹⁴ For example, in Griffith; G Dunlevy, ‘Griffith shuts up shop for water meeting’ *The Age* (October 13 2010).

⁷⁹⁵ See A Rehn and S Townsend, ‘Fires, a fake horse’s head and yet more political talks: Murray protests turn ugly’ *The Advertiser* (15 October 2010); D Jopson and T Arup, ‘Irrigators vent fury at proposed water cuts’ *Sydney Morning Herald* (14 October 2010); and, C Gross, *Why Justice is Important* in Connell and Quiggen 149. An example of article referencing the burning of the *Guide* a year after it happened is; S Neales and J Owens, ‘Face-off over Murray-Darling’ *The Australian* (28 November 2011). An example of a parliamentary reference to this incident two years later; Rowan Ramsey MP, *Second Reading Debate (Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012)* (The House, 30 October 2012). Most protests occurred in a handful of towns most likely to be affected; nonetheless, the point was that this shaped future media coverage; Wahliquist (2011) 129. There is some evidence that the burning of the *Guide* may have been involved journalists; Crook, ‘Murray-Darling authority losing the spin war’. Whether confected or not, the protest was highly effective.

⁷⁹⁶ By a senator with a long history of involvement in the Basin; Senator Nick Xenophon, *Disallowance Speech: Murray Darling Basin Plan* (The House, 28 November 2013).

⁷⁹⁷ These floods were so extensive that they disrupted the Basin Plan process; MDBA, *Media Release: Clarification of Release of Socio-economic Study* (23 March 2011) <<http://www.mdba.gov.au/media-pubs/mr/clarification-release-socio-economic-study>> accessed 27/3/2011. Ironically, after commencing the Basin Plan’s development in the driest year of record, water flowed through the Murray’s mouth into the sea for the first time in a decade the day before the *Guide* was release; see MDBA, *MDBA Basin News e-Letter* (MDBA June 2009) and T Arup and P Ker, ‘Old pals reunite as the Murray meets the sea again’ *The Age* (8 October 2010). On the impact of these floods on media coverage, see Wahliquist (2011) 124. The floods

The response from irrigator groups to the *Guide* quickly framed it as an extreme pro-environmental outcome, notwithstanding that the Authority recommended SDLs at the bottom of the sustainable range.⁷⁹⁸ The peak interest groups for irrigators, and farmers more broadly, claimed that SDLs of 3000-4000GL would be ‘disastrous’ for Basin communities and were completely unacceptable.⁷⁹⁹ An analysis of the media narrative established around the *Guide*’s release concluded that:

A successful launch of the *Guide* would have meant making the case that the MDBA was rescuing the Basin from environmental catastrophe. But the irrigators got in first, and the overwhelming story the media ran became the catastrophe about to be inflicted on them by the Authority.⁸⁰⁰

While the community backlash was prompted by the public release of the first proposed SDLs, it also encompassed a backlash against the Minister’s prioritisation of water buybacks. This prompted a broader blurring of the

were pointed to by some as proof that difficult decisions need not be made. This argument was made by the leader of the National Party (whose constituents are largely in rural Australia); Warren Truss, ‘A basin full of water for all’ Opinion *The Australian* (7 January 2011). It was also made by irrigators; B Packham, ‘Floods undermine Murray-Darling push to return water

to environment, say irrigators’ *The Australian* (17 January 2011). The floods brought back profitable farms; Australian Bureau of Statistics, *Press Release: Agricultural Production Rebounds in 2010-2011* (29 June 2012). They also lead to spectacular wetland breeding events; see T Arup, ‘Waterbird numbers soar in east’ *The Age* (19 December 2011) and M Schliebs, ‘Celebrations muted despite “singing land”’ *The Australian* (4 October 2010).

⁷⁹⁸ This is recognised in this report from the day after the *Guide* was released; P Ker and T Arup, ‘Minimum return for Murray’ *The Age* (9 October 2010). The following article was more typical of the media coverage; L Vasek and L Wilson, ‘Plan will “save river, kill towns”’ *The Australian* (9 October 2010).

⁷⁹⁹ Crucially, however, these groups always avoided identifying an acceptable SLDs figure, enabling them to claim to support “sustainability” but oppose whatever the Authority actually proposed; see B Keane, ‘Some things to bear in mind on the Murray-Darling Basin...’ *Crikey* (12 October 2010).

⁸⁰⁰ Wahliquist (2011) 130.

formal boundaries between the two decision-making processes,⁸⁰¹ which continued throughout the second phase of the case.⁸⁰²

The Minister's initial response to the backlash to the *Guide* was to emphasise the Authority's independence in most public statements, and thereby reaffirm the *status quo* outlined in Chapter Three when it came to the construction of accountable decision making by the Authority:

The last thing I'm going to do is start giving instructions to an independent authority from the sidelines. This authority was given its independence by the [Coalition] Howard Government and given it for good reasons.⁸⁰³

Yet the Government seemed disinclined to significantly challenge the communities or irrigator interest groups that had deemed SDLs of 3000-4000GL unacceptable.⁸⁰⁴ The Minister moved to distance himself from the *Guide*, stating 'It is not my Guide'.⁸⁰⁵ The Minister's response was described by the editorial of the national broadsheet *The Australian* as "hiding" behind the Authority:

...the government has muffed the challenge presented by the Murray-Darling and helped create the present political crisis. Rather than take responsibility from the start, it left the MDBA [the Authority] to take the rap for the *Guide* released in October. Rather than argue the case for reform, Labor handed Mr Taylor the job of explaining the water buybacks at increasingly heated community meetings. It was an impossible task for the MDBA, charged with researching what the system

⁸⁰¹ Such blurring is common; see Christensen and Laegreid(2006) 26.

⁸⁰² See Decision making coda in the Conclusion.

⁸⁰³ Mr Burke MP, Sky news television interview quoted in Wahliquist (2011) 120.

⁸⁰⁴ And were widely criticised in the broadsheet press for this; see for example, "The government is caving to pressure from irrigators" Editorial *The Age* (28 October 2010).

⁸⁰⁵ Miller 193. The Minister also pointed out that the *Guide* was not government policy; Tony Burke MP, *Ministerial Statement* (The House, 25 October 2010) 1305. This reflected a deliberate attempt to distance the Minister from the Authority; Adviser, The Hon Tony Burke MP, Minister for Water, interview by author, Canberra, Thursday 7 July 2011.

needed, not deciding on a solution, let alone selling it. The resulting imbroglio shows the pitfalls for any government that tries to hide behind bureaucrats.⁸⁰⁶

In the context of a backlash that centred on the presumed impact of any Basin Plan on the future of Basin communities, the Authority defended their two-step methodology. The Chair reaffirmed that the Act did not give the Authority the discretion to give any greater weight to socio-economic considerations.⁸⁰⁷ But the Minister adopted the alternative position, insisting that the Act enabled the Authority to “balance” environment, social and economic considerations.⁸⁰⁸

On this basis, the Minister argued that it might be possible to go below the minimum SDLs of 3000GL. The Minister’s position was probably influenced by the difficulty that the minority Government would have amending the Act, given the absence of control over either house of Parliament or a cross-party consensus regarding how to address over-allocation in the Murray-Darling Basin.⁸⁰⁹ I analyse this disagreement between the Authority and Minister, and

⁸⁰⁶ ‘Gillard must get to grips with the politics of water’ Editorial *The Australian* (8 December 2010).

⁸⁰⁷ See quotation to the media in Wahliquist (2011) 122.

⁸⁰⁸ *Transcript of interview between Tony Burke MP and David Speers (PM Agenda)* (25 October 2010) < <http://www.environment.gov.au/minister/archive/burke/2010/tr20101025.html>> accessed 25/9/2013. For an excellent critique of how the rhetoric of “balance” plays into the false dichotomy between the economy and the environment that opponents for the Basin Plan’s relied upon, see B Keane, ‘Neither side get the Murray Darling basics right’ *Crikey* (19 October 2010).

⁸⁰⁹ The Opposition, the Coalition, did not have a clear policy on the Basin Plan process, but rather tended to send different messages to different constituencies; B Keane, ‘Some things to bear in mind’. Hence, the Opposition would have likely not supported a pro-environmental amendment to the Act. Consequently, the Government was reliant on the Greens Party and rural independents in both houses of Parliament, who were unlikely to both back the same amendments.

its ramifications for the accountability of both decision makers, in Chapter Five.

The significance of the backlash for the direction of subsequent decision making was that Mr Taylor resigned as Chair of the Authority on 7 December 2010.⁸¹⁰ In the accompanying press release, Mr Taylor described his interpretation of the Act as irreconcilable with the Minister's.⁸¹¹ It was time, stated Mr Taylor, for 'the Government to reconsider the next phase' of decision making.⁸¹²

Explaining the politicisation of the Basin Plan case

The Basin Plan process confirms findings from existing studies that decision making about salient and controversial issues tends to attract greater levels of political attention and accountability.⁸¹³ The Basin Plan's development was included in all major party policy platforms in two elections since its

⁸¹⁰ With effect from 31 January 2010; Authority, *Murray Darling Basin Authority Annual Report 2010-2011* Appendix A.

⁸¹¹ Michael Taylor AO, Media Release: Plan for the Murray-Darling Basin-Role of Authority Chair, 7 December 2010 <<http://www.mdba.gov.au/media-pubs/mr/role-of-authority-chair>> accessed 7/12/2010.

⁸¹² Michael Taylor AO, *Plan for the Murray-Darling Basin - Role of Authority Chair* (7 December 2010). Mr Taylor's resignation was generally viewed as likely to allow more pro-irrigation influence of Plan; M Kenny, 'Left high and dry: River reform in jeopardy following resignation' *The Advertiser* (8 December 2010).

⁸¹³ Koop 211. (It might also be that strong political accountability mechanisms lead political actors in practice to treat a public policy issue as a politically salient.)

announcement,⁸¹⁴ and received significant and sustained coverage in the Australian media.

The Basin Plan was always likely to become controversial, given the trade-offs between competing interests involved.⁸¹⁵ Yet when it became a ‘major controversy’⁸¹⁶—indeed a ‘political minefield’⁸¹⁷—the salience of the issues created the conditions for politicisation. Virtually every aspect of the Authority’s and the Minister’s decision making became controversial after the release of the *Guide*. Most notably, the very legal basis for decision making became controversial, as I explore further in Chapter Five. I argue that the lack of clarity regarding the decision makers’ responsibilities—and therefore who was to blame—was the factor that intensified this controversy.⁸¹⁸ This was because the Authority had to interpret the Act’s manifold criteria in order to articulate their methodology for setting SDLs,⁸¹⁹ and the Minister had virtually no legislative criteria to point to as justifying his approach.

This scenario was important in creating the widespread perception that the Authority’s initial setting of proposed SDLs was a policy failure and involved

⁸¹⁴ See L Taylor, ‘Abbott’s refusal on costings does not stack up’ *The Sydney Morning Herald* (26 August 2010) and S Maher and A Wahiquist, ‘Gillard commits to water buyback’ *The Australian* (11 August 2010).

⁸¹⁵ Bouilly and Maywald 103.

⁸¹⁶ Connell (2011a) 4000. The Authority’s Chair described setting SDLs as the ‘critical and controversial’ task; MDBA, *Media release: Basin Plan Guide released for public discussion*.

⁸¹⁷ M Kenny, ‘Rivers are full, reform dries up’ *The Advertiser* (8 December 2010).

⁸¹⁸ This left both decision makers without the political cover they needed; Former Chair of Murray-Darling Basin Commission, interview with author.

⁸¹⁹ On the extent of this interpretation see Productivity Commission XXXI.

some sort of administrative deviance.⁸²⁰ This perception was consistently reflected in media coverage of the Authority's decision making.⁸²¹ For example, in one of the more sober Australian broadsheets, *The Age*, the Basin Plan process was described as 'one of the most divisive and poorly executed attempts at public policy in Australian political history'.⁸²² Likewise, the political rhetoric around the Authority often emphasised administrative deviance. For example, one opposition Member of Parliament described the Authority as 'deeply flawed ... an Authority that has been discredited over many years now on so many fronts.'⁸²³

Hence, I argue that the politicisation in the Basin Plan case was magnified by this perception of policy failure and administrative deviance on the part of decision makers. This perception stemmed from the attempt to depoliticise the process by not explicitly recognising and resolving the trade-off between

⁸²⁰ This was the dominant theme in virtually all the interviews I conducted. It was also acknowledged by the second Chair in early public interviews; A Jamieson, 'Murray Murmurings: The death of the guide' *Crikey Blog* (18 March 2011) <<http://blogs.crikey.com.au/rooted/2011/03/18/murray-murmurings-the-death-of-the-guide/>> accessed 20/03/2011. It is this perception that is important for the accountability analysis, rather than its reasonableness. There are strong arguments that this was a case of 'unrealistic expectations', as argued by the CEO of the National Water Commission. As he pointed out 'All sorts of things that have been difficult to solve for many years are now being collected up and assumed to be solved in the plan...'; Hansard, *Official Committee Hansard: Supplementary Budget Estimates* (Hansard 2009) 166. Likewise, 'the somewhat purist goal of ending a century of parochialism and over-use has been revealed as a pipe-dream'; M Kenny, 'A drain on the Murray' *The Advertiser* (11 December 2010). While I do not consider the reasons for the various failings of the Basin Plan process, they are likely to be the subject of many other studies. See generally the collection *Basin Futures: Water Reform in the Murray-Darling Basin* (ANU e Press 2011).

⁸²¹ See M MacKenzie, *Murray Darling Basin Plan 2012 Pleases No-one* (Bush Telegraph (ABC Radio) 28 November 2011). For an excellent analysis, see Wahliquist, *The media and the Guide to the Basin Plan* 129.

⁸²² Green 'Surface tension'.

⁸²³ Dr Sharman Stone MP, *Second Reading Debate (Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012)* (The House, 30 October 2012) 12260.

interests and values involved in addressing over-allocation in the Basin. The backlash definitively established that this attempt had failed, and punished the Authority and Minister for perpetuating the legislative approach in their decision making during the first phase of decision making.

As I argued in Chapter Three, the conditions for this reaction began with Parliament delegating decisions involving significant political choices to an expert, independent agency, and the Minister then treating the Authority's decision during the first phase of the case as definitive. This delegation lacked the democratic legitimacy that would have flowed from an explicit framework for how those choices should be made. As Shapiro points out:

It takes extremely exceptional circumstances to justify non-democratic policy-making agencies to the citizens of democratic polities. The creation of such a 'political' independent agency is rather like constitutional guaranteed rights. It is an announcement by the 'demos' that it does not trust itself and wishes to put certain policy questions beyond its own reach.⁸²⁴

One implication of the politicisation of the Basin Plan case would be the reshaping of the multiple accountability regime that oversaw the Minister and the Authority.

⁸²⁴ Shapiro (2011) 289.

Section 3: Acting in concert to contest the adequacy of the formal accountability regime

In this section, I analyse the backlash as a process in which Basin communities called the Authority and Minister to account for their decision making in the first phase of the case. By analysing the Basin communities as additional “social” accountability actors, I find that the communities successfully extracted accountability from the Authority, and to a lesser extent, the Minister. More significantly, I find that the backlash involved many different actors—both existing forums and additional accountability actors—acting in concert to call the decision makers to account *and* to generate accountability politics. I establish that we see a convergence in the accountability demands made by Basin communities, which results from the way that other accountability actors echoed those demands, or, in the case of the Authority, selectively responded to them. I then show how various forums and additional accountability actors acted in concert to create the pressure for additional accountability forums that addressed the perceived inadequacy of the formal accountability regime.

The backlash as a process of calling to account the Authority and Minister

The information sessions about the *Guide* became the arena in which Basin communities directly called to account both the Authority and the Minister and made accountability demands about the inadequacy of their decision

making during the first phase of the case.⁸²⁵ With respect to the Authority, this calling to account—and the making of specific accountability demands—took place outside an established accountability relationship. With respect to the Minister, this calling to account took place outside any institutionalised accountability arrangements, although, as an elected representative and member of the Government, the Minister arguably had an ongoing direct accountability relationship with citizens within Basin communities.⁸²⁶

I find that Basin communities successfully *extracted* a sort of direct accountability from the Authority during the information sessions. In doing so, the Basin communities challenged the adequacy of the existing indirect accountability relationships with the Authority (that is, via elected representatives or the Basin Communities Committee).⁸²⁷ As the stakeholders with the clearest interest in the impact of the Basin Plan, Basin communities were well placed to have the practical capacity to extract accountability outside of an existing accountability relationship.⁸²⁸

⁸²⁵ These demands included calls for the Authority members to resign; *Feedback from Griffith community information session* (MDBA 2010). On social accountability see in Section Five, Chapter One.

⁸²⁶ See Section Three, Chapter One. Basin communities saw both decision makers as directly accountable to them irrespective of the formal arrangements; NRM Manager, National Farmers Federation (NFF), interview by author.

⁸²⁷ This may have been prompted by the marginal status that either of these representative actors had in the first phase of decision making; NRM Manager, National Farmers Federation (NFF), interview by author; Former Director, Victorian Office of Water, interview with author; Healthy Rivers Campaigner, Australian Conservation Foundation, interview with author, Canberra, 15 July 2011; Former Chair of Murray-Darling Basin Commission, interview with author.

⁸²⁸ See Section Three, Chapter One.

I find that Basin communities successfully made accountability demands that were recognised by both decision makers as requiring a response, and therefore a dialogue and information exchange occurred. The tenor of the Chair’s response to these demands in the information sessions was, I find, in the form of an account for the Authority’s actions, as I analyse below. This account was delivered in a manner that went beyond providing information or trying to fend off criticism.⁸²⁹ While the Minister initially eschewed a dialogue with the Basin communities, he was obliged to enter that dialogue through community meetings of his own. More significantly, the Minister was obliged to respond to various demands, as I examine further below.

Yet the Basin communities’ success in forging a direct accountability relationship in which the decision makers responded to some of the communities’ demands is not explicable if the exchange is viewed as a bilateral accountability dialogue. The Basin communities were adept “social” accountability actors, who used social protest and bad publicity, as well as civic dialogue and participation in consultative processes, to call the decision makers to account. But two notable features of the backlash are only explicable if we analyse this accountability dialogue as multilateral.

First, other actors reiterated the communities’ demands, both within the information sessions themselves (which Opposition members, individual Basin

⁸²⁹ This recognises that obligations to account can be informal and event voluntary; Bovens, (2007) 451.

States and stakeholder groups attended)⁸³⁰ and through the extensive media coverage of these sessions.⁸³¹ Some of these actors were established accountability forums, such as Opposition members (including in Parliament) and the Ministerial Council. Others acted as additional accountability actors throughout the second phase of the case, such as individual Basin States,⁸³² stakeholder groups,⁸³³ and experts.⁸³⁴ Second, there is a convergence of accountability demands that happens relatively quickly through these information sessions and, I argue below, takes place because the accountability dialogue becomes *de facto* multilateral. As I argue in Section Five, this convergence may also have been aided by the Chair of the Authority at least

⁸³⁰ *Feedback from Goondiwindi community information session* (MDBA 2010) and NRM Manager, National Farmers Federation (NFF), interview by author.

⁸³¹ I analyse the media as playing the role of relaying the demands of additional accountability actors and evaluations of accountability forums rather than playing the role of holding the Authority or Minister to account. While there were individual instances of the media doing so, the media did not engage sufficiently in the detail of the process in order to be able to separately call and hold the decision makers to account; Adviser, The Hon Tony Burke MP, Minister for Water, interview by author; ABC, 'Interview with Craig Knowles and Wentworth Group' (Bush Telegraph 13 May 2011).

⁸³² I analyse this role below.

⁸³³ The main stakeholder groups that I include in the accountability analysis are the National Farmers Federation (NFF), the National Irrigators Council (NIC), and the Australian Conservation (ACF). These three groups were recognised by both decision makers as the most significant such actors, and were included in decision making and accountability processes as a result; Adviser, The Hon Tony Burke MP, Minister for Water, interview by author. The second Chair took a representative of each of these three groups to all community consultations he held; NRM Manager, National Farmers Federation (NFF), interview by author. The NFF and ACF have had a long-standing involvement in water policy in Australia, and have previously worked together to identify common positions that governments would find difficult to reject. The NIC is a newer organisation that was established due to a split within the NFF, and so its positions on specific details often differed from NFF's.

⁸³⁴ I include experts as additional accountability actors in my analysis because they played a high profile and consistent role in the accountability processes, and in commenting of accountability demands or evaluations in the public sphere. The main such group was the Wentworth Group of Concerned Scientists, but individuals were also significant. From the perspective of the decision makers, experts played a similar accountability role as stakeholder groups, and were not necessarily accorded a special status as "independent" experts; Adviser, The Hon Tony Burke MP, Minister for Water, interview by author.

partly shaping the accountability demands that the Authority was then “obliged” to respond to.

Neither do the information sessions fit well into our understanding of an accountability process in which the dialogue between the decision maker and forum results in an evaluation by that forum. As is typical of social accountability actors, the accountability demands of Basin communities were too diffuse to, by themselves, result in a dialogue that formed the basis of an “evaluation” of the decision maker’s accountability. Instead, the decision makers were evaluated when communities’ demands were subsequently picked up by accountability forums, especially parliamentary committees, which I examine instances of in Chapter Five. As such, I analyse the Basin communities, or more specifically the diverse individuals and groups that comprised those communities, as additional accountability actors rather than forums during the second phase of the case. And I analyse the information sessions as part of a broader process of calling and holding the decision makers to account that commences with the backlash.

I argue that the events of the backlash are best understood as being similar to Mulgan’s case study in which the existence of a ‘political arena’ in which ‘hostile critics engaged in adversarial politics with a vested interest in getting dirt’ on the decision makers became central to politicising the case.⁸³⁵ Within that arena no one actor is in control. But there is, I find, a good degree of

⁸³⁵ Mulgan (2009) 347.

orchestration between actors. This orchestration is sufficient to support a finding that the various accountability actors involved in the backlash *acted in concert*. They did so not only to call the decision makers to account but also to contest *how* the decision makers were held publicly to account for their decisions in the first phase of the case, and should be held to account for their subsequent (and final) decisions. Hence, within this political arena public accountability (and not just decision making) was contested and accountability politics was generated.

The acting in concert was primarily for actor A to make accountability demands in ways that made them more likely to be picked up by actors B and C; and, for actors B and C to reiterate those demands or justify their own actions as a response to them. As Fox argues, accountability politics enables the researcher to ‘account for strategic interaction between multiple actors’⁸³⁶ and thereby seek to ‘capture the dynamics that construct accountability’.⁸³⁷

The convergence of demands for accountability through the “echo chamber” effect

There were manifold accountability demands for accountability from Basin communities, as would be expected of citizen responses to a complex public decision-making process.⁸³⁸ Notwithstanding this heterogeneity, a notable

⁸³⁶ Fox 8.

⁸³⁷ Fox 27.

⁸³⁸ 3000 pieces of individual feedback were received following the release of the *Guide*; MDBA ‘View feedback received’ (MDBA, 2011) <www.mdba.gov.au/communities/having-your-say/feedback-received.html> accessed 15/02/2012. I do not include these submissions in my accountability analysis because they did not prompt the same echoing effect of the demands made at the public meetings.

feature of the Basin Plan case is the convergence between the accountability demands made of the decision makers in the final quarter of 2010.⁸³⁹

The extensive media coverage prompted this convergence, by transmitting demands *between* Basin communities, as well as within the public sphere more generally, such that those demands are reiterated in successive information sessions. The convergence of demands around a handful of subject matters is also a product of other actors such as stakeholder groups, Basin States, elected representatives and the Minister picking up on a subset of the range of demands and echoing those demands either in the information sessions (which some of these actors attended) or through the media. I find that there is likely to have been a feedback loop in operation: the community demands that were echoed by other actors, and dominated media coverage of the information sessions, were also prevalent in subsequent information sessions.

Basin community demands of the Authority

Basin communities demanded accountability from the Authority for what the communities perceived to be its lack of concern for the social and economic impact on communities of setting SDLs.⁸⁴⁰ Demands made of the Authority

⁸³⁹ This convergence was noted in media reportage of the information sessions; B Herbert, *More angry scenes at water forum in Griffith* (ABC (PM) 14 October 2010). My analysis is based on a document analysis of the summary of feedback provided in the 33 information sessions held by the Authority, which were posted by the Authority after each session. However, these records were not transcripts. Given this, I cross checked the record against media reports of the meetings, particularly those of the ABC new and current affairs radio programme “PM”, which broadcast a selection of the meetings. For reasons of space, I provide a handful of references rather than cite each instance of a given demand being made.

⁸⁴⁰ This demand was often the headline summary in the Authority’s record of the information sessions; *Feedback from St. George information session* (MDBA 2010) and *Feedback from Moree community information session* (MDBA 2010). Also see, *Feedback from Griffith community*

regarding socio-economic impact converged around two subject matters. The first was the inadequacy of the Authority's assessment of the socio-economic impact of various SDLs, including the insufficiency of its methodology and social and economic evidence base.⁸⁴¹ This demand was echoed by stakeholder groups representing both agricultural and environmental interests, as well as by experts, who offered alternative data.⁸⁴² The epistemic quality of information was thereby rendered an endogenous factor within the accountability dialogues

information session (MDBA 2010); *Feedback from Goondiwindi community information session* (MDBA 2010).

⁸⁴¹ See community member Ian Cobbleddick; A Caldwell, *Farmers angry over public meeting of Murray-Darling plan* (ABC (PM) 12 October 2010); *Feedback from Griffith community information session*; and, *Feedback from Renmark community information sessions*. The Authority acknowledged the validity of this criticism at the first public meeting following the *Guide's* release; P Ackerman 'Farmers pour scorn on water blueprint' *The Australian* (13 October 2010). The main example in the ensuing public controversy was the figure that only 800 jobs would be lost Basin wide as a result of adopting the proposed SDLs; MDBA *Guide* 121. The Chair acknowledged that this figure was not based on sufficient research and was probably an underestimate. The government research organisation responsible for the work defended its validity during a (Parliamentary) Senate Estimates hearing shortly afterwards; G Dunlevy, 'Creators defend modelling of Murray-Darling social impact' *The Canberra Times* (20 October 2010). The more general demand for taking greater account of social and economic factors was echoed by the Ministerial Council; Ministerial Council, *Communique: Murray-Darling Basin Water Ministers meet in Albury* (17 December 2010). It was also echoed by individual Basin States; Herber 'More angry scenes'. There was also a broader demand that the Authority return to Basin communities after they issued their full evidence-base, which was delayed by several weeks after the release of the *Guide*; *Feedback from Griffith community information session*.

⁸⁴² For example, with respect to the fracas regarding the data on job losses and therefore the economic harm of a Basin Plan, another social-scientist who was a consultant to the Authority (Judith Stubbs) found that a 25% cut in water would lead to a loss of 14,000 jobs; G Dunleavy, 'Rumours make wait for basin plan worse' *AAP General News* (7 October 2010). This discrepancy was picked up in subsequent information sessions; *Feedback from Narrabri community information session* (MDBA 2010). The NIC also claimed there would be a loss of 14,000 jobs. The NFF claimed there would be a loss of 20,000 in NSW alone. The ACF also called the Authority to account for the socio-economic evidence base, and released economic analysis which found that the Basin Plan would deliver more economic benefits than the Authority had recognised; Dunleavy 'Rumours'.

around the Basin Plan.⁸⁴³ These demands were often connected to demands that the *Water Act 2007* be amended.⁸⁴⁴

The second subject matter around which we see convergence related to the paucity of the Authority's public consultation during the first phase of decision making.⁸⁴⁵ This demand was echoed by individual Basin States and, eventually, by the Ministerial Council, as well as by elected representatives such as local councils.⁸⁴⁶ This demand was an instance of the Authority being called to account for a subject matter they were not formally responsible for, given the formal consultation process I set out in Section One.

Demands were also made of the Authority to account for the rigour (or lack thereof) of their scientific analysis, particularly the hydrological analysis of the Basin that underpinned the proposed SDLs. There were manifold specific demands about technical aspects of the Authority's methodology and use of data, but many of them related to what communities viewed as errors in the

⁸⁴³ See Section Two, Chapter Two.

⁸⁴⁴ *Feedback from Deniliquin community information session* (MDBA 2010); *Feedback from Griffith community information session*; and, *Feedback from Narrabri community information session*. See Section One, Chapter Five for analysis of how this demand was responded to by the Authority and picked up by the Minister.

⁸⁴⁵ See L Ray, 'Too little time, too big a basin' ABC Mildura Swan Hill (20 December 2010); Herbert 'More angry scenes'; *Feedback from Dalby community information session* (MDBA 2010); *Feedback from Goondiwindi community information session*. The significance of this accountability demand to communities was reiterated in interviews; Former CEO of the National Farmers Federation, interview with the author. The Authority itself noted the converging of demands around consultation when it noted that one information session did *not* include multiple instances of these demands; *Feedback from Narrabri community information session*.

⁸⁴⁶ The demand for more public consultation was echoed by the Ministerial Council; Ministerial Council, *Communique* (17 December 2010). It was also echoed by actors representing individual Basin States; Anonymous, 'Walsh urges more basin plan talks' ABC News (20 December 2010); Anonymous, 'Harriss: Not enough consultation over plan' ABC News (20 December 2010).

Authority's catchment level analysis.⁸⁴⁷ These demands converged around two subject matters: the Authority's reliance on a methodology based on "end of system flows" (or how much water reached the bottom of the Murray-Darling system where it flowed into the sea) and the Authority's lack of transparency around how it calculated the proposed SDLs.⁸⁴⁸ Interestingly, the lack of scientific rigour was also linked to the lack of public consultation.⁸⁴⁹

The community demands around the inadequacy of the socio-economic and scientific analysis were bolstered by the Authority's actions. For example, from the outset the Chair questioned the validity of the Authority's social science evidence-base in the information sessions and encouraged Basin

⁸⁴⁷ See, comment from community member Ian Gibb; Caldwell 'Farmers angry'; *Feedback from Goondiwindi community information session*; *Feedback from Moree community information session*. There were some significant errors in the analysis at this level, because of the way that the Authority had calculated aggregate SDLs, and then retrospectively allocated reductions to different catchments; Former Director, Victorian Office of Water, interview with author.

⁸⁴⁸ The two demands were related, insofar as the lack of transparency was primarily with respect to the actual methodology that had been used to calculate SDLs. It appears that while the Authority had an international panel review some of its SDLs analysis, that review covered analysis based on a different methodology to end of system flow modelling that the Authority ended up relying on (probably due to a lack of time); Healthy Rivers Campaigner, Australian Conservation Foundation, interview with author. This meant that the science in the *Guide* was not peer reviewed, and was widely discredited within academic communities; Dr Daniel Connell, Crawford School of Government (ANU), interview with author, Canberra 4 May 2011 and Professor Mike Young, Environment Institute, University of Adelaide, interview with Author, Adelaide, 2 May 2011. Also see Wahliquist (2011) 130 and House Standing Committee (2011) 397. The absence of footnotes from the *Guide*, and the delay in publishing the evidence-base, were two specific criticisms made by experts and Basin communities alike: L Wilson, 'Not my water plan: Burke' *The Australian* (23 October 2010). Institutions should be judged not merely by their transparency, but by the epistemic quality of our understanding of them; Keohane (2005) 20 and Dooren and Willems 525.

⁸⁴⁹ Interestingly given their minimal approach to consultation during the first phase of the case, the Authority themselves link consultation to evidence gathering and testing their evaluations in the *Guide*; see MDBA *Guide* 39. Also see MDBA, *Media Release: MDBA to commission further study of local community impacts* (17 October 2010). The Authority responds to this demands in the second phase of decision making by emphasising public consultation as a means to obtaining 'people's knowledge and expertise'; Murray-Darling Basin Authority, 'Basin Plan community consultation' (MDBA, 2011) <<http://www.mdba.gov.au/what-we-do/basin-plan/consultation>> accessed 12/12/2013.

communities to question the Authority's 'models'.⁸⁵⁰ The Authority quickly committed to commissioning further socio-economic research,⁸⁵¹ sending the message that future decisions about proposed SDLs could be very different.⁸⁵² In this way, the Authority appeared to respond to demands by accepting their validity. This is interesting given that, with the exception of demands framed around scientific rigour, the demands made in the course of the backlash called the Authority to account for subject matters for which it was not (entirely) responsible.

Basin community demands of the Minister

With respect to the Minister, the Basin communities also demanded that he attend the Authority's public information sessions.⁸⁵³ In effect, communities sought to make the Minister accept responsibility for the proposed SDLs earlier than the Minister was officially responsible for SDLs under the Act. (This

⁸⁵⁰ ABC, 'Farmers vent Murray plan frustration' ABC Online and Miller 194. At the first information session, a member of the Authority's Board stated: 'Many of the comments you're making we don't disagree with. We don't know the answers. And that's why we're saying if you've got better socio-economic information bring it forward'; Herbert 'Farmers angry'. Miller judges the Authority's attitude to their own socio-science data as 'overly cautious'; Miller 195 & 197.

⁸⁵¹ Wilson, 'Hit list' and MDBA, *MDBA to commission further study of local community impacts*. It should be noted this was all before the Authority publicly released its evidence-base for the *Guide*, a release which focused on hydrological and environmental science; MDBA, *Media Release: MDBA releases volume 2 of Basin Plan Guide* (22 October 2013).

⁸⁵² This episode can be understood as an example of the distribution and quality of information becoming a factor that is changed through accountability processes, including the Windsor Committee discussed below, rather than being exogenous; see Section Two, Chapter Two.

⁸⁵³ For example, *Feedback from Griffith community information session*. This demand was then reiterated by Opposition members; Dunlevy, 'Griffith shuts up shop for water meeting'. The Minister was also called to account for his decision not to attend the Authority's information sessions by the media; for example, H Hawley, 'Murray-Darling Basin Authority head resigns' ABC (PM) (7 December 2010). The Minister did organise some separate public meetings; ABC, 'Burke faces Riverland irrigators on Murray demands' ABC News Online (5 November 2011).

strategy was adopted throughout the second phase by interest groups representing agricultural as well as environmental interests.⁸⁵⁴)

The Authority's information sessions also became a site for accountability demands of the Minister to better address the socio-economic impact of water recovery.⁸⁵⁵ The communities demanded that the proportion of water recovered through water buyback should be reduced and the proportion recovered through infrastructure increased.⁸⁵⁶ It was this demand that was most echoed by other accountability actors, particularly political accountability actors.⁸⁵⁷ It was also a demand that the Authority's response appeared to bolster.⁸⁵⁸

Beyond calling the Minister to account for his prioritisation of water buyback, accountability demands about water buyback were less coherent than

⁸⁵⁴ Adviser, The Hon Tony Burke MP, Minister for Water, interview with author. Interviews with individuals from the NFF and the ACF confirmed that they both viewed their role as getting the Minister to take more responsibility for the SDLs that required by the Act at this stage of the process, and for the need for specific support for community adjustment; Former CEO of the National Farmers Federation, interview with author; Healthy Rivers Campaigner, Australian Conservation Foundation, interview with author.

⁸⁵⁵ For example, *Feedback from Moree community information session*; *Feedback from Narrabri community information session*. There is a section on water buyback in almost all the Authority's summaries of feedback. While the Minister did not attend the Authority's information sessions, officials from the Department of Water, who were responsible for buyback, did; Department of Sustainability, *Annual Report 2010-2011* 232.

⁸⁵⁶ Some actors demanded that buyback should be halted; for example, from the Victorian Farmers Federation; ABC, 'Basin plan sparks calls to "stop buybacks"' ABC News Online (7 October 2010).

⁸⁵⁷ Notably the Ministerial Council; *Communique*. It was also echoed by the Opposition, which compared the proportion of money allocated to each that had already been spent, which overstated the reality; L Wilson and S Maher, 'More must be spent on infrastructure, says Coalition' *The Australian* (8 December 2010).

⁸⁵⁸ For example, the Chair suggested to the community at Griffith that infrastructure to make environmental watering more efficient, or "environmental works and measures", might be an alternative to water buyback; Harebert 'More angry scenes'. This foreshadowed the trajectory of later decision making around water recovery, as well as the evaluations of various accountability forums, such as the Windsor Committee; House Standing Committee (2011) 126. This instance supports the conclusions about the Authority that I draw in Section Five.

demands about proposed SDLs. The greater variety in demands reflected the ambivalence around water buyback within Basin communities and their representatives. Individual entitlement holders wanted to be able to sell water to the Government at an advantageous price, and so some accountability demands centred on the Minister's market-based approach to tenders that prioritised price over other considerations.⁸⁵⁹ However, the very idea of buyback being from "willing sellers", one of the few criteria in the Act, was often contested.⁸⁶⁰

Basin communities (and, indeed, often individual entitlement holders) wanted to prevent consumptive water "leaving" their local area, and so accountability demands from these actors centred on the (presumed) socio-economic impact of water buyback.⁸⁶¹ The Minister was also criticised for not aligning his water purchases with the Authority's decision making about setting

⁸⁵⁹ For example, *Feedback from Dalby community information session*; *Feedback from Goondiwindi community information session*; *Feedback from St. George information session*; D Jopson, 'Spin on rights purchase is running dry' *The Sydney Morning Herald* (6 September 2010). The Minister was urged to align purchases with unviable irrigation areas and coordinating purchases among groups of irrigators, which leaves fewer remaining irrigators to cover the same overall costs of maintaining the irrigation systems.

⁸⁶⁰ The Authority itself noted the converging of demands around "willing sellers" when it noted that one information session did *not* include multiple instances of these demands; *Feedback from Narrabri community information session*.

⁸⁶¹ Adviser, The Hon Tony Burke MP, Minister for Water, interview with author. Mr Tony Windsor MP warned against the hypocrisy of farmers who championed water markets but wanted to prevent the Government from using them to recover water for the environment; L Wilson and M Schliebs, 'Windsor warns irrigators not to renege on buybacks' *The Australian* (18 January 2011).

SDLs, for example, by purchasing water from catchments the Authority identified as especially over-allocated.⁸⁶²

In order to analyse the interests of the actors within the accountability regime, however, it is important to recognise that it was probably more crucial for irrigation interests to delegitimise the Minister's prioritisation of water buyback than it was to discredit the Authority's proposed SDLs.⁸⁶³ This is because the Commonwealth's considerable financial resources meant that it could potentially have achieved the same environmental outcomes through the water market without formal regulation, by simply purchasing similar amounts of water to the SDLs and reallocating it to the environment.⁸⁶⁴ It is notable that the accountability demands about the Minister's prioritisation of water buyback lacked the support of experts that that had been lent to the demands around the proposed SDLs.⁸⁶⁵

A notable finding from the Basin Plan case is the extent to which the handful of demands around which there was convergence during the backlash

⁸⁶² *Feedback from Goondiwindi community information session*. The independent Productivity Commission echoed this criticism; see Productivity Commission XXIX. And by the Opposition; Arup, 'Further buybacks in the pipeline' and, later, John Cobb MP, *Second Reading Debate (Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill)* (The House, 30 October 2012) 12617.

⁸⁶³ On these attempts to delegitimise the buybacks, see M Schliebs, 'Pile-up of salt feared in Murray Basin' *The Australian* (21 July 2011).

⁸⁶⁴ This was recognised by agricultural groups; NRM Manager, National Farmers Federation (NFF), interview with author. S Hoobin, 'Voice of reason on Murray-Darling is drowned out by book-burning few' *The Australian* (4 November 2010) Opinion and Connell (2011b). This approach would not have been without its risks given the States retained the right to issue further water entitlements, but States attempting to do so would attract significant criticism given the consensus that the Basin's water is already significantly over-allocated.

⁸⁶⁵ This is because expert assessments of buyback tended to support the Minister's market-based approach; Q Grafton and Q Jiang 'Economics of Water Recovery in the Murray-Darling Basin' (Centre for Water Economics, Environment and Policy Research Paper 10-11 2010).

would subsequently be picked up by accountability forums holding the Authority to account, and were reflected in the evaluations of those forums.⁸⁶⁶

The important conclusion about the convergence of demands around the social and economic impact of the Basin during the backlash is that it is an example of accountability actors trying to make a decision maker responsible for a subject matter they are not formally responsible for, or at least not fully responsible for. If a decision maker needs to be responsible for a subject matter before they can be called to account for it, the goal of some accountability actors might be to “responsibilise” that actor for a subject matter in order that they can be rendered accountable for it.⁸⁶⁷ Although the communities could not responsibilise the Authority or Minister by themselves, their actions were essential to the subsequent instances of responsibilisation in the Basin Plan case, which I examine in Chapter Five.

Notwithstanding that the actors echoing the communities’ demands all had varying interests in the Basin Plan process, I argue that we see the convergence in accountability demands because a variety of interests were served by discrediting the Authority and Minister’s approach to decision making during the first phase. We see this particularly with response to the scientific rigour of the Authority’s analysis: some actors instrumentally focused on this aspect of decision making to discredit the Authority as an expert

⁸⁶⁶ It is beyond the scope of this thesis to trace all the instances in which this occurred. However, I trace in detail how the Windsor Committee picked up the demands about a lack of scientific rigour and transparency in Section Two, Chapter Five.

⁸⁶⁷ See Section Three, Chapter One.

decision maker, while others sought to discredit particulars of the Authority's approach because it was in their interests that the SDLs were based on credible, defensible scientific analysis.⁸⁶⁸

Beyond making demands about the inadequacies of the decision making of the Authority and Minister, it is important to note that the accountability politics generated through the backlash contested the adequacy of the existing accountability regime established by the *Water Act 2007*. Specifically, what was contested was the adequacy of the lack of direct accountability relationships between those affected by decision and the decision makers. Certainly, it was to the instrumental advantage of those actors who perceived their interests to be threatened by the Basin Plan—chiefly irrigator interest groups and many Basin communities—to contest the attempt to insulate decision making from political (and electoral) influence.⁸⁶⁹ By making the Authority directly accountable to Basin communities, or their political representatives in Parliament, those groups whose interests were threatened by the original proposed SDLs were able to upgrade their status from being merely powerful players to becoming decisive actors.⁸⁷⁰ However, in order to effect substantial change to the accountability regime overseeing the Authority and the Minister,

⁸⁶⁸ See my analysis of which actors were in each camp in Section Two, Chapter Five.

⁸⁶⁹ For example, 'If we are to get a sensible outcome then this will have to be a judgment call made by politicians, not a technical decision by an unelected bureaucracy'; National Irrigator Council chief executive Danny O'Brien, quoted in T Arup and P Ker, 'Fight looms on advice for basin water target' *The Age* (9 December 2010).

⁸⁷⁰ See Section Five, Chapter Two.

the Basin communities and other actors needed to activate existing accountability forums.

Section 4: Acting in concert to reshape the accountability regime

The Basin communities and other actors successfully contested a number of aspects of the formal decision making process, accountability regime, and responsibilities set out in the *Water Act 2007*. However, additional accountability forums were needed to ensure that the decision makers were formally obliged to respond to the demands made by communities, and echoed by others, during the backlash, and able to be evaluated for that response through an accountability process. In this section I show that for these additional forums to be established, it was necessary for accountability forums with the power to alter the accountability regime—the Minister, Parliament and, to a lesser extent, the Basin States—to act in response to the accountability politics generated by the backlash.

Turning point: the Minister's response to the backlash

As the backlash unfolded, the Government—embodied by the Minister—faced a choice. The choice was essentially whether the Government would recognise the inadequacy of the legislative and policy framework underpinning the Basin Plan process. That inadequacy centred on the failure to recognise and address the impact that reducing the water available for consumptive use would have on Basin communities (at least in the short term).

This choice translated to two more specific choices. The Minister could accept that the Government needed to offer financial and practical assistance to support community adaptation. Such assistance was argued to be essential to successful reform by the Opposition, by experts, and by organisations reflecting both environmental and agricultural interests.⁸⁷¹ Alternatively, the Minister could accept that, in the absence of such support, the *Water Act 2007* needed to be amended in order to enable the Authority to decide lower proposed SDLs, which might be more acceptable to Basin communities but would be unlikely to secure environmental sustainability.⁸⁷²

The Minister instead opted for a third choice, which was to defend the adequacy of the existing legislative and policy framework. The Minister argued that this framework could deliver an outcome that would achieve both environmental sustainability and future prosperity for Basin communities.⁸⁷³ This course of action is the backdrop to the Minister's role in responsabilising the Authority for addressing the socio-economic impact of reduced water allocations through existing decision-making processes, which I examine in Section One, Chapter Five.

⁸⁷¹ The Opposition argued that the Government should have released its own policy alongside the *Guide* with a plan for how to minimise the impact on Basin communities. Similar proposals had been made by the Wentworth Group. Miller argues that the Authority should have explicitly recommended the Government work on a comprehensive structural adjustment package in the *Guide*; Miller 195 & 197.

⁸⁷² As irrigator groups and some Opposition members had been arguing since 2007. See G Lloyd, 'Joyce joins the fray to damn water plan' *The Australian* (22 October 2010) and J Kelly and J Massola, 'Basin authority Mike Taylor's resignation won't halt Murray-Darling water reforms, says PM' *The Australian* (7 December 2010).

⁸⁷³ This tended to be described as a "triple bottom line" approach; Tony Burke MP, *Ministerial Statement* (The House, 25 October 2010) 1305.

Hence, in order to address the accountability demands emanating from Basin communities, and being echoed by other accountability actors, the Minister acted to reshape the multiple accountability regime overseeing the Authority's decision making and, to some extent, his own decision making. The Minister did so by reshaping the accountability relationship of both decision makers with Parliament and by reshaping his accountability relationship with the Authority.

The establishment of the Windsor Committee

In the week following the release of the *Guide*, the Minister requested⁸⁷⁴ that House of Representatives Standing Committee on Regional Australia conduct an inquiry into the socio-economic impact on Basin communities of the proposed SDLs within the *Guide* and water buyback.⁸⁷⁵

The influence of the Windsor Committee, as this forum became known, stemmed from the way the Committee's deliberations were presented as part of the decision-making process by two of the Authority's other forums—the Minister and the Ministerial Council. In announcing the Committee's inquiry, the Minister said:

The inquiry is an important part of the broader consultation process for the Murray-Darling Basin Plan ... This inquiry, headed up by Tony Windsor, will help ensure that we can find the balance between healthy rivers, strong communities, and continued food production.

⁸⁷⁴ Jointly with the Ministers for Regional Australia and for Agriculture; The Hon Simon Crean MP, The Hon Tony Burke MP and Senator the Hon Joe Ludwig, *Parliamentary Inquiry into the Murray-Darling Basin Plan* (14 October 2010). Ministers can ask committees to inquire into matters under House of Representatives, *Standing Orders* 215(b).

⁸⁷⁵ *Terms of Reference: Inquiry into the Impact of the Murray-Darling Basin Plan in Regional Australia* (The House of Representatives 2010).

Similarly, the Ministerial Council issued the following communiqué:

Ministers have heard loud and clear the concerns of Basin communities about the *Guide to the proposed Basin Plan* and the need for greater community involvement in the preparation of the proposed Plan. Ministers agreed to support a new process for the Basin Plan going forward that will more fully involve state governments and Basin communities.

The Basin Plan will need to properly take into account social and economic factors, including the needs of urban centres that rely on the Basin. Ministers encouraged the Murray-Darling Basin Authority to release the proposed Basin Plan according to a timetable that allows it to take into account the findings of the House of Representatives Committee inquiry chaired by Mr Tony Windsor, MP.⁸⁷⁶

Unsurprisingly, given this imprimatur from the Minister and Ministerial Council, the Authority itself treated the Windsor Committee as though it were a contributor to the process to develop the Basin Plan.⁸⁷⁷ For example, when there was delay in the Committee's final report the Authority issued a press release indicating that the next iteration of decision making—the *Proposed Basin Plan*—would not be released until the Authority had been able to consider the Committee's findings.⁸⁷⁸

The Committee's influence also stemmed from the status of its Chair: The Hon Tony Windsor MP. Mr Windsor was an independent representative whose constituency was in the Murray-Darling Basin and was one of three independents on whose support the minority Government relied. Mr Windsor consistently emphasised the Parliament's role in the Basin Plan process,

⁸⁷⁶ Ministerial Council, *Communique* (7 December 2010).

⁸⁷⁷ This included the inquiry's recommendation on how the Authority should engage with the public; MDBA, *Plain English summary of the proposed Basin Plan — including explanatory notes* (MDBA, Canberra, 2011) viii and MDBA, *Proposed Basin Plan –Consultation Report 6 & 8*. The Authority also directly links to the Windsor Inquiry's report from its website; MDBA, 'Steps in the development of the Basin Plan'.

⁸⁷⁸ MDBA, *Authority says findings will be considered* (23 May 2011).

arguing that the ability of Parliament to disapprove of any final Basin Plan meant that ‘any decision making will (sic) be the Parliament making decisions ... because the Authority has (sic) no authority to do anything’.⁸⁷⁹

Using this influence, the Committee offered formal evaluations and recommendations at three points during the Authority’s decision making in the second phase. The Committee delivered interim findings to the Minister in February 2011, regarding the need for the Authority to consider engineering solutions (“works and measures”) when modelling the proposed SDLs rather than basing their models on “over-bank flows” (the former require significantly less water).⁸⁸⁰ (The Minister referred this matter to the Authority and promised to discuss it at the April 2011 meeting of the Ministerial Council.)⁸⁸¹ The Committee delivered its final report in May 2011⁸⁸² and a whole-of-government response was delivered in November 2011.⁸⁸³ On 29th May 2012, the day after the release of *Proposed Basin Plan—A revised draft*, the Minister again asked

⁸⁷⁹ Kelly and Massola. The Minister argued that the final Basin Plan would not have avoided being disallowed by Parliament had it not been for Mr Windsor; Tony Burke MP, *Second Reading Debate (Water Amendment (Water for the Environment Special Account) Bill 2012)* (The House, 28 November 2012) 13799.

⁸⁸⁰ House of Representatives Standing Committee on Regional Australia, *Interim Findings: Inquiry into the Impact of the Murray-Darling Basin Plan on Regional Australia* (House of Representatives 2011).

⁸⁸¹ The Hon Simon Crean MP and The Hon Tony Burke MP, *Government Response to Interim Findings* (House of Representatives Standing Committee on Regional Australia 2011).

⁸⁸² House Standing Committee (2011).

⁸⁸³ Australian Government, *Australian Government Response to the House of Representatives Standing Committee on Regional Australia Committee Report: Of drought and flooding rains* (Australian Government 2011).

the Committee to inquire into several aspects of that draft of the Basin Plan.⁸⁸⁴ The Committee published this subsequent report in July 2012.⁸⁸⁵ While it is beyond the scope of this thesis to trace in detail how both decision makers adopted these recommendations, it is important to note that many of them were adopted.⁸⁸⁶

I focus my accountability analysis on the Windsor Committee, which was the site of the clearest accountability interaction between two forums, as I analyse in Chapter Five. I do this because it was recognised by other accountability actors as *the* most significant forum; while other parliamentary forums (examined below) were viewed as relatively irrelevant.⁸⁸⁷ The establishment of this additional forum was tremendously significant because the way this accountability process was *de facto* embedded in the Basin Plan decision making signalled a shift in what counted as accountable decision making, especially for the Authority.

The Minister's reshaping of what counts as accountable decision making in his relationship with the Authority

As part of his response to the backlash, the Minister committed to using his powers to direct the Authority to change the SDLs if they prioritised

⁸⁸⁴ House of Representatives Standing Committee on Regional Australia, *Terms of Reference: Inquiry into Certain Matters Relating to the Proposed Murray-Darling Basin Plan* (The House of Representatives 2012).

⁸⁸⁵ House of Representatives Standing Committee on Regional Australia, *Report into Certain Matters Relating to the Proposed Murray-Darling Basin Plan* (House of Representatives 2012).

⁸⁸⁶ For analysis of this, see Coda to Decision making in the Conclusion.

⁸⁸⁷ NRM Manager, National Farmers Federation (NFF), interview with author; Director, South Australian Department of Water, interview with author.

environmental outcomes over social and economic outcomes.⁸⁸⁸ This signalled a change in the accountability relationship between the Minister and Authority, with implications I more fully examine in Section One, Chapter Five. With this action the Minister challenged the previous construction of accountable decision making around independent, expert decision making.

Specifically, this change in the Minister-Authority accountability relationship was marked by a greater use of the Minister's *ex ante* powers. The appointment of Mr Craig Knowles as the new Chair of the Authority in January 2011 is the best example. Mr Knowles was a former parliamentary colleague of the Minister, and former Labor Minister for natural resources in New South Wales.⁸⁸⁹ Upon his appointment, Mr Knowles adopted the Minister's position regarding the Act's criteria for setting SDLs. After questioning by the media, the Minister publicly confirmed that the Act's interpretation had been discussed with Mr Knowles *prior* to his appointment as the second Chair of the Authority.⁸⁹⁰ This use of the accountability relationship to bring the Authority towards the Minister's preference was important because the Chair's

⁸⁸⁸ T Arup and P Ker, 'Labor attacks river report: Heat on Murray Authority' *The Age* (26 October 2010) and P Dorling, 'Gillard backpedals on Murray' *The Canberra Times* (18 October 2010).

⁸⁸⁹ As such, Mr Knowles was involved in the negotiation of the National Water Initiative; S Maher, 'Former NSW Labor minister Craig Knowles appointed to head Murray-Darling authority' *The Australian* (28 January 2011). This appointment was criticised by the Opposition as compromising the Authority's independence; ABC, *Former Labor MP new Murray Darling Basin Authority boss* (ABC (PM) 28 January 2011). It should be noted that the appointed was broadly supported by the key stakeholders. It would be included in the category of 'partisan politicisation' under Mulgan's analysis in R Mulgan, 'Politicisation of Senior Appointments in the Australian Public Service' (1998) 57 *Australian Journal of Public Administration* 3, 7.

⁸⁹⁰ S Maher, 'Tony Burke brings in Labor mate Craig Knowles to ease Murray anger' *The Australian* (29 January 2011).

acceptance of the different legal interpretation allowed the Authority's previous work to be discounted as being based on a legal error. Indeed, the new Chair announced that the Authority's decision would effectively begin again⁸⁹¹—but this time around the Authority would adopt 'a balanced approach'.⁸⁹²

With respect to the remaining Board members, the Minister did not seek to invoke the formal sanction of dismissal. Notwithstanding the widespread criticism of the Authority over the *Guide*, the Minister claimed 'It's not within my power to tell them they have to go'.⁸⁹³ But the Minister used significant *de facto* pressure when he publicly suggested that each Board member needed to consider his or her position.⁸⁹⁴ Mr Knowles also publicly stated that he had asked each Board member to examine their own consciences as to whether they could be a constructive part of the Authority's deliberations⁸⁹⁵ and asked them to work within the Act.⁸⁹⁶

One Board member, Dr Dianna Day, did resign;⁸⁹⁷ while another, Professor Barry Hart, publicly refused to resign despite 'extreme' pressure to do so.⁸⁹⁸ In

⁸⁹¹ Note that the MDBA's website with steps for the development of the Basin Plan does not include the *Guide*; MDBA, 'Steps in the development of the Basin Plan'. This approach reflected the submissions of significant agricultural stakeholders, who argued that the *Guide* should not form the basis of any of the Authority's subsequent decision making; Federation, National Farmers. 2010. "Submission to the Guide to the Proposed Basin Plan Volume 1 & Volume 2 Part I." *Submissions to MDBA* (December).

⁸⁹² I Hayes, 'New watermark for Murray-Darling' *Courier Mail* (29 January 2011).

⁸⁹³ Wilkinson *Backlash in the Basin*.

⁸⁹⁴ Wilkinson *Backlash in the Basin*.

⁸⁹⁵ Wilkinson *Backlash in the Basin*.

⁸⁹⁶ T Coull, 'MD Basin Authority Member Quits' ABC Rural (28 February 2011).

⁸⁹⁷ Wilkinson *Backlash in the Basin*.

any case, the new Chair appeared to side-line the Board by establishing an advisory committee and a technical delivery group outside the framework of the *Water Act 2007*,⁸⁹⁹ which were apparently referred to within the Authority as “the shadow Board”.⁹⁰⁰ All of these actions constructed accountable decision making in terms of responsiveness and openness, rather than independence and expertise. While this is a matter of emphasis, in order to understand how actions within accountability processes influence the construction of accountable decision making, it is important to take this further analytical step.

Analysing the Minister’s role in reshaping the accountability regime

The power of governments to shape the accountability regime that holds government actors to account is identified as a factor that can be revealed by the analytical approach I set out in Section Five, Chapter Two. While the Minister was hardly in control of events during the backlash, he was able to successfully rebuff accountability demands that the Government fund a separate community adjustment process or that it seek to amend the *Water Act*

⁸⁹⁸ BARRY HART: Yeah there's pressure. Look, it's extreme. Let me, let me make it clear. It is an independent body. I'm sure those people who wrote the act saw that there were potential given that this is such a major reform, there was a potential for this, so it's extremely difficult to, I think they have to show that I'm mentally deficient and convince the Governor-General of that. No, no I don't want to be trivial about that. But I think that those who put the act together saw those possibilities. No I'm, I'm committed for the long term.

MARIAN WILKINSON: And has the new chairman put any pressure on the authority members to resign?

BARRY HART: Look the new chairman has pointed out very clearly what the public is thinking about the guide in particular and by implication us, so I think I'll leave it at that.

Wilkinson

⁸⁹⁹ G Kelton, ‘Maywald's key post to fix River Murray plan’ *The Advertiser* (10 February 2011) and C Clifford, ‘Craig Knowles says cost of Basin revamp worth it’ *ABC News* (23 March 2011). Also see P Ker, ‘Knowles denies plan to purge’ *The Age* (2 February 2011).

⁹⁰⁰ Former Chair of Murray-Darling Basin Commission, interview with author and Solicitor, Australian Government Solicitor (out posted at the Authority 2010-2011), interview by author, Canberra, Saturday 26 March 2011.

2007. Indeed, the Minister plays a smaller role in this accountability analysis than might have originally been expected precisely because he continued to successfully rebuff most accountability demands and avoid formal negative evaluations of his decision making.

As in Mulgan's analysis of the AWB case, the Minister was able to do so through his (at least partial) control of the terms of reference of the most significant accountability forum—the Windsor Committee. Specifically, the Minister did so by framing those terms of reference in terms of how the socio-economic impact of the Basin Plan could be ameliorated *through* the existing decision-making processes. This did involve the Minister accepting responsibility for the social and economic outcomes of water recovery. However, as I show in Chapter Five, the Minister successfully transferred much of the responsibility for ameliorating socio-economic impacts of the Basin Plan to the Authority. Despite the proliferating demands made of both decision makers during the second phase of decision making, my accountability analysis focuses on the Authority in Chapter Five because the Minister so successfully “responsibilised” the Authority.

Parliament and the Basin State's role in reshaping the accountability regime

Parliament also responded to the backlash by establishing additional forums to oversee both decision makers. Specifically, two Senate committees conducted inquiries relevant to the Authority's decision making with respect to

proposed SDLs and, to a lesser extent, water recovery.⁹⁰¹ In the weeks after the release of the *Guide* the Senate referred an inquiry into the “The Management of the Murray-Darling Basin” to the Rural and Regional Affairs and Transport References Committee.⁹⁰² In February 2011, the Senate referred an inquiry into the *Water Act 2007* to the Legal and Constitutional Affairs References Committee.⁹⁰³ The Committee’s report was not directly pertinent to the Authority’s decision making, but maintained public attention on the issue of the Act’s interpretation.⁹⁰⁴

Procedurally, parliamentary committees are potentially powerful accountability forums because they have the power to summon witnesses,⁹⁰⁵ and to oblige public decision makers to account to them and to produce documents. Substantively, Mulgan points out that parliamentary committees can seek information and encourage discussion of a decision maker’s actions

⁹⁰¹ The dynamics between these parliamentary forums and other forums or additional accountability actors was similar to those I examine with respect to the Windsor Committee in the following section. Actors appeared before the Committee to relay their demands, information, or evaluations and these committees often acted to put these demands to the Authority or Government, or picked up the information and evaluations in their final reports. While I focus my analysis on this more significant site of accountability interactions, there were a number of instances of interactions with these other Parliamentary committees, albeit with less significance for the overall construction of the Authority’s accountability within the multiple accountability regime.

⁹⁰² See The Senate, *Journals of the Senate* (The Senate 28 October 2010). Rural and Regional Affairs and Transport References Committee (Senate), *Terms of Reference for Inquiry into the Management of the Murray-Darling Basin* (The Senate 2010).

⁹⁰³ The Senate, *Journals of the Senate* (The Senate 9 February 2011) 526.

⁹⁰⁴ Senate Legal and Constitutional Affairs Reference Committee (2011). The government responded to this on 27 March 2012 in Australian Government, *Australian Government Response to the Senate Legal and Constitutional Affairs Reference Committee Report - A Balancing Act: provisions of the Water Act 2007* (Australian Government 2012).

⁹⁰⁵ And provide parliamentary immunity to those witnesses; *Senate Standing Orders* 34.

and accountability through their evaluations and recommendations.⁹⁰⁶ More significantly for my accountability analysis, the openness of parliamentary committees to input from other forums or additional accountability actors, and the fluidity around the subject matters and normative standards they invoke, makes them a likely participant in accountability interactions.

Although the Basin States were collectively in an accountability relationship with the Authority through the Ministerial Council, in practice the Council had problems extracting information from the Authority and ensuring it responded to the Council's evaluations and directions.⁹⁰⁷ Individual Basin States therefore became more active accountability actors in the second half of the Basin Plan case, including by acting to reshape the multiple accountability regime overseeing the Authority (and indeed the Minister). Basin States could facilitate other accountability forums, or additional accountability actors, by funding their activities. For example, Basin States funded reviews of the Authority's decision making rigour and alternative modelling, which contributed to the continued contestation over setting SDLs and subsequent generated accountability demands.⁹⁰⁸ The Basin States could threaten to launch legal challenges to the Basin Plan, especially regarding the Plan's constitutional validity. For example, from early 2011, South Australia consistently threatened

⁹⁰⁶ Mulgan (2003) 47 & 54. Also see Giddings 684.

⁹⁰⁷ This was particularly the case in the first phase of decision making, but continued to some extent in the second phase. South Australian Minister for the River Murray, interview with author and Director-General, NSW Department of Environment and Water, interview with author, Sydney, 21 April 2011.

⁹⁰⁸ For an analysis of how varying assumptions explained differential outcomes, see Authority (2012) 3.

to challenge the validity of any Basin Plan that did not ensure sustainability.⁹⁰⁹ This acted as a prospective accountability arrangement that the Authority had to factor into its decision making.

Basin states also had two strong sanctions at their disposal: they could cut the Authority's budget (as New South Wales and South Australia did during the second phase of the case),⁹¹⁰ and they could make negative statements in the public sphere or before other accountability forums (as all Basin states did throughout during the second phase of the case).⁹¹¹ Because the Basin states possessed greater technical and policy capacity in water planning,⁹¹² and better 'local connections' in the Basin, criticism of the Authority from Basin states was influential.⁹¹³ As a result, all Basin states acted as additional accountability

⁹⁰⁹ These threats were made from October 2011; see D Montoya, *The Basin Plan: Legal Debates and Developments* (NSW Parliamentary Library Research Service 2012) 10.

⁹¹⁰ This is a "harder" form of sanction; Biela and Papadopoulos 5. These cuts amounted to around half of South Australia's contribution and nearly three-quarters of NSW's contribution to jointly funding projects; MDBA, *Murray-Darling Basin joint program arrangements* (MDBA 2013) 2. These cuts were not directly to the Authority's Basin Plan functions, because that is funded by the Australian Government, but effect the joint natural resource management programs and infrastructure maintenance; MDBA, *Statement from the MDBA chair Craig Knowles* (20 December 2012).

⁹¹¹ Which are a "softer" form of sanctions; Schillemans 178 and Biela and Papadopoulos 5. Such statements became increasingly common during the second phase of decision making, especially from Basin States with Coalition Governments; see L Wilson and D Warne-Smith, 'States Nats threaten consensus on reform' *The Australian* (22 October 2010).

⁹¹² Former director of the Victorian Office of Water, interview with author; Dr Daniel Connell, interview with author.

⁹¹³ For a discussion of the dynamics around when public criticism is an effective sanction, see Schillemans 178.

actors in the public sphere and through forums such as parliamentary Committees.⁹¹⁴

Moreover, what gave Basin states their *de facto* veto player status was that they could plausibly threaten to withdraw their referred powers, which would undermine the legal basis for the Commonwealth setting enforceable SDLs.⁹¹⁵ This threat was taken seriously by political actors: as Mr Tony Windsor MP pointed out, ‘if one of them (the four Basin states) pulls out, the whole thing turns to dust ... there’s a lot of exit points on this’.⁹¹⁶

The nature of the multiple accountability regime in the second phase of the case

The establishment of the Windsor Committee and other parliamentary committees, as well as the re-empowerment of Basin states, substantially changed the nature of the accountability regime overseeing both decision makers.

The multiple accountability regime overseeing the Authority is comprised of political, bureaucratic, legal (theoretically) and professional forums, as well

⁹¹⁴ For example, all Basin jurisdictions appeared before, or met with, the Windsor Committee; House Standing Committee (2011) Appendix C.

⁹¹⁵ The Queensland Government threatened to withdraw their referrals in the fourth phase of the process; R Barrett, ‘Newman marks 100 days with threat to quit Murray-Darling water plan’ *The Australian* (3 July 2012). It remains legally uncertain whether a state government is able to withdraw their referral of powers because it has not yet been tried for powers that were not referred with a time limit; Lynch 381. In reality, a Basin State is more likely to thwart the implementation of aspects of the Basin Plan they disagree with rather than incur the public scrutiny that would attend pulling out of the process; Mike Smith, Director, South Australian Department of Water, interview with author.

⁹¹⁶ Wilson and Schliebs, ‘Windsor warns irrigators’.

as a range of social and professional additional accountability actors. Political forums, however, dominate the regime. I argue that this dominance had an important impact of how public accountability operated in the Basin Plan case. Notably, it contributed to the politicisation of the accountability processes in the case and, given the veto player status of Parliament, to the fusing some of those accountability processes with the decision-making processes.

The dominance of political forums, particularly parliamentary committees, facilitates the arena shifting I identified at the end of Chapter Three. As is recognised in accountability literature, political forums are also political actors,⁹¹⁷ and many of those actors have an interest in transferring some of the controversy around the decision making into accountability dialogues. Parliamentary committees, for example, are composed of representatives who are ‘conscious of their relationship with constituents, who are often adversarial and aggressive’.⁹¹⁸ Moreover, such forums are likely to use the ‘capacity to scrutinise and to sanction with the aim to pull an agency more towards its own preferences’.⁹¹⁹ We also see the latter phenomenon with the Minister and his actions towards the Authority.

Parliamentary forums provided a platform for additional accountability actors to make accountability demands, and relevant information, public in a formal accountability forum. Consequently, there is a high coincidence of

⁹¹⁷ Mulgan (2009) 343.

⁹¹⁸ Harlow (1999) 172.

⁹¹⁹ Biela and Papadopoulos 6.

actors, aside from the two public decision makers, who are involved in both the decision-making processes and the accountability processes within the Basin Plan case. I find that these actors treat the decision making and accountability processes as connected.⁹²⁰

Open, political accountability forums make it more likely that the public sphere will also become a significant site for the broadcast of accountability demands and evaluations. This is because legislatures as forums generally play the role of an ‘inducer rather than enforcer’;⁹²¹ they primarily rely upon pressuring public decision makers, or governments, into responding to them. As ‘the principal forum of the political process’,⁹²² Parliament is the actor that often ‘generates the political noise and political heat’ necessary to prompt public decision makers to respond to the demands and adverse evaluations of other actors.⁹²³

Another notable feature of the multiple accountability regime in the Basin Plan case was that accountability forums tended to frame their evaluations prospectively.⁹²⁴ The structure of the regulatory process in the Basin Plan case effectively enabled a kind of interim retrospective review to take place *during*

⁹²⁰ This was assumed by the majority of actors I interviewed, who discussed their own involvement in accountability processes, and the involvement of others, in these terms.

⁹²¹ Mulgan (2003) 62.

⁹²² Evans (1999) 89.

⁹²³ Evans (1999) 88.

⁹²⁴ By contrast, accountability processes that tend to follow an accident or crisis, which will tend to focus on retrospectively reconstructing the facts, and potentially allocating blame and recommending institutional reform; see those processes studied in Romzek and Ingraham; Mulgan (2003); Harlow (1999); and, L Svedin, *Accountability in Crises and Public Trust in Governing Institutions* (Routledge 2012).

decision making. This occurred by virtue of having multiple mandated phases of decision making both around SDLs and, in practice, multiple phases of water buyback. Moreover, because additional accountability forums were activated or established in response to the perceived flaws (and lack of accountability) in earlier phases of the decision making, those forums were more likely to frame their evaluations in terms of how the two decision makers should change their approach in subsequent phases of the process. We see this in the analysis of interactions between the Windsor Committee and professional forums, and the evaluations that those interactions influence, in the following Chapter.

Indeed, the reshaping of the accountability regime overseeing both decision makers involved a redistribution of power: away from the Authority and the Minister and towards the Basin communities and their representative groups, as well as towards Parliament and towards the Basin States. This confirms the validity of the methodological assumption that the distribution of power can be altered within—or is endogenous to—accountability processes.⁹²⁵

Having analysed how forums and additional accountability actors acted in concert to make demands directly of the Authority and Minister, and respond to those demands by reshaping the accountability regime, I now turn to the role of the Authority.

⁹²⁵ See Section Two, Chapter Two.

Section 5: Analysing the role of the Authority in generating accountability politics during the backlash

In this section, I find that the Authority played a more significant role in the accountability interactions analysed in this chapter than might be initially apparent. *Prima facie*, the series of events sparked by the backlash to the *Guide* appear to be a case of an inept public decision maker being publicly sanctioned for their decision making, initially by those affected by that decision making and later by various accountability forums. However, I find that the Authority should be analysed as acting to create the conditions in which other accountability actors acted in concert to generate accountability politics in the Basin Plan case. This explains why the Authority appeared to consistently provide the ammunition that the Basin communities, and others, used to criticise its decision making.

The apparent paradox of the Authority's actions

It is difficult to explain the Authority's decision making approach to setting SDLs during the first two years of the Basin Plan process. This is because the Authority's actions appear to be—and in fact probably are—paradoxical.⁹²⁶ In the first interpretation, the Authority acts as a faithful, if misguided “agent” who attempts to reconcile the tensions that were not resolved through the *Water Act 2007*. In the second interpretation, the Authority was an ‘unruly

⁹²⁶ While this thesis treats the Authority as a unitary actor, the explanation for the paradoxical actions appears to be a significant split between the Authority's board and its CEO; Former Director, Victorian Office of Water, interview with author.

agent',⁹²⁷ who acted to maximise the public and stakeholder pressure on its political masters and, potentially, to reshape the accountability regime that oversaw both it and the Minister.

First interpretation: the Authority as faithful but misguided agent

During the first decision making phase, the Authority's approach was perceived by most other actors as centralist and technocratic.⁹²⁸ This was despite the fact that the history of attempts to regulate the Basin pointed to both approaches as spelling disaster. According to the first interpretation, the Authority's response to the legislative and policy framework described in Chapter Three was to accept the tasks it was delegated by the *Water Act*: to identify proposed SDLs based on a technical assessment of the available environmental, social and economic evidence base and the criteria of prioritising environmental sustainability; to identify outcomes and objectives for the Basin Plan; and to consult mostly subsequently to producing a proposed Basin Plan.

This view accords with what one would expect a government agency to do: to accept the legal basis for its decision making and the broader policy framework within which it operates. It also accords with what one might expect of an independent, expert agency: to treat issues as technical issues irrespective of whether they require political choices, and to accept (indeed perhaps

⁹²⁷ Olsen 453.

⁹²⁸ This was a key theme of virtually all interviews I conducted.

appreciate) a process that mandates little consultation until the agency's technical assessments are complete.

The evidence for this interpretation of the Authority's approach to setting proposed SDLs during the first phase is considerable. However, I will focus on two key pieces of evidence.

The view of the Authority as centralist and technocratic is supported by the Authority's apparent equation of independence with separateness, particularly from Basin states⁹²⁹ but also from stakeholders and experts.⁹³⁰ For example, the Authority seems to have primarily relied upon its own internal expertise, or on consultants, to undertake the modelling that underpinned the proposed SDLs.⁹³¹ This is notwithstanding that the data of the Basin States underpinned the modelling, and the States had far more expertise, developed while regulating the Basin for over a century.⁹³² The Authority's consultations with Basin States, as well as stakeholders and experts, were also interpreted as premised on a lack of trust by many of those consulted. For example, all

⁹²⁹ South Australian Minister for the River Murray, interview with author; General Manager, National Water Commission, interview with author; Director, South Australian Department of Water, interview with author; Director-General, NSW Department of Environment and Water, interview with author; Former Director, Victorian Office of Water, interview with author.

⁹³⁰ Healthy Rivers Campaigner, Australian Conservation Foundation, interview with author.

⁹³¹ This was one reason why the scientific basis of the *Guide* was much more susceptible to criticism by scientists, because it had not been peer reviewed by academic standards (only discreet aspects of the Authority's analysis were reviewed); Professor Richard Kingsford, School of Biological, Earth and Environmental Sciences, University of New South Wales, interview with author, Sydney, Wednesday 20 April 2011. Also Professor Mike Young, Environment Institute, University of Adelaide, interview with author. In general, this meant that the Authority and Minister lacked the public cover for their decision making that they might otherwise have expected from scientists; NRM Manager, National Farmers Federation (NFF), interview by author.

⁹³² General Manager, National Water Commission, interview with author.

participants were required to sign unusually strict confidentiality agreements⁹³³ and the Basin States received lead-resistant copies of the *Guide* only five days prior to its public release.⁹³⁴

The Authority's minimal approach to public and other consultation also supported the interpretation of the Authority as adhering to the formal decision-making process of the Act, despite that approach being at odds with the best practice approaches that have made Australia a world leader in water management. These approaches emphasise community involvement and ownership of reform as a crucial component of decision making.⁹³⁵ Public information or consultation sessions did occur during the first phase of the case, including within Basin communities.⁹³⁶ But other water policy agencies and experts viewed them as grossly inadequate.⁹³⁷ This was seen as a key reason

⁹³³ NRM Manager, National Farmers Federation (NFF), interview with author; Bouilly and Maywald 105. This approach was due to the risk of leaks; Policy officer, Community Engagement, Murray-Darling Basin Authority, interview with author, Canberra, Wednesday 23 March 2011.

⁹³⁴ Director, NSW Office of Water, interview with author. As it happened, the proposed SDLs were leaked a day ahead of the official release.

⁹³⁵ *National Water Initiative* principle 93.

⁹³⁶ Indeed a survey of 500 residents of Basin communities found that 5% of them had been involved in the process to produce the *Guide*, a relatively high figure; B Ramsay, 'Murray Murmurings: is the silent majority in the Basin being sidelined?' Crikey Blog (28 October 2010) <<http://blogs.crikey.com.au/rooted/2010/10/28/murray-murmurings-is-the-silent-majority-in-the-basin-being-sidelined/>> accessed 12/12/2010.

⁹³⁷ See National Water Commission, *Australian Water Reform 2009: Second Biennial Assessment of Progress in Implementation of the National Water Initiative* 34. The Commission's view was diplomatically conveyed in this report, but was very critical; General Manager, National Water Commission, interview with author. Also, Former Director, Victorian Office of Water, interview with author; Director-General, NSW Department of Environment and Water, interview with author and Former Chair of Murray-Darling Basin Commission, interview with author.

why the community response to the Authority's proposals was so hostile.⁹³⁸ The Authority also had minimal contact with the media during the first phase.⁹³⁹

Second interpretation: the Authority as unruly agent

There is an alternative interpretation of the Authority's actions during the first phase of decision making that was adopted by a small but well-placed group of actors.⁹⁴⁰ On this view, the Authority exercised its independence to challenge the delegation of political choices to it, the legal prioritisation of environmental interests in setting SDLs, and the lack of public consultation prior to the proposed SLDs being developed. It initially challenged the *status quo* within Government.⁹⁴¹ It was only when the then Minister, Senator Penny Wong, declined to alter either the *Water Act 2007*, or address the lack of support for community adjustment, that the Authority engineered a scenario in its release of the *Guide* that would see that framework publicly challenged. Drawing on my interviews with some of the key actors in these events (see Appendix B), I find that this interpretation of events is more plausible and analyse the Basin Plan case on this basis.

⁹³⁸ See Bouilly and Maywald 106. This was likely due to the very tight time-frames involved in preparing the Basin Plan, and in that sense the decision making approach may have been due to circumstances as much as strategy; see Ray 'Too little time'.

⁹³⁹ See Wahliquist (2011) 115. This contributed to a dearth of journalists who had a good understanding of the context.

⁹⁴⁰ Notably from those commentators with a deep understanding of the process: Stevenson, and Briscoe 5. This interpretation of events was also confidentially suggested in several interviews with the author, aside from those two cited here.

⁹⁴¹ There is also evidence that at least the Authority's Chair was engaged in a robust discussion with the Minister about the likely community hostility to proposed SDLs which prioritised the environment in the absence of significant support for communities to transition to SDLs at that level. This was confirmed by the South Australian Minister for the River Murray, interview with author. Also Former Director, Victorian Office of Water, interview with author. Also see P Ker, 'Departing chief had supporters on the land' *The Age* (8 December 2010).

Specifically, I find that it is implausible that the Authority was naive about the improbability of Basin communities, States and irrigator interest groups accepting the proposed SDLs required by the *Water Act 2007* without substantial support for community adjustment. The Authority's first Chair had been the executive head of Commonwealth departments responsible for agriculture, regional Australia, natural resources and the environment as well as a senior civil servant in Victoria prior to his appointment as Chair.⁹⁴² The other senior members of the Authority also had extensive relevant experience, including working for Basin States.

In the six months or so leading up to the *Guide's* release, the Government was informed of the likely community backlash by lobbyists representing the peak environmental and agricultural stakeholder groups.⁹⁴³ Moreover, in mid-2010, the Wentworth Group of Concerned Scientists released a proposal citing similar proposed SDLs to those the Authority would announce three months later. The Wentworth Group are an independent group of some of Australia's most prominent scientists and economists concerned with land and water use, especially in the Basin.⁹⁴⁴ The Wentworth Group called on the Government to

⁹⁴² Bushfire CRC, 'Mr Mike Taylor AO' (*Bushfire CRC*, 2013) <<http://www.bushfirecrc.com/people/mike-taylor>> accessed 1/8/2013. One of the few media articles that includes this interpretation of events is also one of the few that analyses the Chair's previous experience in agriculture policy and water reform; Stevenson, 'Newsmaker: Mike Taylor'.

⁹⁴³ Former CEO of the National Farmers Federation, interview with the author and Healthy Rivers Campaigner, Australian Conservation Foundation, interview with.

⁹⁴⁴ The group has been convened by World Wildlife Fund (Australia). The Wentworth Group was a major proponent of returning water to the environment, and ensuring security for both consumptive and environmental use, by clarifying water property rights for farmers; Wentworth Group of Concerned Scientists, *Blueprint for a Living Continent* (Wentworth Group

substantially alter the water recovery approach, in order to ensure funding benefited *communities* as well as individual irrigators.⁹⁴⁵ The release of such a proposal by a prominent and credible actor casts doubt on the idea that the Authority was naïve about the likely response to the *Guide*.

The Authority's discretionary decision to release the *Guide*, then, reflects its decision not to adhere to a formal process which saw most of the significant public consultation take place *subsequent* to the preparation of the proposed Basin Plan.⁹⁴⁶ The probable intent behind this action was obscured in the consequent public backlash because the dominant accountability critique that emerged was of the Authority's lack of consultation.⁹⁴⁷

This interpretation of events explains why the *Guide* pointed to many of the inadequacies of the Authority's own analysis, as did the Chair in his comments about the *Guide*. Moreover, the Chair emphasised the prescriptive nature of the Act's requirement to prioritise environmental interests,⁹⁴⁸ and

of Concerned Scientists 2002) and Wentworth Group of Concerned Scientists, *Blueprint for a National Water Plan* (Wentworth Group of Concerned Scientists 2003). Many of these principles were enshrined in the *National Water Initiative*.

⁹⁴⁵ Wentworth Group, 'Sustainable Diversions in the Murray-Darling Basin' 4.

⁹⁴⁶ It should be noted that the Authority did deliberately delay the release of the *Guide* until after the August 2010 Australian election, as on the original timetable it would have been released during the election campaign. This points to a limit on the extent to which the Authority sought to politicise the process.

⁹⁴⁷ Section Two.

⁹⁴⁸ See quotations in Wahliquist (2011) 122. Also see P Akerman, 'Farmers respected 'frank' Murray-Darling chairman' *The Australian* (8 December 2010).

also the value of having a public discussion about the trade-offs between interests and values involved in setting SDLs.⁹⁴⁹

In this light, Mr Taylor's actions during the information session and resignation was a kind of calling of the Government to account about the political nature of the decisions that were required to develop a Basin Plan.⁹⁵⁰

Incorporating decision makers into the analysis of accountability interactions

My findings regarding the Authority's actions underscore the need to encompass decision makers in any analysis of actors acting in concert with one another, particularly to contest the established accountability framework. We see that decision makers can shape the multiple accountability regime they face through *accepting* as well as *rebuffing* accountability demands made outside of any established accountability framework. We can also see that public decision makers can go some way to shaping the arenas in which accountability demands can be made upon them.

I argue that this analysis of the Authority's actions also affirms some of Olsen's criticisms of the limitations of a principal-agent approach to analysing complex and dynamic contexts such as the Basin Plan case. The legislative framework, and the broader lack of political consensus about the Basin Plan's objectives, meant that the political "principals" did not have clear, pre-

⁹⁴⁹ L Taylor, 'Basin plan gets bogged down in legal wrangling' *The Sydney Morning Herald* (27 October 2010) 6.

⁹⁵⁰ G Lloyd, 'Resignation forces process to get back on track' *The Australian* (8 December 2010).

determined electoral mandates, political goals or interests against which the actions of the Authority could be compared.⁹⁵¹ This means that a principal-agent approach that focuses on questions of autonomy and control, such as whether the Authority was disciplined for deviating from politically set goals, is inappropriate for understanding the Basin Plan case.⁹⁵² As Olsen argues:

Administrators have to decipher political decisions and legal documents and develop practical, viable solutions. They are not held to account solely as a tool for elected leaders. They are exposed to a variety of pressures and the legitimacy of public administration depend on their ability to reconcile contradictory premises and competing accountabilities to multiple masters on specific issues in specific situations.⁹⁵³

The failure of the Authority to successfully negotiate this scenario during the first phase of decision making was crucial for the subsequent developments in the case.

Furthermore, adopting principal-agent approaches can easily miss ‘what is at stake in accountability processes beyond disciplining unruly agents’.⁹⁵⁴ In the case of the Authority, the struggle over whether it *was* an “unruly agent” was really about who was responsible for ameliorating the (presumed) socio-economic impact of addressing over-allocation.

⁹⁵¹ Olsen 448.

⁹⁵² Olsen 448.

⁹⁵³ Olsen 465.

⁹⁵⁴ Olsen 453.

Conclusion

In this chapter, I have established that accountability interactions in which different actors acted in concert can reshape the accountability regime attaching to public decision makers. Specifically, I find each of the three kinds of accountability actors I include in my analysis—forums, decision makers and additional accountability actors—acted in concert to generate accountability politics in the Basin Plan case. In this context, the nature of the forums to which the Authority (and to a lesser extent, the Minister) was obliged account was contested, with the outcome being the establishment of additional and mainly political forums. The subject matter that the Authority was called to account for was also expanded to include the outcomes of setting proposed SLDs and the lack of public consultation during the first phase of decision making.

I set up the Basin Plan case as one involving two distinct phases: in the first we see routinised accountability processes with no accountability interactions and in the second we see accountability politics within the public sphere and interactions between actors. I have argued that the differences between these two phases is explained by the switch between what Olsen terms a settled and unsettled political order that occurs with the backlash. This finding demonstrates the value of in depth case studies over a longer period of time for examining how the dynamics within an accountability regime might shift in response to events.

My central argument has been that different actors acted in concert during the backlash because they shared an interest in demanding that the decision makers account for the impact (as well as rigour) of their decisions and for contesting the adequacy of the formal accountability regime and the decision making process it complemented. My analysis of the backlash points to a potential role for additional accountability actors in interacting with existing forums to reshape the multiple accountability regime overseeing a decision maker. Such actors can do so by contesting the adequacy of existing arrangements and through influencing the dynamics within the accountability regime, including the public sphere, more generally.

The acting in concert we see in this Chapter was more within the accountability regime, made up of the public sphere and of particular accountability dialogues rather than strictly an accountability process. This points to the need to expand the conception of where accountability interactions can take place, as postulated in Chapter Two. It also suggests the importance of the public sphere in unsettled political orders as a venue for contesting the accountability status quo. Both instances reveal the value of adding a regime-level perspective to the analysis of accountability processes, more conventionally understood.

I provided a high-level analysis of the accountability demands made by different actors, and the political purpose of those demands within a broader political struggle. This provides the background for the creation of the multiple accountability regime and the accountability interactions I analyse with a

greater degree of formality in Chapter Five. In the two chapters, I examine both the broader and archetypal concept of accountability interactions I set out in Section One, Chapter Two, as well as the different approaches comprising my analytical framework.

In this chapter, I adopted the approaches to analysing accountability politics, and understanding the political dimension of a case. In particular, I confirmed existing findings about the capability of governments to significantly shape the accountability regime that oversees different government actors. I also confirmed existing findings about how political forums are likely to affect the dynamics within an accountability regime, both because they are political actors and because Parliamentary forums have relatively unfixed subject matters and standards. In the next chapter, we see how this might make such forums likely participants in accountability interactions.

Chapter Five: Acting and interacting in order to reshape the substance of a decision maker's accountability

Introduction

In this chapter, I examine how the substance of what the Authority is held to account for, and the normative standards against which they are evaluated, are the subject of both responsabilisation and accountability interactions between multiple forums. By tracing in detail how the Minister responsabilises the Authority, and how the Windsor Committee interacts with another forum, I establish that the subject matter and normative standards elements are reshaped through processes of holding the Authority to account. I then broaden the frame of analysis to consider how accountability interactions manifested more broadly in the second phase of the case.

Extending my analysis of the Minister's actions in Chapter Four, I show how in response to the demands made during the backlash, the Minister successfully "responsibilises" the Authority for ameliorating the social and economic impact of setting SDLs and, to some extent, water recovery. Specifically, I find that the Minister contested, and then reconstructed, the ends that the Authority was supposed to secure through its decision making. The Minister did so through his accountability dialogue regarding the legislative criteria for setting SDLs. While this analysis focuses on the bilateral dialogue between the Minister and Authority, it shows how that dialogue

resulted from the broader multilateral dialogue about the responsibility of both decision makers for the socio-economic impact of the Basin Plan, which I examined in Chapter Four.

I then analyse how two forums—the Windsor Committee and the Commonwealth Science and Industrial Research Organisation (CSIRO) interact in a way which sees the transfer of evaluations between the two forums. This interaction occurs with respect to a *de jure* responsibility of the Authority, namely to undertake rigorous, evidence-based decision making when setting SDLs. However, at the level of the specific matters that the Authority is held to account for, the transfer of evaluations involves a transfer of subject matters, as well as of normative standards. This finding directly responds to the central research question of this thesis.

This finding shows that interactions between multiple accountability forums are a distinct phenomenon. I analyse the motivations of the forums and additional accountability actors involved in these interactions to interact rather than act autonomously. I argue that it is necessary to include the broader political context in the analysis to understand these motivations, and to understand the effect that accountability interactions might have on the decision making being overseen. I conclude with reflections on conceptualising and analysing accountability interactions given the case analysis and findings of this and the previous chapter.

Section 1: Responsibilising the Authority for ameliorating the socio-economic impact of the Basin Plan

In this section, I analyse how the Minister successfully reshaped the Authority's responsibility for ameliorating the socio-economic impact of the Basin Plan. One of the implications of multiple accountabilities, as I examined in Chapter One, is that *who* is actually held to account *for what* is more malleable in practice, and can differ from the formal responsibilities established through legislative frameworks. In Chapter Four I analysed how the Minister responded to the backlash by reshaping the accountability regime in the Basin Plan case, including the nature of his accountability relationship with the Authority. In this section, I examine the implications of that reshaping for the substance of the Authority's accountability.

Specifically, I analyse the Minister's public disagreement with the Authority's Chair during the backlash over the legislative criteria for setting proposed SDLs as an example of the Minister responsibilising the Authority for a subject matter they were not formally responsible for. I argue that the Minister made the Authority effectively responsible for the achievement of additional objectives related to community adjustment, including with respect to water recovery. In terms of the categories of subject matters, this incorporated accountability for results into the Authority's accountability.

Reshaping the Authority's responsibilities through legislative (re)interpretation

As I introduced in Chapter Four, demands to amend the *Water Act 2007* to ensure that socio-economic outcomes could be weighted equally to environmental outcomes in setting SDLs arose during the information sessions following the *Guide's* release. These demands were an example of those that the Authority appeared to play some role in generating: the Chair stressed to the Basin Communities and the media that the *Water Act 2007* 'set down a prescription' that required the Authority to *first* consider environmental sustainability when setting proposed SDLs.⁹⁵⁵ This accorded with the widespread understanding of the Act.⁹⁵⁶ Nonetheless, as I described, the Minister publicly rejected that the Authority was required to prioritise environmental interests.

In order to resolve the difference of opinion with the Authority, the Minister sought further legal advice from the Government Solicitor (which had also advised the Authority), promising to provide that advice to Parliament.⁹⁵⁷ Yet, interestingly the Minister does not appear to have requested legal advice as to whether his interpretation or the Authority's was correct. The result of the Minister's request was a legal paper titled 'The role of social and economic

⁹⁵⁵ Quoted in Wahliquist (2011) 122. Also see Akerman, 'Farmers respected 'frank' Murray-Darling chairman'.

⁹⁵⁶ Hence a news article published just prior to the *Guide's* release also said the *Water Act 2007* "clearly states that it must prioritise the needs of the environment"; S Morris, 'MP calls for water wisdom' *Australian Financial Review* (6 October 2010).

⁹⁵⁷ Tony Burke MP, *Ministerial Statement* (The House, 25 October 2010) 1305.

factors in the Basin Plan',⁹⁵⁸ which carefully avoids vindicating either the Minister or Authority's interpretation.⁹⁵⁹ Instead, the Government Solicitor clarifies that social and economic factors must be taken into account and optimised but does not state definitely that any SDLs must give primacy to environmental sustainability.⁹⁶⁰

Of course, the Authority *had* taken socio-economic factors into account, which was why the Authority had recommended SDLs at the bottom of the sustainable range.⁹⁶¹ Yet the Minister's statement to Parliament on 25 October 2010 presented the question as whether social and economic considerations could be taken into account:

It is clear from this advice that environmental, economic and social considerations are central to the Water Act and that the Basin Plan can appropriately take these into account. I do not offer the advice as a criticism of the MDBA. What is important now is how the MDBA now responds to this legal advice.⁹⁶²

⁹⁵⁸ Australian Government Solicitor (2010).

⁹⁵⁹ Interestingly, the paper obliquely points to how the Authority could have potentially got around the restrictive provisions of the *Water Act 2007* in order to arrive at lower proposed SDLs, namely through a process of defining key environmental assets with reference also to social and economic outcomes; Australian Government Solicitor (2010). A similar point was made prior to the release of the *Guide* in Productivity Commission xxix-xxx.

⁹⁶⁰ Specifically, the eight page paper states 'where a discretionary choice must be made between a number of options the decision maker should, having considered the economic, social and environmental impacts, choose the option which optimises those outcomes'; Australian Government Solicitor (2010) paragraph 4. It is later acknowledged 'Both Conventions [on which the Act is based] establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allows consideration of social and economic factors. In short it would be an over-simplification to regard implementation of the agreements as being concerned with 'purely' environmental objectives as opposed to social and economic considerations.'; Australian Government Solicitor (2010) paragraph 23 (my emphasis).

⁹⁶¹ This fact was largely missed in the subsequent media coverage, although it was pointed out by the Australian Conservation Foundation; Arup and Ker, 'Labor attacks river report: Heat on Murray Authority'.

⁹⁶² Tony Burke MP, *Ministerial Statement* (The House, 25 October 2010) 1305.

In Parliament, the Minister presented the advice as supporting his preferred ‘triple-bottom line’ approach to setting SDLs, although did not specify what that approach entailed.⁹⁶³

It is notable how much further the Minister’s public statements went than his Parliamentary statements. Mr Burke said to the media:

There was a live question as to whether they [the Authority] were allowed to give an *equal* weighting [to environmental, economic and social factors] and there was an argument that the *Water Act* was preventing them from doing so. But the advice clarified they are able to optimise all three ... I think the issue is settled now that it is completely open to the Authority and the Parliament to completely optimise all three.⁹⁶⁴

The Minister went on to say that his ‘continued confidence’ in the Chair was contingent on Mr Taylor accepting this interpretation of the Act.⁹⁶⁵ Yet the Minister denied having sanctioned the Authority, stating: ‘I’ve always respected their independence, but there was a question mark over what their legal job was’.⁹⁶⁶ Nonetheless, the Minister was generally understood within the public sphere to have sanctioned the Authority through his holding of it to account for the interpretation of the Act, and the methodology for setting SDLs that was based on that interpretation. For example, the Minister was described as having ‘publicly rebuked the independent ... Authority’ and quoted as saying

⁹⁶³ Ibid.

⁹⁶⁴ Quoted in L Taylor, ‘Government stands firm on Murray-Darling’ *The Age* (8 December 2010) (my emphasis).

⁹⁶⁵ Ibid.

⁹⁶⁶ *Transcript of interview between Tony Burke MP and David Speers.*

that the Authority could not ‘hide behind’ the Act.⁹⁶⁷ The ambiguity around whether the Authority was sanctioned, which was also evident in the treatment of the Board, reflected the Minister’s preference to make the Authority “face consequences” in the public sphere rather than through formal sanctions within accountability processes.

The Authority’s response was to publicly indicate that the ‘refined legal advice produced by the Minister’ might mean that proposed SDLs could potentially go below the minimum 3000GL.⁹⁶⁸ Mr Taylor said he would need to clarify the approach with the Government Solicitor, but that ‘clearly [if] socio-economic impacts can be considered simultaneously to the environment, (and) that will mean we actually could review that 3000 number down’.⁹⁶⁹ Mr Taylor also said that such an approach could mean that ‘we can now have a discussion about trade-offs’ that would be required to set any SDLs.⁹⁷⁰

This public accountability dialogue between the Minister and Authority prompted an intense debate within the public sphere about what the Act actually required.⁹⁷¹ The intervention of prominent constitutional law expert

⁹⁶⁷ S Morris, ‘All equal under Water Act 2007’ *The Australian Financial Review* (26 October 2010). Other media reporting also emphasised that the Minister had sanctioned the Authority; Arup and Ker, ‘Labor attacks river report: Heat on Murray Authority’.

⁹⁶⁸ Mr Taylor, quoted in Taylor, ‘Basin plan gets bogged down in legal wrangling’. Also see P Ker, ‘Murray chief looks to cities to save water’ *The Age* (28 October 2010).

⁹⁶⁹ L Wilson, ‘Legal advice give scope to consider needs of farmers’ *The Australian* (27 October 2010).

⁹⁷⁰ Taylor, ‘Basin plan gets bogged down in legal wrangling’.

⁹⁷¹ Some media coverage noted how the legal paper tabled could be read as supporting diverse positions; for example, L Taylor, ‘Burke’s mirror on the wall leaves all satisfied’ *The Sydney Morning Herald* (28 October 2010). However, most media reported the story as though the

Professor George Williams, who publicly supported the Authority's position, was crucial to how the public debate unfolded.⁹⁷² The tenor of this expert analysis is summarised in a subsequent article by Williams and Kildea:

The [Minister's] suggestion that the MDBA can give "equal weighting [to] environment, economy [and] social impacts" is simply incorrect. This is not permitted by the *Water Act*, and indeed to do so could risk the Plan being struck down by the High Court as being developed inconsistently with the terms of the Act. Suggestions that the Plan might "optimise" environmental, social and economic factors are closer to the mark, but only so long as they are read against the requirement that the Plan comply with the relevant international environmental conventions.⁹⁷³

Formal accountability forums, specifically two parliamentary committees, later picked up the contestation over the legislative obligations on both the Authority and Minister regarding their setting of SDLs.⁹⁷⁴ While in many ways the issue remained unresolved, the debate firmly established the possibility of a constitutional challenge to the Basin Plan,⁹⁷⁵ which various actors, notably

Australian Government Solicitor had contradicted their own former advice. Some interest groups intervened, such as the ACF, which rejected the Minister's interpretation of the Act; E Rodgers, 'Burke plays down challenge to basin plan' ABC News (28 October 2010).

⁹⁷² E Rodgers, 'Burke plays down challenge'. The Minister did so again after Mr Taylor's resignation; Taylor, 'Government stands firm on Murray-Darling'.

⁹⁷³ Williams and Kildea 13.

⁹⁷⁴ The Windsor Committee heard evidence from Professor Williams and Dr Kildea; House Standing Committee (2011) Appendix C. Members of the Windsor Committee were heard by the authority to informally comment following Professor Williams' evidence "Taylor was right then". The Senate Legal and Constitutional Affairs Committee heard evidence from Professor John Briscoe, who presented a similar analysis of the Act; Legal and Constitutional Affairs (2011) Appendix 1. I do not examine in detail how other forums evaluated the Authority for its interpretation of the Act, or how they evaluated the Minister, because the Minister's successful responsabilisation of the Authority was more significant for the construction of accountable decision making in this case. However, this is an example of a demand made by Basin communities, and echoed by other actors, being picked up by accountability forums. For an excellent analysis of the Senate Legal and Constitutional Affairs Committee and responses to it see Montoya.

⁹⁷⁵ The Minister had to reject this possibility as early as October 2010; Anonymous, 'Burke plays down challenge to basin plan'. The idea of a legal challenge, especially from South Australia or an environmental group, was a 'credible threat' in the minds of decision-makers throughout the second phase of the case; Healthy Rivers Campaigner, Australian Conservation Foundation, interview with author.

South Australia, used to influence the decision making later in the process.⁹⁷⁶ As I have argued, the prospective operation of the High Court as a legal accountability forum, with its more set subject matters and normative standards, altered the accountability regime in the case even though it did not materialise during the timeframe of the case. As one commentator wrote ‘If Professor Williams is right, Burke may have bought short-term calm at the cost of long-term certainty. Because a plan that does not meet the [legal] requirements ... will surely be challenged in the courts’.⁹⁷⁷

Importantly for the accountability relationship between the Authority and the Minister, the Chair sought further advice from the Government Solicitor. That advice prompted Mr Taylor to resign on 7 December 2010 on the basis that he could not accept the Minister’s interpretation of the criteria for setting SDLs. In a press release, the Authority cited Mr Taylor as stating:

The *Guide* was developed with full regard to the requirements of the *Water Act*, and in close consultation with the Australian Government Solicitor. However, the Authority has sought, and obtained, further confirmation that it cannot compromise the minimum level of water required to restore the system's environment on social or economic grounds.⁹⁷⁸

In response the Prime Minister and Minister confirmed the Government’s interpretation.⁹⁷⁹ The Minister denied there was any inconsistency between the two legal advices, albeit while declining to release Government Solicitor’s

⁹⁷⁶ See Decision making coda below.

⁹⁷⁷ Taylor, ‘Burke's mirror on the wall leaves all satisfied’.

⁹⁷⁸ AO ‘Plan for the Murray-Darling Basin—Role of Authority Chair’.

⁹⁷⁹ Kelly and Massola.

advice to the Authority.⁹⁸⁰ The Opposition called for all legal advice to be made public,⁹⁸¹ but the Government defended its decision not to release any of legal advice to the Authority on the basis that Government Solicitor had not be informed that it would be made public and therefore doing so could comprise the Government's legal position.⁹⁸²

The outcome of this accountability process was that the Minister held the Authority to account for its methodology, or, more precisely, for the legal interpretation underpinning it. The outcome for subsequent decision making in the case was that the Authority's position on the Act's requirements became aligned with the Minister's position.⁹⁸³ As was noted by media at the time, the Minister had 'changed the boundaries' for the Authority's decision making.⁹⁸⁴ Immediately following Mr Taylor's resignation, the executive head of the Authority, Mr Rob Freeman, confirmed the Minister's claim that the Authority's legal advice was not inconsistent with the legal advice the Minister provided to Parliament, and stated that environmental interests did not need to

⁹⁸⁰ Taylor, 'Government stands firm on Murray-Darling'. The Authority sought advice from the Attorney-General's department as to whether it could release the advice, and was advised that they should not, as per usual Government practice; see Legal and Constitutional Affairs Committee (2011) 67.

⁹⁸¹ Arup and Ker, 'Fight looms on advice for basin water target'.

⁹⁸² This decision was subsequently criticised in the majority report of the Senate inquiry into the Act, which argued that resolving the issue of interpretation of the *Water Act 2007* would have been in the 'public interest'; Legal and Constitutional Affairs Committee (2011) 64.

⁹⁸³ Although note that the criteria outlined in the final Basin Plan accord more with the Authority's original interpretation. See Coda to decision making in the Conclusion.

⁹⁸⁴ Hawley 'Murray-Darling Basin Authority head resigns'.

be prioritised.⁹⁸⁵ As I set out in Chapter Four, the new Chair of the Authority also publicly accepted the Minister's interpretation of the Act upon his appointment.

Analysing the Ministerial-Authority dialogue about the Act as an instance of responsabilisation

I analyse the accountability outcome of this disagreement—or accountability dialogue—between the Minister and Authority to be the responsabilisation of the Authority for ameliorating the socio-economic impact of setting SDLs. This Ministerial action is explicable in the context of the Minister's choices following the backlash: namely, the choice to neither amend the *Water Act 2007*, and thereby change the Authority's formal responsibilities, nor to provide additional support for community adjustment, and thereby have the Government assume explicit responsibility for the socio-economic impact of addressing over-allocation. I therefore analyse this episode as an instance of a fora 'us[ing] its capacity to scrutinise and to sanction with the aim to pull an agency more towards its own preferences'.⁹⁸⁶

The accountability outcome was broader than is immediately evident from the fact that the Authority accepted that it needed to equally weight social and

⁹⁸⁵ J Om, *Mixed signals on Basin plan* (ABC (PM) 14 December 2010). Many studies have found that an important contextual factor is personal relationships between boards and ministers; C Howard and R Seth-Purdie, 'Governance Issues for Public Sector Boards' (2005) 64 *Australian Journal of Public Administration* 56, 67. Because these are not on the public record they are outside the scope of my study. However, I note that a number of interviewees viewed the executive head as closer to the Minister than the Chair; Former Director, Victorian Office of Water, interview with author. This could explain the different behaviour by these two key actors within the Authority, as I alluded to in Section Five, Chapter Four.

⁹⁸⁶ Biela and Papadopoulos 6.

economic factors, alongside environmental factors, in its future decision making to set proposed SDLs. This broad implication is an instance of Olsen’s argument that the responsibility of a decision maker as comprised of both the ‘authority’ of the decision maker and the ‘purposes’ and ‘ends’ s/he is meant to pursue, and so a change to the “ends” can be equated with a change to the scope of the Authority’s decision making authority.⁹⁸⁷

Effectively, the Minister made the Authority responsible for pursuing “ends”—or SDLs—that would not cause significant disruption to the social and economic *status quo*. And, by making the Authority responsible for that objective, the Minister also reshaped what the Authority would be held to account for by various other forums, namely ameliorating the socio-economic impact of proposed SDLs, whether by reducing the SDLs, increasing the levels of groundwater extraction, post-posting the implementation of SDLs, or recommending the reengineering of environmental sites instead of water buyback.⁹⁸⁸ As a result, the responsabilisation of the Authority—and the Authority’s acceptance of that responsibility—altered the normative standards against which the Authority was evaluated as well as the trajectory of the decision making in the Basin Plan case.

Furthermore, in analysing the significance of this instance of responsabilisation, it is important to reflect on its implications for the construction of accountable decision making within the Basin Plan case. In the

⁹⁸⁷ See Section Two, Chapter Two.

⁹⁸⁸ All these actions are set out in the Coda on decision making in the Conclusion.

case of the Authority, as I argued in Chapter Three, the *Water Act 2007* framed the accountable decision maker as an expert, independent decision maker. In the case of the Minister and the setting of SDLs, the accountable decision maker was framed as the decision maker who respected the independent, expert character of the Authority's decision making.⁹⁸⁹

However, the Authority's expert, independent status is connected to the broader issue of what is (or should be) the regulatory goal of decision making. Hence, the debate about the criteria for setting proposed SDLs in the *Water Act 2007* becomes a vehicle for contesting whether "good" decision making should prioritise environmental sustainability as an outcome, or should treat as equally important environmental, economic and social outcomes. Given the widespread recognition in 2007 that the scientific evidence base on the Basin's health pointed to the longer-term need to prioritise environmental sustainability, the *Water Act 2007* framed the "good decision maker" as the expert, independent decision maker that could make a difficult political choice. For actors whose interests were served by that choice being avoided, or delayed—which after the backlash included the Minister—it was important to reconstruct the accountable decision maker as needing to be consultative and responsive to the concerns of communities.

⁹⁸⁹ Particularly through the provisions regarding suggestions and directions, as set out in Section One of this chapter. This construction underpinned the Minister's initial response to the backlash, which was to emphasise the Authority's independence.

Section 2: Accountability interactions between forums holding the Authority to account

In this section, I present a detailed, empirical analysis of interactions between the Windsor Committee and a professional forum—the CSIRO. I find that these two accountability forums interacted with one another in an accountability process that held the Authority to account for the scientific rigour of its analysis underpinning the proposed SDLs published in the *Guide*. I also set out my analysis of this interaction in significant detail as an illustration of how I employ my analytical framework. I thereby show how this interaction occurred at a number of steps in the accountability process through which the Authority was held to account for the rigour of its decision making underpinning the original proposed SDLs.

The accountability process holding the Authority to account for scientific rigour

Of the two accountability forums involved in this interaction, each had a different basis for its accountability relationship with the Authority. The Windsor Committee had a mutually recognised political accountability relationship with the Authority, founded in the constitutional authority of Parliament. The scope of that relationship was only limited by the terms of reference for the Inquiry. These terms were broad enough to implicitly encompass the Committee's consideration of the rigour of the scientific analysis that underpinned the Authority's proposed SDLs.

By contrast, I find that CSIRO forged an accountability relationship with the Authority by making accountability demands during the accountability process. CSIRO had the practical capacity to make the Authority respond to those demands through CSIRO's reputation-based authority and its legitimate scientific interest in the Authority's decision making with respect to SDLs. CSIRO is a government funded, independent scientific body that has conducted extensive research on the Murray-Darling Basin.⁹⁹⁰ CSIRO's research and expertise was an important source for the modelling that underpinned the Authority's proposed SDLs.⁹⁹¹

The first step of the accountability process was a private letter from CSIRO to the Authority's CEO, on 17 December 2010, titled 'Technical comments' on the *Guide*. In this letter, CSIRO identified inadequacies in the Authority's evidence base and analysis, especially the socio-economic evidence base, that had a 'significant bearing' on the proposed SDLs.⁹⁹² CSIRO also criticised the Authority's lack of transparency around how it had used scientific evidence in

⁹⁹⁰ CSIRO has a notable record in researching the hydrology and ecology of the MDB, and in researching innovation in water use by industry.

⁹⁹¹ For an overview of CSIRO's contributions to the Basin Plan process see CSIRO, *CSIRO Submission on the Proposed Murray-Darling Basin Plan* (CSIRO, Australia, 2012) 1. The CSIRO were paid for research work during the Basin Plan process, as well as providing previously published research. Dr Bill Young, director of the Water for a Healthy Country National Research project, was also seconded to the Authority as the Director of Basin Modelling for a year in 2009-2010. See Dr Bill Young, 'The science behind the Murray-Darling Basin plan' (*The Conversation*, 30 November 2011).

⁹⁹² Ian Prosser, *CSIRO Technical Comments on the Guide to the Proposed Basin Plan* (2010) 3.

its analysis.⁹⁹³ This letter initiated (private) ‘dialogue’ between CSIRO and the Authority.⁹⁹⁴

However, CSIRO’s accountability demands became the first step of a *public* accountability process when its letter became public. Initially, CSIRO’s letter was published by the Authority on 23 February 2011; CSIRO then gave a copy of the letter to the Windsor Committee, and Dr Bill Young read excerpts when he appeared as a witness in front of the Committee, on 25 February 2011.⁹⁹⁵ (I consider Dr Young’s actions as additional confirmation that the letter reflected CSIRO’s evaluation of the Authority.)

The timing of events make it reasonable to infer that the prospect of CSIRO appearing before the Windsor Committee prompted the Authority to make CSIRO’s accountability demands public and to respond to those demands by rendering account. While there is no public record of the Windsor Committee or CSIRO initiating contact with one another,⁹⁹⁶ it should be noted

⁹⁹³ This letter specifically focused on instances where the Authority had misused or misrepresented CSIRO research. It should be noted it did not evaluate the entire science base of the *Guide* as flawed, but focused on areas of improvement; Hansard, ‘Public hearings (Canberra) 25 February 2011’ House Standing Committee on Regional Australia, RA12.

⁹⁹⁴ This dialogue was confirmed by both parties publicly; Hansard, ‘Public hearings (Canberra) 25 February 2011’ RA11 and Hansard, *Public Hearing (Canberra, 25 March 2011)* (2011) 86.

⁹⁹⁵ The timing of the public release explains why the CSIRO’s submission to the Inquiry does not mention the letter, nor repeat the specific criticisms of the *Guide* it contained; see Dr Bill Young, *CSIRO Submission 10/401* (2010) and Hansard, ‘Public hearings (Canberra) 25 February 2011’ RA11.

⁹⁹⁶ All Commonwealth agencies with responsibilities related to the Murray-Darling Basin, and/or the Basin Plan process appeared before the Committee. CSIRO’s appearance therefore may or may not have been *intentionally* facilitated by either party in order to reveal the contents of the private letter. However, CSIRO is the other Commonwealth agency that I am aware gave a private briefing to the Windsor Committee prior to the public meetings.

that CSIRO gave a private briefing to the Windsor Committee on 24 November 2010, prior to CSIRO's letter to the Authority.⁹⁹⁷

The second step of the process was when the Authority was obliged to respond to CSIRO's accountability demands publicly through the accountability mechanism of the Committee hearings. Empirically, this occurred when a member of the Windsor Committee incorporated CSIRO's broad demand for accountability regarding the Authority's use of the scientific evidence base into his call for the Authority's CEO to account to the Committee on 25 March 2011.⁹⁹⁸ I analyse this step as also cementing CSIRO's public accountability relationship with the Authority, which I classify as a professional accountability relationship.⁹⁹⁹ (This relationship continued when CSIRO was later commissioned by the Authority to conduct a peer review of its subsequent proposed SDLs, as I examine in the following section.)

In rendering account, which constituted the third step of the process, the Authority's CEO largely accepted the validity of CSIRO's evaluation.¹⁰⁰⁰ However, the Authority, in debating the account with the Committee (the fourth step of the process), ultimately questioned the relevance of CSIRO's

⁹⁹⁷ Referred to in the cover letter of CSIRO's submission to the Inquiry; CSIRO, *Inquiry into the impact of the Murray Darling Basin Plan in Regional Australia* (2010). It should be noted that the negative evaluation of the Authority's scientific rigour were not included in CSIRO's submission, which is why it is significant that they subsequently became public.

⁹⁹⁸ Mr Secker MP; Hansard, *Public Hearing (Canberra, 25 March 2011)* 86.

⁹⁹⁹ Were I employing a different typology, this relationship neatly fits the classification of a "horizontal" accountability relationship.

¹⁰⁰⁰ Including regarding specific points from CSIRO, such as about the Authority's analysis of climate change; Hansard, *Public Hearing (Canberra, 25 March 2011)* 89. Although Mr Freeman, CEO, did question the validity of some of CSIRO's specific points; Hansard 86-87.

evaluation on the basis that it related to the Authority's previous decision making.¹⁰⁰¹ The message was that the Authority's decision making on proposed SDLs would differ in the second phase of the Basin Plan case. For example, the Authority Chair's key point in his evidence to the Committee was that the *Guide* no longer represented the Authority's policy position:

... my principal concern was that it showed very little respect to people and their efforts, both historically and indeed their desire to be involved in matters that are obviously very dear to them when it comes to water management. That is why I have said, frankly, that I do not have a high degree of ownership of it [the *Guide*] and I would like to think that, symbolically, my appointment offers the hope of a fresh start and an opportunity to reengage with communities and incorporate their wisdom and their desires, as best as they possibly can be, into the work.¹⁰⁰²

Nonetheless, the important point for analysing the accountability interaction between the Windsor Committee and CSIRO is that information provided by CSIRO to the Committee was used by the Committee during its debate with the Authority. This included technical information with respect to specific subject matters, such as the Authority's treatment of climate change, that were raised in CSIRO's letter and testimony.¹⁰⁰³ This interaction therefore accords with my conceptualisation of a *functional* interaction between two forums.

The fifth step of the accountability process was the Committee setting standards against which to assess the Authority's account with respect to the rigour of its decision making. I find that the Windsor Committee adopted the normative standards that CSIRO used to assess the Authority's decision

¹⁰⁰¹ Hansard 86.

¹⁰⁰² Hansard 73.

¹⁰⁰³ Hansard 88-89.

making, namely *scientific standards of rigour*. The Committee further adopted CSIRO's focus within these broad normative standards, namely the rigour of the assumptions and data underpinning the modelling used to generate proposed SDLs. I also find that there is a reasonable chance that the Windsor Committee would not have obliged the Authority to account for this aspect of its decision making had CSIRO's demands and evaluation not been known to the Committee, given the focus of the Committee's terms of reference on the social and economic impact of setting SDLs. This interaction accords with my conceptualisation of a *constitutive* interaction between two forums.

In evaluating the Authority's account, the sixth and most significant step of the accountability process, the Windsor Committee drew significantly on CSIRO's evaluation. The Committee's evaluation of the Authority on the subject matter of the scientific rigour of the decision making was damning:

In summary, it appears that the MDBA may have started with some sound methodologies, high quality data and respected modelling, yet delivered a document which fails to provide a credible scientific basis for the proposed SDLs.

In the Committee's evaluation of the 'Use of science and data' it explicitly refers to the CSIRO's criticisms of the *Guide*, and then goes on to state:

Although the CSIRO states that the MDBA did not use 'best science' in a number of areas, it is the assumptions that have been made by the MDBA that are of particular concern.

The work done by the CSIRO in its Sustainable Yields project formed the basis of a lot of the modelling that underpinned the *Guide*. Even with this as a basis, the CSIRO expressed dissatisfaction in the assumptions applied by the MDBA and the way the results were communicated [cites extract from letter, as read into the transcript of evidence by Dr Bill Young of the CSIRO]...¹⁰⁰⁴

¹⁰⁰⁴ House Standing Committee (2011) 3.58 & 3.59.

After citing CSIRO's specific criticisms of the Authority's treatment of climate change in the *Guide*,¹⁰⁰⁵ the Committee stated:

The above comments made by the CSIRO are of particular concern as the MDBA repeatedly reference research by the CSIRO when discussing their consideration of climate change in the *Guide*.¹⁰⁰⁶

In framing its recommendations, the Committee emphasised its negative assessment of the Authority's analytical assumptions and evidence base, notably about specific subjects such as climate change and groundwater analysis.¹⁰⁰⁷ These subjects formed the focus of CSIRO's critical evaluation.¹⁰⁰⁸ While the Committee did not actually frame its evaluation around a critique of the proposed SDLs in the *Guide*, it did conclude its assessment of the Authority's scientific rigour with the comment: 'it does call into question, however, the SDL 'numbers' recommended'.¹⁰⁰⁹

The final step of the accountability process was the Committee's decision regarding the consequences that the Authority should face given its negative

¹⁰⁰⁵ House Standing Committee (2011) 3.78 & 3.81.

¹⁰⁰⁶ House Standing Committee (2011) 3.78 & 3.81.

¹⁰⁰⁷ House Standing Committee (2011) Chapter Three.

¹⁰⁰⁸ See Recommendations 2 and 3; House Standing Committee (2011) xvii The Committee's evaluation of the Authority's treatment of climate change in the *Guide* (see Recommendation 2), and particularly the regional variability of the impact of climate change, draws heavily on CSIRO's letter. The Committee's evaluation of the Authority's treatment of groundwater in the *Guide* (see Recommendation 3) does not directly cite CSIRO's letter or evidence before the Committee; House Standing Committee (2011) 3.88-3.94. However, the content of the recommendation and the letter are similar, and whilst there is no paper trail it should be noted that CSIRO did provide the Committee with a private briefing on 24 November 2010; see cover letter of CSIRO, *Inquiry into the impact of the Murray Darling Basin Plan in Regional Australia*. The Committee also cites Professor John Briscoe, a member of the international review panel that assessed the methodology underpinning the *Guide*; House Standing Committee (2011) 3.60.

¹⁰⁰⁹ The Committee were keen to maintain a distinction between critiquing the science underpinning the Authority's work and the *assumptions* that the Authority relied on; see House Standing Committee (2011) 3.66.

evaluation. Given the Authority's approach to its dialogue with the Committee—and indeed, its approach in all dialogues during the second phase of the case—was to acknowledge the flaws in its decision making during the first phase, there was no need for the Committee to formally sanction the Authority. However, there was a strong incentive for the Committee to frame its evaluation prospectively to attempt to influence the Authority's future decision making. As I argue below, the Committee's focus on the scientific rigour of the Authority's decision making in the first phase was designed to delegitimise SDLs in the range proposed by the Authority in the *Guide*.

Analysing accountability interactions in this accountability process

Based on my analysis of this accountability process—and with reference to this thesis' main research question—I find that there was an accountability interaction between CSIRO and the Windsor Committee that influenced both the scope of what the Authority was obliged to account for and the normative standards against which the Authority's account was assessed.

The mechanisms by which CSIRO interacted with the Windsor Committee were hearings of the Committee (both private and public), and the provision of its 17 December 2010 letter to the Committee. There is no evidence on the public record of further interaction between the two forums. However, as I note above, the timing of the Authority's publication of the CSIRO letter raises questions about whether the Authority assumed the Windsor Committee was aware of CSIRO's private letter and intended to question CSIRO about it.

In analysing the conditions that prompted this interaction, I find that CSIRO did act in a manner that made it more likely that the Windsor Committee would adopt its evaluation. It did so by presenting its private letter and by emphasising the evaluation contained within that letter during the Committee hearing. However, as I discuss above, there is not sufficient evidence to draw conclusions about whether CSIRO would have so acted had the Authority not published the private letter first (on 23 February 2011), or whether there were any other relevant interactions between CSIRO and the Windsor Committee prior to the public hearing on 25 February 2011.

I further find that additional accountability actors, notably the National Irrigators Council, cited CSIRO's evaluation in their own evidence to the Committee, making it more likely the Windsor Committee would adopt it.¹⁰¹⁰ Interestingly, another accountability actor, the Wentworth Group, implicitly rejected the significance of CSIRO's evaluation by urging the Committee to 'accept the science'.¹⁰¹¹ Understanding why the National Irrigators Council, but not the Wentworth Group, would cite CSIRO's evaluation requires an appreciation of the broader political context. Specifically, it requires an appreciation of which actors gained from using accountability processes to discredit the Authority's capacity to set proposed SDLs.

¹⁰¹⁰ Mr Ellis, Chair, National Irrigators Council, cited CSIRO's letter as support for the National Irrigator Council's criticisms of the scientific rigour of the Authority's decision making; Hansard, *Public Hearing (Canberra, 25 March 2011)* 50. Another actor that I do not include in my analysis, Mr Wiskin, a private-sector water advisor, did likewise; Hansard 10.

¹⁰¹¹ Hansard, *Public Hearing (Canberra, 2 March 2011)* 24.

Analysing the motivations of forums to interact with one another

To understand what might have motivated both the CSIRO and the Windsor Committee to interact, I employ the analytical approach I developed originally to examine functional interactions. I argue that the respective capacities of the Windsor Committee and CSIRO reveal why they each had an incentive to interact with one another. While these specific incentives are particular to this case, the finding that differential capacities can give forums an incentive to interact with one another is likely to have more general relevance. It also makes it more likely that accountability interactions are a broader phenomenon within multiple accountability regimes, and that this phenomenon should be included in analysis of such regimes, particularly in unsettled contexts where forums are less likely to act autonomously.

CSIRO's capacities clearly included knowledge and experience relevant to evaluating the scientific rigour of the Authority's decision making. But more significantly, I argue, CSIRO had substantial *credibility*, because of its good reputation, independence, and, perhaps, because it was the only actor with the capacity to assess the very complicated hydrological modelling and other scientific analysis involved in setting SDLs.¹⁰¹² As a result, CSIRO's negative

¹⁰¹² Given the extent to which the Authority's modelling drew on CSIRO's modelling and research and because Dr Bill Young had been seconded to the Authority as Director of Basin Plan Modelling during the first phase of decision making, giving him a unique insider's view.

evaluation of the Authority's scientific rigour was interpreted by the media as devastating for the Authority's credibility.¹⁰¹³

I argue that the Windsor Committee, as a political forum wary of charges that it was politicising the process, sought to appropriate credibility from CSIRO in order to discredit the Authority's expert status. This analysis accords with Papadopoulos' argument that 'experts are only credible if they can demonstrate the autonomy of science from politics, and they must convince that their discourse rests on different premises than the discourse of politicians or interest groups'.¹⁰¹⁴ Because CSIRO's apolitical status was never questioned—in contrast, for example, to the status of the Wentworth Group—they were successfully able to remain credible.¹⁰¹⁵

I therefore find that the Committee constructed the Authority's accountability with reference to scientific rigour not only to *retrospectively* evaluate the Authority's decision making in the *Guide*, but also to *prospectively* influence the Authority's credibility regarding future proposed SDLs. By questioning the Authority's capacity to develop rigorous, evidence-based

¹⁰¹³ For example, R Beeby, 'Experts misquoted in water plan' *The Canberra Times* (Canberra, 16 March 2011); M Kenny, 'Murray system analysis slammed' *The Advertiser* (18 March 2011); A Aikman, 'CSIRO findings sink revised basin plan' *The Australian* (8 June 2011).

¹⁰¹⁴ Papadopoulos 477.

¹⁰¹⁵ A Eacott, 'Scientists quit 'flawed' Murray-Darling process' ABC News (21 May 2011).

proposed SDLs, the Committee attacked the Authority's reputation as a trustworthy *expert* agency.¹⁰¹⁶

In assessing the Windsor Committee's resources and capacities, and how they might have been an incentive for CSIRO to interact with the Committee, I refer back to my earlier analysis of this Committee as being *the* most significant accountability forum during the Basin Plan case. The likelihood of CSIRO influencing the Authority's future decision making was significantly enhanced by its evaluation being adopted by the Windsor Committee (although it did not control *how* it was adopted). The Committee was a powerful but not decisive accountability forum, and its capacity to influence the Authority through its evaluation lay mostly in the reputational damage it could inflict.¹⁰¹⁷ Specifically, the Committee had significant power to shape how the Authority's accountability was constructed in the public sphere. It is likely that CSIRO was genuinely concerned by the inadequacies of the Authority's scientific rigour in the first phase of decision making and viewed public accountability processes as a vehicle for trying to improve the rigour in the second phase.¹⁰¹⁸

I further find that the Authority's status as an independent, expert agency shaped the way in which accountability forums, including the Windsor

¹⁰¹⁶ By contrast, focusing on the inadequacy of the socio-economic evidence base would have drawn attention to the limitations of the evidence-base *per se*, rather than the Authority's capacity to analyse it. See Section Three, Chapter Three.

¹⁰¹⁷ On the capacity of an entity with a good reputation to sanction a public decision maker through public shame see Schillemans 178.

¹⁰¹⁸ CSIRO has arguably played this role historically. Connell points out that that organisations such as the CSIRO make it more difficult to suppress debate about potentially inconvenient issues; Connell (2007) 22.

Committee, framed evaluations. Forums tended to frame their evaluations around the *way* the Authority developed the proposed SDLs rather than *what* the Authority decided the proposed SDLs should be. In this case, I argue, forums strategically focused on the Authority’s methodology in part to avoid the charge that they were trying to influence *what* those proposed SDLs should be, given SDLs were meant to result from an expert process insulated from “political” interference.

Analysing accountability interactions in terms of a broader political context and accountability politics

To understand the significance of the interaction between CSIRO and the Windsor Committee, and the diminution of the Authority’s expert credibility, it is important to look at the broader political context at the time the Committee released its report in May 2011.

The Windsor Committee did *not* focus its evaluation of the Authority’s decision making in the *Guide* on the inadequacy of social and economic data and analysis. That inadequacy was acknowledged—indeed emphasised—by the Authority alongside its release of the *Guide*.¹⁰¹⁹ It was the subject of criticism by CSIRO in its private letter and its submission to the Committee,¹⁰²⁰ as well as criticism by many other actors who appeared before the Committee. In my assessment, the inadequacy of the social-economic evidence base was generally

¹⁰¹⁹ See Section Two, Chapter Four.

¹⁰²⁰ Prosser 3.

accepted as the clearest shortcoming in the Authority's decision making regarding the proposed SDLs in the *Guide*.

The Windsor Committee did chastise the Authority for 'failing to adequately address socio-economic modelling on the impact of proposed SDLs in the *Guide*'.¹⁰²¹ However, the Committee did not frame any of its recommendations around improving the Authority's socio-economic evidence base, except for its recommendation that the Authority 'draw upon local knowledge and expertise' in its future decision making.¹⁰²² Nor did the Committee mention CSIRO's evaluation of the inadequacy of the socio-economic evidence base in its final Report, despite the Committee asking CSIRO about this matter during the public hearings.¹⁰²³

Instead, as I set out above, the Committee focused on the inadequacies of the Authority's analysis of the natural and hydrological science. This is curious because it is the socio-economic basis of the Authority's decision making that most directly relates to the Committee's terms of reference regarding the 'socio-economic impact' of the *Guide* on 'regional communities'.¹⁰²⁴ Hence, the Committee's emphasis on the Authority's scientific failings, and its use of the CSIRO's evaluation, should be understood as an attempt to attack the

¹⁰²¹ House Standing Committee (2011) 3.9.

¹⁰²² This was a sub-recommendation of the Committee's recommendation 4 'Engagement with the community' rather than in its recommendations about the *Guide*; House Standing Committee (2011) xviii.

¹⁰²³ Hansard, Public hearings (Canberra 25 February 2011) 12.

¹⁰²⁴ *Terms of Reference: Inquiry into the Impact of the Murray-Darling Basin Plan in Regional Australia*.

credibility of the Authority in general, and specifically the proposed SDLs of 3000-4000GL set by the Authority.

Following the backlash, the broader political argument regarding SDLs quickly became how they could be brought below the minimum of 3000GL identified in the *Guide*. Between May and July 2011, pressure grew on the Authority to guarantee that its work on the *Proposed Basin Plan* would be subject to independent scientific peer review, as I examine in Section Three. Concerns that the process was being driven by political rather than scientific concerns arose when the Authority began discussing proposed SDLs lower than the minimum possible range identified in the *Guide*.¹⁰²⁵ The focus of the Windsor Committee's evaluation can be understood in that political context. Moreover, it is important to analyse the Windsor Committee's action in the context of contestation over how the Authority's role as a decision maker should have been constructed, notably its expert role.

In this section, I have shown how accountability interactions can play a decisive role in shaping how an individual forum evaluates a decision maker as a result of an accountability process in which they interact with another forum. I have done so by applying the analytical framework I developed in the early chapters of this thesis. In the next section, I consider whether the Basin Plan case also points to the need for a regime-level approach to analysing accountability interactions.

¹⁰²⁵ Specifically, cuts of 2800 GL rather than the 3000-4000 GL identified in the *Guide*; L Wilson, 'Authority looks at cutting Murray buybacks' *The Australian* (20 May 2011).

Section 3: Reflections on conceptualising and analysing accountability interactions

In this section, I briefly reflect on the implications of the case analysis in Chapters Four and Five for how the phenomenon of accountability interactions should be conceptualised and analysed. First, I consider whether there might be an alternative analytical approach to identifying accountability interactions by mapping where different accountability forums reference one another in their demands or evaluations, or reference additional accountability actors. Second, I reflect on the conception of accountability that I developed in Chapter Two in the light of my case analysis. These reflections point to how the conception of accountability interactions, and the analytical framework for researching the empirical phenomenon they capture, might be further developed in future studies.

Analysing discrete accountability interactions across a multiple accountability regime

A notable feature of the multiple accountability regime overseeing the Authority's setting of SDLs during the second phase of decision making was that it included many accountability actors putting forth their demands and evaluations both in the public sphere and before accessible accountability forums such as parliamentary committees. Based on my case analysis, I conclude that accountability forums that produced formal evaluations, such as

reports, often referenced information, demands or evaluations from other forums and additional accountability actors.

Interactions primarily functioned to transfer discrete accountability demands, pieces of information, normative standards and evaluations both between forums themselves and from additional accountability actors to forums. I argue there was such a pattern in the Basin Plan case.¹⁰²⁶ Tracing these references can be a way of analysing both individual interactions, and also analysing whether there is a pattern of discrete interactions across the regime.

These interactions did not usually play the definitive role that the interaction analysed in Section Two played in constructing the decision maker's accountability. However, I extend my analysis from Chapter Four and argue that the prevalence of these discrete interactions within the multiple accountability regime in the Basin Plan case points to the possibility that

¹⁰²⁶ While I do not set out each and every one of these interactions, for reasons of space, some telling examples are as follows. For example, the resignation of Peter Crozier, member of the Wentworth Group, from the Authority's scientific panel in May 2011 was raised with the Authority by Opposition members in Senate Estimates and in one of the Senate Inquiries; Anonymous, 'Experts warn Murray-Darling plan fails to deal with issue of drought'. The National Water Commission's evaluation of the Authority's community engagement in its Biennial Assessments it is picked up by an Opposition member in Senate Estimates; Hansard, *Official Committee Hansard: Supplementary Budget Estimates* 161; See for example, Commission, *Australian Water Reform 2009: Second Biennial Assessment of Progress in Implementation of the National Water Initiative* Finding 1.13 & Recommendation 1.9 and Commission 10. However, what this approach does not capture is where a forum or additional accountability actors makes a point that is simply picked up, but not explicitly referenced, by another forum. For example, the Windsor Committee emphasises the importance of accountability, transparency and community engagement in the Authority's decision making in a way that is very much in line with the evaluation of the National Water Commission, which acted as a professional accountability actor with respect to the Authority's decision making. The NWC appeared before the Committee, but is not cited in the Committee's evaluation; Hansard, *James Cameron (NWC), Transcript of Evidence, Inquiry into Impact of the Murray-Darling Basin Plan on Regional Australia* (2011 2011) 10 and House Standing Committee (2011) 5.139.

interactions play a role in creating an “echo chamber effect” in multiple accountability regimes. I suggest that this effect can function to create convergence between the accountability demands made by multiple accountability actors, and, potentially, the evaluations by multiple forums.

It is also interesting to examine *the way that* forums select between the information, demands and evaluations available from other forums and additional accountability actors. For example, the Windsor Committee did not draw on the evaluation of the Minister’s decisions around water buyback, despite the Productivity Commission having a similar credibility to CSIRO. It is likely that this was because the Productivity Commission’s report was contrary to the Committee’s proposals to increase infrastructure investment rather than water buyback.¹⁰²⁷

Another approach to mapping this broader conception of interactions is to examine the way that the demands and evaluations of additional accountability actors are picked up in the public sphere, as I did in Chapter Four. In the Basin Plan case there was a consistently high level of coverage of statements by such actors. These statements were often framed as demands for accountability or as evaluations of current decision making. For example, a critical evaluation of the final *Proposed Draft Plan* by 60 scientists was given widespread coverage in

¹⁰²⁷ B Keane, ‘Murray-Darling: keep the pollies away’ *Crikey* (2 June 2011).

2012.¹⁰²⁸ Another instance followed an environmental group calling the Authority to account for changing water quality targets from ‘mandatory’ to ‘aspirational’ in 2011, following letters from the New South Wales and Victorian Governments obtained being under Freedom of Information requests.¹⁰²⁹

However, ultimately I argue that the analytical approach adopted in Section Two is required to fully understand the particular impact that accountability interactions have on accountability and decision making in a case. This involves quite detailed tracing of when interactions occur around a given issue, and when these interactions contribute to holding a decision maker to account or change the direction of their decision making. A good example is the lead up to the independent review by CSIRO of the Authority’s later SDLs decision making.

This independent review resulted from a series of interventions in the public sphere in May and June 2011, some of which were picked up by accountability forums. First, the Wentworth Group, a prominent scientific body with longstanding involvement in Australian water policy, withdrew from the Authority’s internal scientific review process citing concerns at significant changes in Authority analysis since the *Guide* and calling for an independent

¹⁰²⁸ C Duffy, *Scientists reject Murray-Darling Basin plan* (2012). Similarly, the South Australian Government funded *Goyder Report*, which was an evaluation of SDLs-related decision making received significant attention in the public sphere.

¹⁰²⁹ L Wilson, ‘Murray-Darling chiefs ‘caving in to Lib states’ *The Australian* (19 November 2011).

review of the Authority's work.¹⁰³⁰ Another group of esteemed scientists also called for peer review,¹⁰³¹ as did one of the major peak organisations, the Australian Conservation Foundation.¹⁰³² Australia's main online activist organisation also launched a campaign to pressure for such a review.¹⁰³³

This amounted to calls in the public sphere for the Authority to be accountable to additional forums, although in contradistinction to the backlash the calls were for additional professional forums, in order to ensure that the Authority could be evaluated with respect to professionally-informed normative standards. The Authority initially down played the need for a peer review of the Authority's scientific analysis used in the development of the Proposed Basin Plan.¹⁰³⁴ However, in July 2011, the Authority commissioned a CSIRO-led review of their use of hydrological and environmental science and methodology in determining an environmentally sustainable level of diversions.¹⁰³⁵ This also included an assessment of the environmental and

¹⁰³⁰ R Willingham, 'Key scientists cast doubt on Murray water return' *The Age* (Melbourne, 21 May 2011).

¹⁰³¹ All eight scientists were members of the Australian Academy of Science; B Herbert, *Scientists' concerns over new water plan* (ABC News 1 July 2011),

¹⁰³² Dr Arlene Harriss-Buchan, *Independent science panel needed to advise on Basin Plan* (Australian Conservation Foundation 2011).

¹⁰³³ Tens of thousands of electronic signatures were collected; N Haxton, *Fight over River Murray flows intensifies* (ABC (The World Today) 8 June 2011).

¹⁰³⁴ Eacott 'Scientists quit 'flawed' Murray-Darling process'. The Chair of the Authority argued that all the science 'underpinning' the Authority's work had been peer reviewed; S Lane, *Murray Darling Authority rejects scientists' criticisms* (ABC (The World Today) 1 July 2011).

¹⁰³⁵ MDBA, *Review of the MDBA "Ecologically Sustainable Level of Take" Method for the Basin Plan* (MDBA 2011). The work took place between July and October 2011. This was welcomed by the Wentworth Group, see Anonymous, 'CSIRO Leads Review Into Basin Plan Science' (ABC News, 27 July 2011). The failure to release this review alongside the *Proposed Basin Plan* in November caused its own accountability claims, with environmental groups writing to the Minister to demand its release; D Wroe, 'Details missing in basin plan consultation' *Canberra*

economic benefits of the Basin Plan,¹⁰³⁶ addressing one of CSIRO's criticisms of the Authority's analysis in the *Guide*. This incident shows that after calls to account were made in the public sphere the Authority took the view that it was practically obliged to make itself accountable.

With respect to analysing accountability interactions as a regime level, there may be some scope for using analytical techniques that trace the way various accountability actors reference one another's demands and evaluations throughout the accountability processes and public sphere that comprise the accountability regime. Such mapping could point to the possible presence of accountability interactions. However, confirming that interactions have occurred and analysing the significance of any interactions is still likely to require the analytical approaches adopted in this thesis.

Reconsidering how accountability interactions are conceptualised

My case analysis finds that accountability interactions can shape both *whether* and *how* a decision maker is called and held to account, and so affirms the value of identifying that interactions could have functional or constitutive effects on accountability. However, it also suggests that this analytical distinction, while useful, needs to be complicated.

Times (12 March 2012). It was eventually released 18 weeks into the 20 week consultation process. Beyond their formal review role, CSIRO have also continued to call the Authority to account for their scientific assessments into the third period of the process. CSIRO's submission on the *Proposed Basin Plan* was specifically framed in terms of whether the concerns CSIRO raised about the *Guide* are 'still pertinent'; CSIRO, *CSIRO Submission on the Proposed Murray-Darling Basin Plan* (2012) 1.

¹⁰³⁶ The figure A\$3 to A\$8 billion was arrived at, albeit with qualifications as to the ability to assess eco-system services; CSIRO, *Assessment of the Ecological and Economic Benefits of Environmental Water in the Murray-Darling Basin* v.

In a constitutional democracy, public decision makers can be assumed to always be accountable in the thin sense of being able to be called and held to account. However, what is mostly of interest to accountability researchers is *whether* decision makers are called and held to account, and if so, *how* and for what they are held to account. The acting in concert that occurred during the backlash ensured that the Authority and the Minister were called and held to account for their decision making in the first phase. But the implications of that backlash, and of the interactions between forums analysed in this chapter, were far more significant for how the two decision makers (although mainly the Authority) were held to account.

For example, my analysis of the interaction between the Windsor Committee and CSIRO, the Committee had the capacity to autonomously hold the Authority to account. I find that the Committee instead opted to interact with CSIRO in a way that changed *how* it held the Authority to account. There were transfers of information, and arguably sanctions, between the two forums, as would be anticipated in functional interactions, but these were intertwined with transfers of subject matters and normative standards. For example, the Committee used information provided by CSIRO about the Authority's scientific analysis but also adopted CSIRO's negative evaluation of the Authority, along with its underpinning subject matters and normative standards. In turn, by adopting CSIRO's evaluation the Windsor Committee were also able to appropriate some of CSIRO's credibility, and were thereby able to more effectively sanction the Authority by challenging its expertise-

based legitimacy.

My case analysis also provides empirical support for the need to recognise that the broader implications of accountability interactions that reshape the multiple accountability regime. In Chapter Two, I suggested that acting in concert to generate the pressure to establish additional forums should be recognised as part of the broader conception of accountability interactions, and this is affirmed by the case analysis. But the case analysis also points to the broader ramifications of establishing additional forums, such as expanding the scope for interactions where those forums become relatively open platforms for existing forums and additional accountability actors to present their demands and evaluations. As suggested in Chapter One, the multiplication of accountability forums is also associated with the multiplication of subject matters and normative standards that can be incorporated into the accountability dialogues. This is likely, in turn, to increase the scope for contestation around which subject matters and normative standards should shape the evaluations of decision makers.

By tracing the interests and ideologies of all the accountability actors in the Basin Plan case, it becomes apparent that generating an arena in which what counts as accountable decision making is contested is to the advantage of many actors. Once this arena is established, those actors contest the existing accountability regime and the dominant construction of accountable decision making as independent and expert.

Employing that approach, I established that accountability interactions

took place in both institutionalised accountability processes and in the public sphere in the Basin Plan case, and, on occasions, bridged the two contexts. An interesting conclusion of my analysis is that the public sphere was a more important arena for accountability interactions than might be expected in an accountability regime with multiple institutionalised accountability processes operating within a robust constitutional-democratic framework.

This may have reflected a broader dynamic of the Basin Plan case, wherein even forums with substantial formal powers tended to use the public sphere to demand accountability from the decision makers or sanction them for negative evaluations. This was particularly evident in the Minister's relationship with the Authority. But it was also evident in, for example, the South Australian government's political use of the threat of a constitutional challenge to any Basin Plan that was adopted with lower SDLs than South Australia deemed necessary. In this instance, I analyse the South Australian Government as recognising that it gained more by making accountability demands in the public sphere in a way that shaped the direction of decision making than it gained from a formal negative evaluation by a legal forum, even a very powerful legal forum.

Finally, whether examining interactions with functional or constitutive effects, I argue that focusing on interactions between forums is likely to be the most fruitful avenue for research. Fundamentally, this is because accountability forums retain the prerogative of evaluating decision-makers. However, I also argue that research should encompass the role played by additional

accountability actors and decision makers. By adopting this conception of accountability interactions accountability researchers are encouraged to adopt a regime-level perspective, alongside the conventional focus on accountability processes, when examining how decision makers are held to account, and how accountable decision-making is constructed, within multiple accountability regimes.

Conclusion

In this chapter I have established how responsabilisation and interactions between two forums can shape the subject matters for which a decision maker is held to account and the normative standards by which a decision maker's accountability is evaluated. This confirms the close connection between these two elements of public accountability, and the ability of these elements to be reconstructed through accountability processes, even where responsibilities and standards are formally set out in legal and policy frameworks.

In the instance of the accountability dialogue between the Minister and the Authority about the Authority's responsibility, my analysis points to how responsabilisation can be the outcome of accountability politics generated by multiple actors acting in concert. This is a bilateral accountability dialogue within a conventional process of holding to account that needs to be analysed within a broader frame of reference that encompasses the multilateral accountability dialogues that might take place within an accountability regime.

It also points to how the responsibilities of a decision maker can be reshaped within an accountability process, and that this process can be closely

connected to reshaping the objectives of decision making or ends that a decision maker is intended to pursue. As I have consistently argued, the scope for contesting this aspect of the Basin Plan case was significantly expanded by the nature of the *Water Act 2007*. However, this instance also points to the more generally increased ability to reshape elements of accountability within multiple accountability regimes in which a broader range of potential subject matters and normative standards might be invoked by an increased number of actors.

My analysis of the interaction between the Windsor Committee and CSIRO demonstrate the value of a detailed analysis of how different actors can interact at different steps within an accountability process. This analysis also reveals the need to be able to analyse the motivations of different actors for interacting, especially in order to be able to understand the implications of certain interactions for how the decision maker's accountability is constructed. My analysis of some other, more discrete interactions in the Basin Plan case pointed to the potential for approaches to analysing the more diffuse manifestations of interactions. However, I argue that in order to identify whether an interaction has occurred and rigorously analyse what its impact was, the approaches I adopt in this thesis are likely to be most fruitful.

I now turn to summarising how the decision making in the Basin Plan unfolded over the remainder of the case and to identifying the broader implications of recognising accountability interactions for understanding multiple accountability regimes.

Conclusion

Decision making coda: Squaring the circle to adopt a Basin Plan

The case analysis of this thesis examined accountability interactions within the accountability regime that oversaw the Authority and Minister during the development of the Basin Plan from October 2008 to November 2012. I have traced how the political order within which this accountability regime operated switched from being a settled to an unsettled one, and how the case was characterised by politicisation and accountability politics in its second half. I established that both decision makers were obliged to respond to accountability demands about the social and economic impact of setting limits on the water extracted from the Murray-Darling Basin, and that certain accountability processes became embedded within the decision making processes.

It remains, in this Coda, to give a brief account of the subsequent fate of the Basin Plan's development, a document whose final form was ultimately influenced by the failure to depoliticise decision making about the Basin, by the successful "responsibilisation" of the Authority in particular for socio-economic impact, and by the return of deal-making that attended the reempowerment of the Basin States and Parliament.

From the *Guide* to the final *Basin Plan*

After the backlash to the *Guide to the Basin Plan*, the Authority and Minister focused on how to adjust the SDLs downwards, and reprioritise water-efficient infrastructure over water buyback.¹⁰³⁷

The Authority's approach to setting proposed SDLs changed markedly.¹⁰³⁸ Henceforth, it described the new approach as 'localism',¹⁰³⁹ an approach which explicitly sought to use the local knowledge of Basin communities to inform setting SDLs and water recovery.¹⁰⁴⁰ The Authority quickly floated the possibility of reducing the proposed SDLs to 2800GL, which it presented as the result of a review of the methodology to set SDLs that identified a more "balanced" approach to environmental, social and economic considerations.¹⁰⁴¹ While this placated irrigator groups, it was generally viewed by environmental groups and experts as an abrogation of the original point of setting sustainable limits on the use of the Basin's resources. As the Australian Conservation

¹⁰³⁷ For example, in the next budget, the Government did not include the additional money it would have required to implement SDLs in the range suggested by the *Guide*, despite an election promise to 'bridge the gap'; L Wilson, 'Basin's final blueprint delayed' *The Australian* (10 November 2010).

¹⁰³⁸ Some observers viewed all the decision making subsequent to the backlash as about trying to do a deal to get out of a difficult political situation; Former Director, Victorian Office of Water, interview with author.

¹⁰³⁹ Jamieson 'The death of the guide'.

¹⁰⁴⁰ Ibid and P Courtney, 'Landline catches up with the new boss of the Murray-Darling Basin Authority' (ABC (Landline) 17 April 2011).

¹⁰⁴¹ M Schliebs, 'Murray plan used wrong modelling' *The Australian* (27 July 2011).

Foundation argued: “balance” in these discussions is just being used as an excuse for “business as usual”¹⁰⁴².

The result of the Authority’s new approach was the *Proposed Basin Plan*, released for five months of public consultation on 28 November 2011. It recommended that the cuts to current diversions of surface water (SDLs) be reduced to 2750 GL/y,¹⁰⁴³ below the minimum of 3000-4000GL/y previously identified by the Authority as crucial to achieving even poor environmental outcomes. To the surprise of many, except perhaps the upstream Basin State who were widely credited with successful lobbying,¹⁰⁴⁴ the Authority recommended a significant *increase* to the allowable limits on extracting groundwater. While groundwater SDLs attracted much less popular attention than the surface water SDLs,¹⁰⁴⁵ the connectivity between rivers and

¹⁰⁴² B Cubby, ‘New chairman, old concerns for future of Murray-Darling’ *The Sydney Morning Herald* (29 January 2011).

¹⁰⁴³ MDBA, *Proposed Basin Plan* 6.04(1). This represents a 25% reduction in diversions; Authority, *The Socio-Economic Implications of the Proposed Basin Plan* 16. For an explanation of how the Authority got to this figure, see MDBA, *Delivering a Healthy Working Basin: About the draft Basin Plan* 31 and MDBA, *The proposed ‘environmentally sustainable level of take’ for surface water of the Murray–Darling Basin: Method and outcomes* (MDBA, Canberra, 2011). This figure was a further reduction of the figure of 2800 GL/y that was used in various models before the Proposed Basin Plan’s release; see for example, CSIRO, *Assessment of the Ecological and Economic Benefits of Environmental Water in the Murray-Darling Basin*

¹⁰⁴⁴ Wilson ‘Murray-Darling chiefs ‘caving in to Lib states’.

¹⁰⁴⁵ Given the significance of this change there was a noticeable lack of transparency. It is difficult to locate this figure in the *Proposed Basin Plan* itself because the aggregate is broken up between ‘groundwater resource units’; see MDBA, *Proposed Basin Plan* 6.03(1)(c) The Plain English version does not provide further elucidation; MDBA, *Plain English summary of the proposed Basin Plan — including explanatory notes* 87 The accompanying report cites the SDLs for groundwater but *not* the aggregate proposed increase. This is a reversal of the presentation of other figures in most Basin Plan documents, including the presentation of surface diversions in the same document, which continues the pattern of citing the cut to current diversions rather than the SDLs themselves; see MDBA, *Delivering a Healthy Working Basin: About the draft Basin Plan* 33.

groundwater potentially left a Basin Plan delivering very little net water back to the environment.¹⁰⁴⁶

The implementation date for all Basin States to comply with SDLs was also delayed until 2019 (from 2014).¹⁰⁴⁷ More significantly, the Authority raised the prospect that any SDLs adopted in a Basin Plan could be ‘reduced significantly’ in the future if “new” knowledge about managing the Basin, or the re-engineering of environmental sites, justified it.¹⁰⁴⁸ Finally, the Authority recommended minimising the socio-economic impact of water recovery by adopting ‘a bias towards investment in infrastructure’, especially environmental works and measures, to reflect community feedback.¹⁰⁴⁹

After incorporating feedback from the public consultation period, the Authority presented the *Proposed Basin Plan* to the Ministerial Council,

¹⁰⁴⁶ The proposed aggregate diversions of groundwater were significantly *increased* to almost 2000 GL/y. This represented an 85% increase in groundwater extractions across the Basin against the baseline diversion calculated in 2009; see CSIRO Submission on the Proposed Murray-Darling Basin Plan 20. Given the connectivity between surface and ground water CSIRO estimated this could result in a 500 GL/y reduction in surface flows; see CSIRO, *CSIRO Submission on the Proposed Murray-Darling Basin Plan 20* Should this prove true, this would leave the aggregate water returned to the environment by the Basin Plan at little more than 250 GL/y. The final proposed groundwater extractions reduced the magnitude of the increase to around 800-900 GL/y, but retained the significant increase in extractions. Again, this aggregate figure does not appear in the official revised draft and is difficult to identify from that draft; *Proposed Basin Plan* 6.04(3) and Schedule 4}. This figure comes from media reports; M Pearce R Herron, J Woodburn, ‘Anger at latest MDBA draft plan’ (*ABC News Online*, 29 May 2012). MDBA, *Proposed Basin Plan - A revised draft* (MDBA, MDBA 2012) 6.04(1).

¹⁰⁴⁷ This followed a request by the Ministerial Council. MDBA, *Proposed Basin Plan* (MDBA 2012) 9.13(2). Note that the Basin Plan itself (with exceptions for water trading rules) commences the day after it is registered; *Basin Plan* 1:04.

¹⁰⁴⁸ MDBA, *Plain English summary of the proposed Basin Plan — including explanatory notes* viii and MDBA, *Proposed Basin Plan - Consultation Report* 7. The Authority embraced an ‘adaptive management’ approach; P Pagen, ‘Adaptive Management’ in Crase (ed) 216. Although my focus here remains on the political use of this approach, it a regulatory approach that is widely regarded as preferable; Bouilly and Maywald 106.

¹⁰⁴⁹ MDBA, *Proposed Basin Plan - Consultation Report* 7 and MDBA, *Plain English summary of the proposed Basin Plan — including explanatory notes* viii.

enlivening the Council's power to make suggestions. The Authority resubmitted the *Proposed Basin Plan - A revised draft*¹⁰⁵⁰ to the Ministerial Council on 28 May 2012, which encompassed the Authority's largely positive response to the Council's suggestions. The revised draft was then presented to the Minister, after which the similar process allowing for Ministerial suggestions took place.¹⁰⁵¹

The specifics of the small changes made to the *Proposed Basin Plan* during this iterative process are not of sufficient interest to detail in this Coda. What is important to recognise is that the Minister and Basin States had been successful enough in reshaping the Authority's approach to setting SDLs that they did not need to rely significantly on the formal mechanisms for making suggestions and directions. Hence, no suggestions were made about surface SDLs—which remained at 2750GL/y throughout the final stage of the process.¹⁰⁵² The Minister did make suggestions regarding groundwater SDLs:¹⁰⁵³ these SDLs continued to be set at levels that increased groundwater extractions, but halved the quantum of that increase to appease some of the outrage from environmental groups about this change.¹⁰⁵⁴

¹⁰⁵⁰ MDBA, *Proposed Basin Plan - A revised draft*

¹⁰⁵¹ MDBA, *Proposed Basin Plan*.

¹⁰⁵² MDBA, *Basin Plan* 6.04(1).

¹⁰⁵³ Tony Burke MP, *Suggestions on the Proposed Basin Plan under s44(1) of Water Act 2007* (Ministerial suggestions on Proposed Basin Plan edn, MDBA 2012) 2.

¹⁰⁵⁴ MDBA, *Basin Plan* 6.04(2). As previously, the aggregate surface SDLs were made clear in a note in the text of the Basin Plan, but no aggregate groundwater SDLs are cited (and need to be calculated from individual SDLs for different groundwater systems).

The resulting *Basin Plan*, adopted by the Minister on 22 November 2012, sets out criteria for setting SDLs. Notwithstanding the Minister’s rhetoric about a “triple bottom line”, the criteria in the *Basin Plan* broadly mirror the criteria to be found in the *Water Act 2007*: SDLs are to be set so as ‘to establish environmentally sustainable limits on the quantities of surface water and groundwater that can be taken for consumptive use from Basin water resources, *having regard to social and economic impacts*’.¹⁰⁵⁵ There are, however, three aspects of the final Basin Plan that do not mirror the Act; each reflects a key shift in the Authority’s approach to its decision making and its understanding of its responsibilities.

First, a stated objective of establishing SDLs is to ‘inform environmental water recovery measures’.¹⁰⁵⁶ The incorporation of water recovery measures in the *Basin Plan* formalises the fusion of the Authority’s decision-making process with the initially separate process for water recovery.

Secondly, a stated outcome of establishing SDLs is that ‘water access entitlement holders and communities of the Murray-Darling Basin are better adapted to reduced quantities of available water’.¹⁰⁵⁷ The articulation of this outcome reflects the successful “responsibilisation” of the Authority for community adjustment, notwithstanding that it remains uncertain how this objective is to be met in practice.

¹⁰⁵⁵ *Basin Plan* 5.05(1) (my emphasis). More specific objectives and outcomes are included in the Plan, although at this general level it replicates the level of abstraction seen in the Act.

¹⁰⁵⁶ *Basin Plan* 5.05(1)(a).

¹⁰⁵⁷ *Basin Plan* 5.05(2)(d).

Thirdly and finally, the final Plan goes beyond the Act by providing that another objective of setting SDLs is ‘to establish a sustainable and long-term adaptive management framework for the Basin water resources’.¹⁰⁵⁸ This objective is the framework for two additional elements of the final *Basin Plan*—an ‘adjustment mechanism’ for SDLs and wider review mechanisms—that can be seen as comprising elements of a “bargain” with Basin states and with Parliament. This “bargain” was the key manifestation of the return to deal-making in the second phase of the case as the primary means of negotiating between the different interests in the Basin’s resources.

The failure of depoliticisation and the return to deal-making in the Basin

By the time the *Basin Plan* was presented to the Minister for adoption, the Minister had significant tensions to reconcile. He needed a Plan that would pass through a Parliament in which the Government controlled neither house, which meant that it had to be acceptable to Basin communities. But he also needed a Plan that was likely to survive a constitutional challenge, which meant that it had to ensure environmental sustainability. Moreover, he needed a Plan that both upstream and downstream Basin States would accept.

The bargains with the Basin States and Parliament were premised on changes being possible *after* the adoption of the Basin Plan by entrenching mechanisms for it to be subsequently altered. The key feature of the resolution to the Basin Plan process was to jettison its original premise: namely, that

¹⁰⁵⁸ *Basin Plan* 5.02(1)(b).

sustainable caps on water use needed to be set “once and for all”. I argue that this prospect of future flexibility was important because it allowed State and Commonwealth politicians to characterise the outcome as a victory—or at least “the best deal possible”—to different constituencies.

For upstream States, and the Opposition and independent members of Parliament who represented Basin communities, there was the prospect of reducing the amount of water that would be reallocated in future to the environment. For downstream States there was the prospect of increasing that amount in future.

The first such mechanism for altering SDLs was a provision in the *Basin Plan* that enables SDLs to be increased or decreased by a specified amount (five per cent) without Parliamentary approval.¹⁰⁵⁹ The inclusion of this mechanism in the *Basin Plan* was the culmination of involvement by all key decision making actors: the mechanism was recommended by the Windsor Inquiry;¹⁰⁶⁰ it was then raised as a topic for Basin state comment by the Authority when it gave the Ministerial Council the *Proposed Basin Plan*;¹⁰⁶¹ all Basin States agreed with the proposal (although disagreed with the details);¹⁰⁶² it was the subject of

¹⁰⁵⁹ *Basin Plan* Chapter 7 ‘Adjustments of SDLs’ and Minister Tony Burke, *Revised explanatory memorandum of Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012* (2012) paragraph 1. The Basin Officials Committee and the public must be consulted.

¹⁰⁶⁰ See *Revised explanatory memorandum* paragraph 12.

¹⁰⁶¹ Craig Knowles, *Transmittal letter* (A letter from the Chair of the Authority accompany the Proposed Basin Plan edn, MDBA 2012).

¹⁰⁶² Ministerial Council, *Notice by the Murray-Darling Basin Ministerial Council under s43(A)(4) of the Water Act 2007 2007* (MDBA 2012) paragraph 5. For a review of the different state views, expressed in individual state feedback on the *Proposed Basin Plan*, see MDBA, *Proposed Basin*

Ministerial suggestions to the Authority; and it received Parliamentary approval via amendments to the *Water Act 2007*.¹⁰⁶³

The stated objective of the mechanism is to permit the adjustment of SDLs ‘in a way that increases environmental outcomes while maintaining or improving social and economic outcomes’.¹⁰⁶⁴ In substance, this mechanism was part of the bargain with upstream States. If changes to river operations or infrastructure projects improved the efficiency of how environmental water was used, less river water would be needed to achieve the same environmental outcomes.¹⁰⁶⁵ Upstream States and communities would effectively get several more years (up to 2015)¹⁰⁶⁶ to identify and fund these initiatives, which they hope will result in a reduction of the amount of water the Commonwealth will need to purchase for use as environmental water.

This intention is reflected in Parliamentary statements by Mr Windsor: ‘If you deduct the 650 gigalitres through environmental works and measures from the 2,750—the baseline figure—the real number becomes 2,100 gigalitres of real water being returned to the system’.¹⁰⁶⁷ The Minister went further in his Parliamentary statement, stating that the mechanism was an ‘incentive’ for

Plan: Authority's views and consultation on the matters raised by the Murray-Darling Basin Ministerial Council (MDBA, MDBA 2012) 5.

¹⁰⁶³ In November 2012 via Parliament of Australia, *Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Act 2012* (2012), which inserted *Water Act 2007* 23A & 23B.

¹⁰⁶⁴ MDBA, *Basin Plan* 5.06(1).

¹⁰⁶⁵ See *Basin Plan* 7.09.

¹⁰⁶⁶ Taking into account the 2015 review. *Basin Plan* 7.10(1).

¹⁰⁶⁷ Tony Windsor MP, *Second Reading Debate (Water Amendment (Water for the Environment Special Account) Bill 2012)* (The House, 28 November 2012) 13797.

Basin States to ‘run the projects’ to improve water efficiency, with ‘their eyes wide open’ to the “stick” of Commonwealth water buybacks being ‘the alternative’.¹⁰⁶⁸ The Minister has the discretion to adopt or refuse any proposed adjustments, so the Commonwealth retains the power to ultimately approve what Basin states propose, but Parliament cannot disallow an adjustment.¹⁰⁶⁹

The second mechanism for SDL adjustment that formed an element of the Minister’s bargain with upstream States comprised broad review provisions in the final *Basin Plan*. The review provisions in the final *Basin Plan* were even broader than those previously proposed by the Authority: the Plan (including the SDLs) can be reviewed at any time, including at the request of the Ministerial Council.¹⁰⁷⁰ There is also a requirement to conduct a review that reassesses climate change risk, connectivity between surface and groundwater, the outcomes of environmental watering and the effectiveness of environmental works and measures.¹⁰⁷¹

Notwithstanding their part of the bargain with upstream States, it is important to note that in principle at least these review provisions embed

¹⁰⁶⁸ Tony Windsor MP, *Disallowance Speech: Murray Darling Basin Plan* (The House, 29 November 2012) 14002.

¹⁰⁶⁹ Water Act 2007 23B(6). Strictly, the adjustment mechanism could have been created under *ibid*. However, the amendment bill created additional transparency requirements for any adjustments to be reported to Parliament, although the adjustments were not made disallowable; *Revised explanatory memorandum* paragraph 3. These provisions were originally opposite, and were the result of amendment to the original Bill made during Parliamentary debate, showing that *who* the decision maker should be around SDLs was still contested; Minister Tony Burke, *Supplementary explanatory memorandum of Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012* (2012) paragraph 3.

¹⁰⁷⁰ *Basin Plan* 6.06(1).

¹⁰⁷¹ 6.06(3).

sound principles of adaptive management of natural resources, and could benefit either upstream or downstream states. For example, given the arguments by various environmental representatives that the SDLs did not adequately account for climate change,¹⁰⁷² these reviews could be used mid-way through the next drought to argue for more water to be returned to the environment. This reflects the broader fact that how Australia regulates the Murray-Darling Basin will be determined over the next decade, rather than being determined through the Basin Plan process.

The bargain with the downstream State, South Australia, allowed for the possibility of additional “top up” SDLs of up to 3200GL by 2024 but formally *outside* the Basin Plan.¹⁰⁷³ Threatening a constitutional challenge, and political campaigns against Commonwealth politicians,¹⁰⁷⁴ South Australia had managed to insist that the Ministerial Council ask the Authority to model SDLs of 3200GL in 2012.¹⁰⁷⁵ The result was modelling which showed that SDLs at this level would secure most environmental objectives provided that existing man-made constraints on river flow (such as low lying bridges) were also removed.¹⁰⁷⁶

¹⁰⁷² For example, Senator Sarah Hanson-Young, *Disallowance Speech: Murray Darling Basin Plan* (The Senate, 28 November 2012) 10138.

¹⁰⁷³ This was legislated through the Parliament of Australia, *Water Amendment (Water for the Environment Special Account) Act 2013*.

¹⁰⁷⁴ M Owen, ‘Weatherill to punish own party over river’ *The Australia* (21 July 2012).

¹⁰⁷⁵ Ministerial Council, *Communique: Murray-Darling Basin Water Ministers meeting in Canberra to consider draft Basin Plan* (MDBA 2012).

¹⁰⁷⁶ MDBA, *Hydrologic modelling of the relaxation of operational constraints in the southern connected system: methods and results* (2012) ii.

In October 2012, shortly prior to the tabling of the Basin Plan in Parliament, Prime Minister Gillard announced an additional A\$1.8 billion to fund initiatives designed to achieve this objective. These initiatives reflected the political constraints that had existed since the backlash: rather than use this funding to buyback more water, it would be used to fund infrastructure ‘that deliver[s] environmental outcomes equivalent to those in the Basin Plan but with less water’; to recover an additional 450GL of environmental water through ‘on-farm water efficiency savings that ensure no social and economic downsides for basin communities’; and, to reengineer the Basin to ensure that environmental water can flow through the system.¹⁰⁷⁷

The final Basin Plan was laid before both houses of Parliament on 26 November 2012. Ultimately, and despite vigorous debate, the Basin Plan survived two motions to disallow it in both houses of Parliament on 28 and 29 November 2012. The motion to disallow in the lower house was put by two Opposition representatives,¹⁰⁷⁸ and members of the Windsor Committee, with seats in irrigation districts and was seconded by two independent representatives.¹⁰⁷⁹ It did not succeed, however, because the Opposition party as a whole ultimately decided not to disallow the Basin Plan, and thereby land themselves with the headache of redoing the process when—as looked likely—

¹⁰⁷⁷ Minister Tony Burke, *Restoring the Murray-Darling Basin to Health* (2013).

¹⁰⁷⁸ Michael McCormack MP, *Disallowance Speech: Murray Darling Basin Plan* (The House, 29 November 2012) and Dr Sharman Stone MP, *Disallowance Speech: Murray Darling Basin Plan* (The House, 29 November 2012).

¹⁰⁷⁹ Bob Katter MP, *Disallowance Speech: Murray Darling Basin Plan* (The House, 29 November 2012) and Mr Andrew Wilkie MP seconded.

they were returned to Government in the following election. The motion to disallow in the upper house was put by the Greens Party, who argued that ‘this process has been all political, not scientific’.¹⁰⁸⁰ It was defeated, however, when only the Greens Party voted for disallowance.¹⁰⁸¹ The Minister’s comment when arguing against disallowance was telling: ‘If this parliament blows it up, lets face fact; there will never be a Murray-Darling Basin Plan.’¹⁰⁸² The fate of the Murray-Darling Basin itself remains to be determined.

I now turn to the insights this case study provides for accountability studies.

The value of recognising accountability interactions

The premise underpinning this thesis has been that researchers must consider the ways in which different accountability actors can interact with one another in accountability processes in order to reach a better understanding of how accountability—or, more particularly, accountable decision-making—is constructed. I argued that we need to challenge the dominant assumption that forums autonomously assess and assign accountability.

At one level, my research contributes to the wave of accountability scholarship concerned with how different components of multiple

¹⁰⁸⁰ Senator Sarah Hanson-Young, *Disallowance Speech: Murray Darling Basin Plan* (The Senate, 28 November 2012) 10138.

¹⁰⁸¹ Senator Hogg (The President of the Senate), *Division-results* (Australia 2012).

¹⁰⁸² Tony Burke MP, *Disallowance Speech: Murray Darling Basin Plan* (The House, 29 November 2012) 14003.

accountability regimes might relate to one another. This thesis also contributes to our understanding of how the very construction of accountable decision-making has been complicated by the advent of multiple accountabilities.

It does so by suggesting the potential for an alternative outcome of multiple accountability dialogues. The literature currently suggests that different forums impose diverging evaluations on long-suffering decision makers. Instead, I have argued that these different forums may influence each other. This influence can come from forums shaping the subject matter for which the decision maker is obliged to account. Influence can also come from forums shaping the normative standards against which they assess that account. It follows that if different forums influence each other, it is possible that the evaluations of individual forums may converge. I provide evidence of this occurring through my case study of the Murray-Darling Plan. Where such a convergence occurs it prompts us to re-imagine parts of the accountability dialogue. I suggest that the dialogue can shift from being a bilateral dialogue between forum and decision maker, to potentially being a *multilateral* dialogue involving other forums and even additional accountability actors.

In my analytical framework, I developed different conceptualisations of accountability interactions and approaches to analysing how interactions could shape the construction of accountable decision-making. I also refined approaches to analysing the broader political context in which accountability processes take place. This allowed me to assess *where* and *why* different actors interacted with one another, and to identify when actors interact and thereby

generate accountability politics.

The first aspect of this thesis' inquiry is to identify whether the phenomenon I conceptualise as accountability interactions arises in multiple accountability regimes. I conceptualise these interactions as occurring when different accountability forums act in concert with one another to hold a decision maker to account, or, act in such a way as to have an effect on the way one another holds a decision maker to account within the same multiple accountability regime. Acting in concert with one another is my broader conception of interactions, and one that I find in my case analysis can take place within the accountability regime, as well as within particular accountability processes. I find that all three kinds of accountability actors (forums, decision-makers and additional accountability actors) interacted in this way. One forum acting so as to affect the way another forum holds the decision maker to account is my archetypal conception of interactions. I find in my case analysis that this kind of interaction can take place between two forums within a process in which one forum is holding the decision maker to account. The empirical findings thus align with the broader conception of accountability interactions that I set out in the earlier chapters of the thesis.

Through my empirical case analysis, I demonstrated that different levels of analysis reveal phenomena that accord with the broader and the archetypal conception of accountability interactions. I argue that a narrative account of the actions of different actors, and how those actions responded to and reinforced one another, can establish that actors acted in concert to hold a

decision-maker to account, or acted in concert to shape the accountability regime that will subsequently oversee a decision maker. I also suggest that establishing that one actor acts in such a way as to affect another, towards a particular end, requires more fine-grained analysis of how those actions related to different steps of an accountability process.

The second aspect of this thesis' inquiry is whether these interactions were capable of shaping *how*—as well as *whether*—a decision maker is called and held to account. I found that accountability actors acted in concert to contest the forums to which decision-makers were obliged to account, to contest what they were obliged to account for, and to contest the standards by which they were judged. More crucially, in doing so, accountability actors recast the *de facto* responsibility of the decision-makers and recast what counted as accountable (and “good”) decision making in the Basin Plan's development.

I argue that it is therefore essential that accountability researchers examine how different accountability actors can interact in ways that extend beyond the existing recognition of interactions that focus on achieving discrete goals such as transferring information between forums. I argue that it is essential to consider also how different accountability actors can interact to reshape what counts as accountable decision making, often in order to encourage the decision maker to adopt an approach to decision making that suits their interests or ideologies.

Part of understanding the political dimension of public accountability is to explicitly examine when forums may seek to use their evaluation of the

decision-maker to steer the substance (as opposed to the propriety or rigour) of subsequent decision making. Accordingly, it is not surprising that where it suits their mutual interests or ideologies to see a decision maker evaluated for certain subject matters, or against certain standards, accountability actors will interact. It is perhaps more significant to recognise the way that multiple accountability regimes change the calculations for accountability actors acting in concert.

My accountability analysis suggests that actors might strategically frame their accountability demands and evaluations so as to encourage other forums to adopt—or at least echo—those demands and evaluations. For example, actors might frame their demands and evaluations with reference to more broadly applicable values such as transparency. This strategic framing and echoing suggests that accountability demands and evaluations may converge around similar themes within the broader accountability regime, as well as being transferred between different accountability processes through specific interactions. Adopting a regime-level perspective enables one to highlight that actors may act in ways that prompt accountability interactions in order to achieve particular outcomes within the broader multiple accountability regime.

This thesis also suggests that within multiple accountability regimes what counts as accountability—or accountable decision-making—can be cumulative. If the public sphere is an important context in which the accountability of decision-makers is constructed, then it may transform the public sphere into an “echo-chamber” of converging demands and evaluations. A single forum may

find it more effective to create an echo-chamber, as opposed to merely providing a lone demand or evaluation; in a given scenario this might aid that forum to shape the process of defining public accountability—or accountable decision making. When this dynamic is overlaid with demands and evaluations being adopted and reiterated by different forums, a form of cumulative accountability can result.

A regime-level perspective points to the potential for this accumulation of converging evaluations to become more than the sum of its parts. I argue that a concept of “cumulative” accountability, and the interactions between different accountability actors that generate it, is a valuable avenue for future research into the implications of multiple accountability regimes for public accountability and for public decision making. As such regimes become common in constitutional democracies, understanding their impacts will be important for accountability scholarship.

Appendix A: Case method

This thesis uses qualitative research methods and a single case study. Given that the analytical approaches are discussed in the main body of the thesis, this appendix aims to be a brief overview of the reasoning behind some of the methodological choices made in the case analysis component of this thesis and the key sources.

The many actors, processes and relationships involved in this study meant that the overall process I engaged in was largely one of “sense making”. This process was in keeping with Gerring’s idea of using multiple types of evidence to try and verify inferences, rather than using multiple instances of the same observation for verification.¹⁰⁸³ Gerring describes this approach as ‘process-tracing’, arguing that this is a dynamic methodological approach because it is probably ‘impossible to arrive at a set of standardised methodological rules’.¹⁰⁸⁴

The first method adopted was document content analysis.¹⁰⁸⁵ I adopted Schilleman’s approach of defining accountability as a communicative interaction between two parties, and using document analysis aimed to identify the content of the accountability dialogue.¹⁰⁸⁶ However, unlike Schilleman’s study, I only included accountability processes that were on the public record, and therefore I did not need to attempt to reconstruct private accountability

¹⁰⁸³ Gerring 173.

¹⁰⁸⁴ Gerring 182.

¹⁰⁸⁵ On content analysis as a methodology for documents and its strengths and weaknesses, see Herawaty and Hoque 151.

¹⁰⁸⁶ Schillemans 181.

dialogues as he did. Documents included official records of accountability dialogues, such as the Hansard of parliamentary committees or Question Time; the evaluations of the decision makers produced by forums; and, media articles recording the statements of different accountability actors.

The second method of gathering information in my case study was in-depth semi-structured interviews with “elite” actors within the Basin Plan case. These were interviews conducted on a confidential basis. (Note that I have included interviewee names in this version of the thesis so that my examiners can trace my sources; these will be excluded from the formal copy that is left with the University). I recorded the interviews and typed up detailed notes, but I did not transcribe the interviews as the interviews were all conducted on the basis that I would not use direct quotes in the thesis due to the sensitivity of the process. I also had many informal discussions in Canberra about the process.

Sampling for these interviews used a mix of theoretical sampling and snowball sampling.¹⁰⁸⁷ Theoretical sampling uses analytical frameworks to indicate which areas or people would be the most fruitful interview targets.¹⁰⁸⁸ Theoretical sampling in this way offered some flexibility to collect data that would answer the questions that arose during the different waves of my analysis. In constructing my evidence base, I focused on seeking interviews

¹⁰⁸⁷ J Corbin and A Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage 2008).

¹⁰⁸⁸ *Ibid.*

with each of the three kinds of accountability actors—decision makers, forums and additional accountability actors.

My thesis differs from theoretical sampling in that I did not begin my analysis with a general target population and continue to sample from that group. Rather, I used snowball sample methods for finding interviewees. While the limitation of this methodology is that my sample cannot be considered representative, I argue that it is appropriate in this case as the Murray-Darling Basin Plan involved actors who had worked in the same field for many years and who therefore often knew each other closely. It also involved a process that was highly contentious during the period of my field work (2011), meaning that access was initially very difficult.

Asking interviewees to recommend other people to interview provided me with a much better sense of how the informal networks between actors in the Plan worked. It also gave me a far greater chance of being allowed to interview senior interlocutors, as there was a higher degree of trust between this snowball sample group than there was between myself as a research and the sample group. This allowed better access than I would have gained otherwise.

Following this, I ensured that I had sufficient coverage in my interview sample through constructing a matrix outlining the types of actors and the area they worked in. This taxonomy (reproduced in Table One below) allowed me to ensure that I had covered all elements of the Basin Plan process.

Table One: Interviewees by type and role description

Category of informant	Category of accountability actor	Individual's Positions/role
Murray-Darling Basin Authority (MDBA)	Decision maker	Head of Socio-Economic Research; Policy officer in community consultations; Australian Government Solicitor lawyer out-posted to Authority
Minister	Decision maker/Forum	Water Advisor to Minister
Commonwealth Department of Water	(Delegate) decision maker	Head of Water Recovery Branch
Peak organisations and key lobby/stakeholder groups	Additional accountability actors	CEO and Natural Resource Manager Campaigner of the National Farmers Federation; CEO of the National Irrigators Council; Healthy Rivers Campaigner for the Australian Conservation Foundation; two members of the Wentworth Group of Concerned Scientists
State Governments (members of Ministerial Council or Basin Officials Committee)	Additional accountability actors/Forums	Head of NSW Office of Water & Head of NSW Environment Department; South Australian Water Minister and Director of Murray River Agreement for South Australia; Former Head of Victorian Office of Water

Other Commonwealth Government agencies	Additional accountability actors	Junior and Senior policy analysts (NWC)
Contracted experts	None	Researcher for ABARE-ABS (Agricultural data); three economists from two of the main consultancy firms who worked with Authority
Scientists	Additional accountability actors	Two of the most prominent scientific and economic commentators on Basin Plan
Additional academic or industry experts	None	Former executive head of Murray-Darling Basin Commission; Former member of the Murray-Darling Basin Community Advisory Committee; Managing Director of Sydney Water; assorted academics

These interviews were essential for understanding the complex and at times confusing Basin Plan process and the actions of the various players, in particular the Authority. Given that there were significantly different interpretations of the actions of both decision makers, and of why the process went so awry, interviewing a range of different individuals was crucial for

developing a coherent analysis of the case. In circumstances where there is a perception of policy failure or administrative deviance there is a significant risk of being given a self-serving version of events by interviewees. I was alive to this risk throughout my interviews, and where possible within the bounds of confidentiality I sought to test the accounts of one actor with other actors who were in a position to be able to critically reflect of that account.

Interview data underpinned my understanding the interests and ideologies of the different actors vis a vis the decision making, which contributed to my analysis of the accountability politics in the case. Interview data also informed my understanding of how the various actors understood the accountability of the Authority and the Minister, whether they viewed themselves as playing an accountability role, and how they understood the role of the various public accountability processes. This underpins my analysis of what forums were significant and not, and informs my findings about the motivations of different actors as they navigated through the multiple accountability regimes.

Given existing studies, I initially assumed that the interactions I would examine would be between formal and informal, or external and internal, accountability relationships. However, it was through my interviews, particularly those conducted in the aftermath of the backlash, that I uncovered the absence of evidence of internal accountability relationships between the decision makers and other actors. With respect to the relationships within Government during the first phase—particularly between the Authority and the Minister—there was sufficient evidence to point to my interpretation of the

Authority's actions to provide the backlash, but not to rigorously trace how this accountability relationship unfolded. With respect to relationships between the Authority and/or Minister and stakeholders, experts or "horizontal" agencies, I interpreted this absence as a manifestation of the construction of accountable decision making as independent decision making during the first phase of the case.

Appendix B: List of interviewees

Name	Position	Date of interview + subsequent contact
Mr Graeme Kelleher AO	Former member of the Basin Community Committee (prior to 2008)	17 January 2011 (Canberra).
Dr Nyree Stenekes	Researcher in the social sciences division of Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES); consultant researcher for MDBA	17 January 2011 (Canberra)
Mr Marlowe Thompson	Australian Government Solicitor's (AGS) solicitor, out-posted to the MDBA (from midway through 2010-2011)	24 February 2011 (Canberra)
Mr Wilfred Finn	Analyst, NSW Natural Resources Commission	10 March 2011 (Sydney)
Dr Kerry Schotts	Managing Director of Sydney Water	11 March 2011 (Sydney)
Mr Will Fargher	General Manager, Water Markets and Efficiency Group, National Water Commission (2009-2012), worked on a review encompassing the MDBA in 2009	18 March 2011 (Canberra)
Ms Lailey Wallace	Basin Plan Development Group, MDBA , worked on public consultations during 2010-2011	23 March 2011 (Canberra)
Mr Don Blackmore	Former CEO of the Murray-Darling Basin Commission (1990-2004)	28 March 2011 (Canberra)
Mr Ben Fargher	Former CEO of the National Farmers Federation (2005-2011)	4 April 2011 (Canberra)
Professor Steven Dovers	Head of Fenner School of Environment and Society,	5 April 2011 (Canberra)

	Australian National University	
Ms Deb Kerr	Natural Resource Management Manager, National Farmers Federation (2008-2014)	14 April 2011 (Canberra)
Dr Peter Crabb	Visiting Fellow, Fenner School of Environment and Society, Australian National University	15 April 2011 (Canberra)
Professor Richard Kingsford	Director of the Centre for Ecosystem Science, University of New South Wales	20 April 2011 (Sydney)
Mr David Harriss	Executive Head of the NSW Office of Water	21 April 2011 (Sydney)
Ms Lisa Corbyn	Director-General of NSW Department of Environment	21 April 2011 (Sydney)
Paul Caica MP	South Australian Minister for Water	29 April 2011 (Adelaide)
Mike Smith	Director of the Murray-Darling Basin Agreement, South Australian Department for Water	2 May 2011 (Adelaide)
Professor Mike Young	Research Chair in Water and Environmental Policy, University of Adelaide; Member, Wentworth Group of Concerned Scientists	2 May 2011 (Adelaide)
Dr Daniel Connell	Research Fellow, Crawford School of Public Policy, Australian National University	4 May 2011 (Canberra)
Mr Euan Robertson	Adviser, The Hon Tony Burke MP (Minister for Water)	7 July 2011 (Canberra)
Mr David Downie	Former Head of the Victorian Office of Water	8 July 2011 (Melbourne)
Mr Mike Taylor AO	Chair, Murray-Darling Basin Authority (2008-2010)	8 July (Melbourne)
Dr Jeremy Cheesman	Principal Economist, Marsden Jacob Associates; consultant researcher for MDBA	9 July 2011 (Melbourne)

Mr Chris Olszak	Analyst, Frontier Economics; consultant researcher for MDBA	9 July 2011 (Melbourne)
Mr Dave Appels	Analyst, Frontier Economics; consultant researcher for MDBA	9 July 2011 (Melbourne)
Dr Arlene Harriss - Buchan	Healthy River's Campaigner, Australian Conservation Foundation and member of the Basin Communities Committee	14 July 2011(Canberra)
Dr John Williams	Member, Wentworth Group of Concerned Scientists	15 July 2011 (Canberra)
Mr Danny O'Brien	CEO, National Irrigators Council	26 July 2011 (Canberra)
Mr Colin Meus	Assistant Secretary, Water Recovery Branch, Department of Water	9 August 2011 (Canberra)
Mr Leo Carroll	Head of Socio-Economic Analysis at Murray-Darling Basin Authority	20 October 2011 (Canberra)
Ms Kelly Haynes-Sutherland	Policy Officer, Department of Prime Minister & Cabinet (worked on Basin Plan project)	15 December 2011 (Canberra)

Appendix C: Timeline of events

January 2007: Prime Minister John Howard, announces a A\$10 billion plan *National Plan for Water Security* to reform rural water management. Most of the effort will focus on the Murray-Darling Basin.

September 2007: The *Water Act 2007 (Cth)* is enacted. The Act is passed without the Basin States agreeing to transfer their constitutional powers to the Commonwealth.

March 2008: The Act commences, and a Memorandum of Understanding on Murray-Darling Basin Reform is signed by the Commonwealth and Basin States. The Act establishes the Murray-Darling Basin Authority, and mandates it to prepare a Basin plan.

July 2008: *Intergovernmental Agreement on Murray-Darling Basin Reform* signed. Prime Minister Kevin Rudd signs an agreement to secure the partial referral from Basin States of relevant constitutional powers to the Commonwealth.

December 2008: The *Water Amendment Act 2008 (Cth)* is passed with the support of both major parties and the Act amended.

October 2010: Release by the Authority of the *Guide to the Basin Plan*.

October 2010: House of Representatives Standing Committee on Regional Australia (Windsor Committee) commence an inquiry into the socio-economic impact of the *Guide*.

November 2011: The Authority releases the *Proposed Basin Plan* for twenty weeks of public consultation (November 2011-April 2012).

April-May 2012: The Authority provides the *Proposed Basin Plan - A Revised Draft* to the Ministerial Council for suggestions, and, after incorporating suggestions, returns the *Plan* to the Council.

May 2012: The Authority provides the *Proposed Basin Plan* to the Minister for suggestions.

October 2012: Prime Minister Gillard announces an additional A\$1.8 billion for environmental works and the recovery of an extra 450GL of environmental water.

November 2012: Parliament amends the *Water Act 2007* to reflect bargains with Basin States through the *Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Act 2012* and *Water Amendment (Water for the Environment Special Account) Act 2013*.

November 2012: The *Basin Plan* is formally adopted by the Minister.

November 2012: The Minister lays the *Basin Plan* before the Parliament, and a motion to disallow the *Plan* in both houses of Parliament is defeated. The *Basin Plan* becomes the operative regulatory framework for the Murray-Darling Basin.

Appendix D: A map of the Murray-Darling Basin area



source: ABC

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