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The Secretary
The Standing Committee on Legal and Constitutional Affairs of the Senate
Canberra
Australia

Dear Sir/Madam:

Thank you for your invitation (email from the Secretary of, dated 14 February 2011) to make a submission to the Inquiry into provisions of the Water Act 2007

Why I make this submission:

For many years I was the Senior Water Advisor at the World Bank. In that capacity I visited Australia in 1996 and became interested in the emerging Australian experience with water management, especially in the Murray Darling Basin. Over the intervening period I have followed developments closely, have visited Australia several times, and interacted with many Australian water professionals, in Australia and overseas.

Two years ago I left the World Bank to assume a position as Gordon McKay Professor of Environmental Engineering at Harvard University, where I direct the Harvard Water Program. In 2010 I visited Australia three times – one as a member of the High-Level External Review Panel convened by the MDBA to review the draft Guide to the Basin Plan; one to work with the National Water Commission, and once as part of the Harvard/University of Melbourne/Monash/Committee for the Economic Development of Australia water collaboration. I have followed developments relating to the Water Act 2007 very closely.

So I am a very interested outsider, who surely has many of the details wrong. If there is a value to my observations it comes from the fact that I have been privileged to see many reform processes in many countries, and have developed a nose for sniffing out the story.

Why do I care?

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I care for two reasons. First, because I have many Australian friends and want what is good for them and your wonderful country. Second, because what happens in Australia matters hugely to the rest of the world.

Perceptions and Facts

The Harvard historian David Blackbourn writes in his great book "The Conquest of Nature" of the dialectic of water challenges and responses. He describes how all water solutions are provisional, how each succeeding generation takes for granted the achievements of their fathers and forefathers, and how contemporaries always wonder how those who went before could have been so short-sighted and stupid.

There is no better illustration of this difference of perception than the situation of water management in Australia. Over the last 10 years Australia did something which no other country could conceivably have managed – in a large irrigated agricultural economy (the Murray Darling Basin) a 70% reduction in water availability had very little aggregate economic impact. Before the buts and the buts and the buts, this extraordinary achievement is, in my view, the single most important water fact of the 21st century, because it shows that it is possible (with ingenuity and investment) to adapt to rapid climate change and associated water scarcity.

What has been very striking to me on my visits to Australia, is how dramatically this perspective is different from the political and public perception, which is largely that "we have done a terrible job". Again and again I had to confront this "truism" in discussions in Australia. After all these discussions I concluded that there was a fatal misdiagnosis of "the problem". If one can conceive of a simple (and simplistic) equation in which:

Outcome = f(Exogenous Change, Institutional Response);

90% of the political and public blame was placed on "institutional response". To cite just two (important) examples: The Honorable Malcolm Turnbull, author of the Water Act 2007 claims that "our water management has been extraordinarily ill informed in years past" (*http://www.malcolmturnbull.com.au/blogs/the-water-act-and-the-basin-plan*) and the MDBA's ill-fated Guide to the Basin Plan asserts that "over the past few decades….the focus has swung to looking at economics …and the role of the environment has been overlooked."

I found (and find) this diagnosis (a) extraordinarily widespread and (b) extraordinarily erroneous. What is obvious to me is that the overwhelming factor behind the dismal situation in the MD Basin was the dramatic reduction in rainfall and even larger reduction in river flows. It is equally clear to me that the Institutional Response (of the Murray Darling Basin Commission, the basin states, and farmers) was extraordinarily innovative and – within the bounds set by nature – effective. Not only for the economy but, as shown by the National Water Commission, for ameliorating the environmental damage of the terrible drought.

The Politics of the Water Act 2007

In the course of my visits and in my reading, I have come to see opportunistic politics as a major factor in the development of the Water Act of 2007 and the current impasse. Of course I know much less about this than any of the esteemed members of your committee, but because this perception underlies my analysis, let me summarize this understanding briefly.

The environmental vote was important in the election of 2007. After seven years of drought environmental conditions were poor, not least in the Murray Darling Basin. The electoral arithmetic of Australia is such that most of the electorate live in the coastal cities. Most city dwellers have both little knowledge of the land and water environment of the world's driest continent, and a paternalistic and dim view of farmers and agriculture. He who could capture the environmental vote would strongly improve his chances in the election. Most environmental-minded voters were Labour. If the Liberal Party were to woo some away it had to do something dramatic. The Water Act of 2007 was one of the dramatic efforts.

The Act was hatched in a very short time, with very little consultation with any of Australia's great water professionals or its innovative farmers. (By the way, in the eyes of this observer at least, the smart city dwellers had been far less innovative vis-a-vis water than their dim-witted country cousins.)

In the eyes of the architects of the Water Act, it was necessary to take power away from those who had made a mess of things (the States and farmers) and put it in the hands of the enlightened in Canberra. A major challenge was how to deal with the matter of the Constitution, which had given the states powers over water management, and which underpinned the inter-state consensual processes which had been the institutional bedrock of the MDB Commission. The primary author of the 2007 Act, the Honorable Malcolm Turnbull, is quite explicit about this. *"In the 1890s our founding fathers missed a big opportunity when they drafted our Constitution in not putting the management of interstate waters under federal jurisdiction. In 2007 we rectified that mistake with the Water Act" (*Malcolm Turnbull "The Water Act and the Basin Plan, December 9, 2*010, http://www.malcolmturnbull.com.au/blogs/the-water-act-and-the-basin-plan/).*

Because constitutional amendments are, not simple, and definitely cannot be done over a weekend before an election, the authors of the Water Act 2007 had to find legal cover for usurping state powers. An alert and enterprising environmental lawyer found the fig-leaf, which was the Ramsar Convention, which the Commonwealth Government had signed, committing itself to protecting wetlands which are critical for migratory birds.

To avoid a constitutional crisis, the Commonwealth had to build the Water Act around this fig-leaf. So the Act became an environmental act, which was all it really could be, since it was in the name of the commonwealth's obligations to an obscure international environmental convention that it was taking powers from the states.

And so the fundamentals of the Act were born – an environmental act in which Canberra would tell states and communities and farmers what to do.

<u>The substance of the Act: 1 Federal and State responsibilities</u>

The framers of the Water Act 2007 had not read their Churchill. Democracy is, indeed, the worst form of government, except for all those other forms that have been tried from time to time. Yes, the consultative, participatory model of the MDB Commission did have its flaws, because consensus was difficult and often slow. But it is now obvious that the commonwealth-bureaucrats-and-scientists-know-better-then-states-and-communities-and-farmers-do model has, once again, proved to be much worse and even much slower.

The highly secretive "we will run the numbers and the science behind closed doors and then tell you the result" MDB Basin Plan process was not, in my view, an aberration which can be pinned entirely on the leadership of the MDBA Board and management, but intrinsic to the institutional power concentration that is fundamental to the Water Act 2007.

The substance of the Act 2: Balance between the environment and human uses

There are claims that the Water Act of 2007 was not an environmental act but one that mandated balance between the environment and human uses. Digging deep into the turgid 236 pages of the Water Act for confirmatory phrases, the Honorable Malcolm Turnbull claims, now, that the Act was all about balance.

To a disinterested reader this is poppycock. The National Productivity Commission's interpretation of the Water Act (2007) is that "*it requires the Murray-Darling basin Authority to determine environmental water needs based on scientific information, but precludes consideration of economic and social costs in deciding the extent to which these needs should be met*". Similarly, the High-Level Review Panel for the Murray Darling Basin Plan (of which I was a member) stated that "*The driving value of the Act is that a triple-bottom-line approach (environment, economic, social) is replaced by one in which environment becomes the overriding objective, with the social and economic spheres required to "do the best they can" with whatever is left once environmental needs are addressed*. "

This interpretation was also very clearly (and reasonably, in my view) the interpretation taken by the Board and Management of the MDBA in developing the Guide to the Basin Plan. This was transmitted unambiguously to the members of the High-Level Review Panel for the Murray Darling Basin Plan.

(As an aside, I have wondered whether this logic is derived from (a) a belief that this is the right thing to do or (b) an understanding that this was the only constitutionally-defensible approach given that state powers were being abrogated in the name of meeting the Commonwealth's Ramsar obligations.)

The substance of the Act 3: The roles of science and politics

The Act is based on an extraordinary logic, namely that science will determine what the environment needs and that the task for government (including the MDBA) is then just to "do what science tells it to do".

In the deliberations of the High Level Review Panel, we pointed out that, taken literally, this would mean that 100% of the flows of the Basin would have to go to the environment, because the native environment had arisen before man started developing the basin. The absurdity of this point was to drive home the reality – that the Murray is one of the most heavily plumbed river basins in the world, and that the real choice was to decide which set of managed (not natural) environmental (and other) outcomes were most desirable.

The job of science in such an instance is to map out options, indicating clearly the enormous uncertainties that underlie any scenario linking water and environmental outcomes. In its final report, the High-Level Review Panel stated:

Far from being "value neutral", a set of value judgements are fundamental to the aspirations of all Acts, including the Water Act. …. It is a fundamental tenet of good governance that the scientists produce facts and the government decides on values and makes choices. We are concerned that scientists in the MDBA, who are working to develop "the facts", may feel that they are expected to trim those so that "the sustainable diversion limit" will be one that is politically acceptable. We strongly believe that this is not only inconsistent with the basic tenets of good governance, but that it is not consistent with the letter of the Act. We equally strongly believe that government needs to make the necessary tradeoffs and value judgements, and needs to be explicit about these, assume responsibility and make the rationale behind these judgements transparent to the public.

<u>The process of formulating the Basin Plan</u>

In all of my years of public service, often in very sensitive environments, I had never been subject to such an elaborate "confidentiality" process as that embodied in the preparation of the Guide to the Basin Plan. The logical interpretation was that the spirit of the Water Act of 2007 (environment first, science will tell, the Commonwealth government will decide, the people will obey) required such a process. The High-Level Panel told the Chair and CEO of the MDBA that they understood that this was what the Act dictated but that it was the role of senior civil servants to explain that this would not, and could not, work. We were given to believe that there was no appetite for such a message at higher levels in the government in Canberra.

A corollary of this flawed process (and the ideas incorporated into the Act) was that there was very little recourse in the process to the immense, world-leading knowledge of water management that had developed in Australia during the last 20 years. Time and again I heard from professionals, community leaders, farmers and state politicians who had made Australia the widely-acknowledged world leaders in arid zone water management that they were excluded from the process.

<u>Investments in water-saving infrastructure</u>

A major complementary program for implementing the Water Act is the massive water infrastructure program. Indeed, the Honorable Malcolm Turnbull believes that "*the real problem is (not the Water Act) but that the Labor Government has failed to invest in the water-saving*

infrastructure that was the centerpiece of the Howard Government's National Plan for Water Security".

In my visits to Australia I heard a chorus of opposition from economists about what they considered to be program which paid a massive amount for every drop of water saved.

In my perception this program has been badly thought through. The economists are largely right – this is a very expensive way to save water and that many of the investments will be made in areas that will, sooner or later, go out of production.

But they also note that this is a "bribe" to farmers for the implicit breach of contract by the Federal Government. If this is the case, then the question should be approached differently.

For example, it seems highly probable that world food prices will continue to increase sharply in coming decades. Australia has developed great expertise in sophisticated and high-valued agriculture. This national asset is, it would seem to me, to be something that Australia would want to preserve and hone. If there were a clear vision for "the future of Australian agriculture in a changing world", and a clear definition of the areas where Australia has a comparative advantage, then investing in modernization of the Australian agricultural economy might be a high-return use of public funds. This is quite different from a fund for "saving water" – it would be an investment in productivity and an investment in a strategic Australian capability. In my view a plan for water cannot be done in isolation from this complementary bit of strategic analysis.

My conclusion:

Let me first repeat what I said at the beginning of this note. I am an outsider. I am flattered to be asked to share my views with your Commission of Inquiry. I am fully aware that there are likely to be many details that I have not got right. But I have worked on water policy issues in dozens of countries and have developed an instinct for what is central. I may have some notes wrong, but believe strongly that I am playing from the right hymn-book.

My conclusion is stark. I believe that the Water Act of 2007 was founded on a political deception and that that original sin is responsible for most of the detour on which Australian water management now finds itself. I am well aware that unpredictability is an enemy and that there are large environmental, social and economic costs of uncertainty. But I also believe that Australian cannot find its way in water management if this Act is the guide. I would urge the Government to start again, to re-define principles, to engage all who have a stake in this vital issue, and to produce, as rapidly as possible, a new Act which can serve Australia for generations to come. And which can put Australia back in a world leadership position in modern water management.

Yours sincerely