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Stephen Palenthorpe
Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Sir

Re: Murray-Darling Basin Commission of Inquiry Bill 2019

1. Thank you for opportunity to comment on the *Murray-Darling Basin Commission of Inquiry Bill 2019*.
2. EDO NSW is a community legal centre specialising in public interest environmental law. We have many years' experience engaging with water law and policy processes at both the State and Commonwealth levels. We also have extensive experience advising a broad range of clients including irrigators, community groups and peak conservation organisations in relation to the *Water Act 2007 (Cth)*, the *Basin Plan 2012* and related policies.
3. Overall we are concerned that the broad scope of the proposed Commission of Inquiry could unduly delay the implementation of recommendations made by previous or current inquiries at a time when urgent action is needed to restore the health of the Basin.
4. In summary our recommendations are as follows:
 - (1) The Commission of Inquiry proposed by this Bill:
 - (a) should add value by building on the findings of past inquiries, and not repeat the work of past or current inquiries/processes;
 - (b) should add value by inquiring into areas not covered, or not able to be covered, by past or current inquiries;
 - (c) is not a replacement for properly funded and resourced science and policy programs, particularly in the critical area of climate change;
 - (d) must not be used as an excuse to delay work for which the need has been identified in past inquiries, including a review of the performance of efficiency projects.
 - (2) The terms of reference in clause 7(1) of the Bill should be amended to:
 - (a) Include specific reference to supply measures in clause 7(1)(e);
 - (b) Remove clause 7(1)(f), given that the failure to address climate change in the Basin Plan has been adequately considered in other

processes and the real need now is for a properly funded and resourced science and policy program;

- (c) Refine clauses 7(1)(b) – (d) to focus on areas not adequately addressed in other processes, to remove the potential for a further inquiry to be used as a justification to delay action.

Need for a Commission of Inquiry

5. The *Water Act 2007* is an ambitious piece of legislation which, while improvement is certainly possible, creates a solid foundation to restore the Basin to health and to address the over-allocation of water in the Murray-Darling Basin¹. As is often the case with laws aimed at restoring the health of the environment, both in Australia and internationally², the implementation of the Act has not lived up to its vision.
6. There have been multiple inquiries into various aspects of the implementation of the *Water Act 2007* (and related State legislation) at both the State and Federal level including, most notably in recent times, the South Australian Royal Commission³, the Productivity Commission's Five Year assessment of the Basin Plan⁴, the Independent Assessment of the fish deaths which occurred over last summer⁵ and the Matthews Inquiry in NSW⁶. There are also ongoing inquiries and other processes including the Northern Basin Commissioner⁷ (with a report due to be tabled in Parliament later this year), the Auditor-General's performance audit of strategic water purchases⁸ (which is due to be tabled in December 2019) and the forthcoming socio-economic panel process⁹.
7. The implementation of some of the completed inquiries has been slow¹⁰, and the government's ongoing failure to respond to the findings of the South Australian Royal Commission has been disappointingly slow. However, if accepted by government and properly implemented, the recommendations of these various inquiries would establish a work program to remedy the most significant of the ways in which the implementation of the *Water Act 2007* has been deficient, most critically:

¹ See section 3(d)(i) (Objects) of the *Water Act 2007*; see also Prime Minister John Howard's address to the National Press Club on 24 January 2007 introducing the National Water Initiative which led to the enactment of the *Water Act 2007*.

² United Nations Environment Program, 2019, Environmental Rule of Law: First Global Report, found at:

https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y

³ <https://www.mdbrc.sa.gov.au/>

⁴ <https://www.pc.gov.au/inquiries/completed/basin-plan#report>

⁵ Vertessy et al, 2019, Final Report of the Independent Assessment of the 2018-19 fish deaths in the lower Darling, Found at: https://www.mdba.gov.au/sites/default/files/pubs/Final-Report-Independent-Panel-fish-deaths-lower%20Darling_4.pdf

⁶ https://www.industry.nsw.gov.au/data/assets/pdf_file/0016/120193/Matthews-interim-report-nsw-water.pdf

⁷ <http://www.agriculture.gov.au/water/mdb/basin-plan/commitments/northern-basin-commissioner#terms-of-reference-for-the-northern-basin-commissioner>

⁸ <https://www.anao.gov.au/work/performance-audit/procurement-strategic-water-entitlements>

⁹ <https://www.basin-socio-economic.com.au/>

¹⁰ Particularly in contrast to the implementation of the Matthews Inquiry, which included the establishment of the Natural Resources Access Regulator.

- (1) A scientific and policy review of the Environmentally Sustainable Level of Take (**ESLT**) and Sustainable Diversion Limit (**SDL**), informed by a properly funded climate science program to incorporate into the Basin Plan the climate science which has been identified as missing from the current Basin Plan¹¹;
 - (2) A review of the SDL Adjustment Mechanism to create a process that is both lawful¹² and practical¹³;
 - (3) A review of the effectiveness and costs of irrigation efficiency measures¹⁴, followed by either law reform¹⁵ or proper program design¹⁶ to ensure that the 'enhanced environmental outcomes' of the Water for Environment Special Account¹⁷ are achieved through responsible use of public funds;
 - (4) A transition strategy for Basin Communities to enable them to prosper even as water availability, and agriculture, shifts under climate change-affected conditions¹⁸;
 - (5) The implementation of a comprehensive monitoring program to inform the ongoing evaluation of the effectiveness of the Basin Plan¹⁹; and
 - (6) Institutional reform of the Murray-Darling Basin Authority²⁰.
8. A particular area in which a Commission of Inquiry with access to Commonwealth public servants and documents²¹ could add value is in relation to the extent to which misconduct or improper influence may have been a driver of any of the deficiencies which have been identified in the implementation of the *Water Act 2007*. In that regard, we think it appropriate that the terms of reference in clause 7 of the Bill include misconduct.
 9. The timeframes for the proposed Commission of Inquiry include the time required for the passage of both this Bill and a funding Bill originating in the lower house²², as well as the 12 months allowed for the inquiry²³ and the further 6 months allowed for a government response²⁴. The policy case for the work outlined above has already been made in other inquiries and much of it requires specialist input from scientists or, in the case of efficiency measures, from the Auditor-General. It would be unfortunate if the possibility of different recommendations from the proposed Commission of Inquiry was used as a reason to delay this work.

¹¹ See recommendations 1 – 4 of the South Australian Royal Commission; Vertessy et al (2019): Finding 9 and Recommendation 18

¹² See recommendation 5 of the South Australian Royal Commission

¹³ See recommendations 4.1 to 4.4 of the Productivity Commission Five-year review

¹⁴ See recommendation 10 of the South Australian Royal Commission and recommendations 5.1 to 5.4 of the Productivity Commission

¹⁵ See recommendation 8 of the South Australian Royal Commission

¹⁶ See recommendations 5.1 to 5.4 of the Productivity Commission

¹⁷ S86AA *Water Act 2007* (Cth)

¹⁸ See recommendation 12 of the South Australian Royal Commission; finding 3.5 and recommendation 3.3 of the Productivity Commission

¹⁹ See recommendations 13.2 and 13.3 of the Productivity Commission and recommendation 27 and 28 of the South Australian Royal Commission

²⁰ See recommendations 14.1 to 14.5 of the Productivity Commission and recommendations 39

²¹ Which were not available to the South Australian Royal Commission

²² See s53 of the Commonwealth Constitution which prevents laws appropriating moneys from originating in the senate and clause 2 of the Bill

²³ Clause 8(2) of the Bill

²⁴ Clause 8(5) of the Bill

10. In summary, the Commission of Inquiry proposed by this Bill:
 - (1) should add value by building on the findings of past inquiries, and not repeat the work of past or current inquiries/processes;
 - (2) should add value by inquiring into areas not covered, or not able to be covered, by past or current inquiries;
 - (3) is not a replacement for properly funded and resourced science and policy programs, particularly in the critical area of climate change;
 - (4) must not be used as an excuse to delay work for which the need has been identified in past inquiries, including a review of the performance of efficiency projects.

Comments on specific clauses

Terms of Reference – clause 7(1)

11. It may be of value in clause 7(1)(e) to include mention of the supply measures which (through the SDL Adjustment mechanism) are used to justify a decrease by 605GL in the water to be recovered for the environmental health of the Basin.
12. The impact of climate change on Basin water resources, communities and ecosystems is a critical issue. However, multiple inquiries have already identified that the Basin Plan is deficient in that it fails to address climate change. The work needed now is a properly funded and resourced climate science and policy program culminating in a review of the ESLT and SDL. Our concern is that including clause 7(1)(f) could be used to justify delaying this critical work.

Building on other inquiries – clauses 7(1)(b) – (d) and 7(3)

13. The terms of reference outlined in clause 7(1)(b) – (d) of the Bill are very broad and will overlap significantly with the already completed and currently ongoing inquiries and other processes.
14. Clause 7(3) of the Bill allows the proposed Commission to elect not to further inquire into matters which have been, or will be, sufficiently and appropriately addressed by another inquiry/investigation or legal proceeding. We agree that this is an appropriate provision which will enable the proposed Commission to focus on those issues which have been incompletely addressed by other processes.
15. However, the extent to which the proposed Commission elects to inquire into any particular issue is unlikely to be known until the report is released. As discussed above, there is a significant body of science, policy and other work that can and should proceed as soon as possible without being delayed by the possibility of different recommendations from the proposed Commission. In that regard, it may be preferable for clause 7(1)(b) – (d) to be further refined to provide greater certainty and manage expectations as to the issues that will be addressed by the proposed Commission.

Thank you for the opportunity to comment on the Bill.

Yours sincerely

EDO NSW

Deborah Brennan

Senior Policy and Law Reform Solicitor

