Senate Environment, Communications and the Arts Legislation Committee
PO Box 6100 Parliament House
CANBERRA ACT 2600

Dear Secretary,

Re: Inquiry into Water (Crisis Powers and Floodwater Diversion) Bill 2010

Thank you for agreeing to accept this submission on June 11, 2010.

The submission is divided into three sections

1. The Big Picture: Crisis Management
2. Water (Crisis Powers and Floodwater Diversion) Bill 2010
3. Fresh Water Futures

This submission was prepared by myself, Diane Bell. I am Professor Emerita of Anthropology at the George Washington University, Visiting Professor at the University of Adelaide and Writer and Editor in Residence at Flinders University. I have published 10 books, numerous articles and held senior posts in the USA and Australia. I am a member of the River, Lakes and Coorong Action Group Inc (RLCAG) and the Water Action Coalition (WAC). My advocacy for fresh water flows for the health of the Murray-Darling Basin extends over a number of years.

Diane Bell

Inquiry into Water (Crisis Powers and Floodwater Diversion) Bill 2010

1. The Big Picture: Crisis Management

There *is* a crisis in the Murray-Darling Basin and this Bill represents creative thinking in terms of finding solutions. As such it deserves serious consideration and hopefully will stimulate debate concerning the management and mismanagement of the Basin. I appreciate this opportunity to comment on the Bill and to be part of the debates concerning the health of the Murray-Darling Basin (MDB).

In this submission, I pose overarching questions and then explore the specifics of the Bill. Key questions include

- Is the failure to manage the current crisis a failure of the legislation, a lack of political resolve and/or inadequate administrative and management arrangements?
- In what ways is the *Water Act 2007* incapable of dealing with the current crisis?
- Does the Murray-Darling Basin Authority (MDBA) not already have the power to manage the crisis?
- Given that the objects of the *Water Act 2007* include s. 3 (d)(ii) *to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin (taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity),* why is it necessary to propose further legislation?
- If the MDBA has been put in place to give force to the Water Act, why is it not acting in accordance with the objects?
- Is it that in the balancing of economic interests against environmental values, the health of the whole system is not accorded sufficient weight? How are so-called 'environmental assets' given a value? By whom? To what ends?
- If the crisis has arisen through mismanagement (and there is evidence and general agreement that is a major contributing cause) can the crisis be addressed via the legislative route?
- Will the Bill provide mechanisms whereby the health of the MDB as a single entity will be privileged over sectional interests or will it entrench certain interests by concentrating power in the hands of a few in times of crisis?
- If the *Water Act 2007* is inadequate, should it be amended?

For solutions to have any chance of success and to ensure they do not entrench existing problems, we need to understand how the current crisis developed. It is possible to argue that over-allocation of the MDB, exacerbated by drought, is the root cause of the crisis. Currently insufficient fresh water is flowing through the system and the accumulated salts and nutrients are not being flushed out to the ocean through the Murray Mouth. Instead there is a continuing need to dredge the Murray Mouth. The

increased salinity levels in Lakes Alexandrina and Albert and in the Coorong are threatening these internationally renowned Ramsar wetlands.

After the recent rains and flooding of 2009 and 2010, it is no longer credible to blame the drought alone for the lack of end of river flows. It has become apparent that it is not just rain that is needed, but policies that will ensure that the floodwaters flow through the system. It is no longer credible to argue that there is not sufficient water in the MDB to flush the system. The problem is that there is no rule/policy/law that ensures water in the system benefits the ecosystem.

So, does the Bill offer a solution?

2. Water (Crisis Powers and Floodwater Diversion) Bill 2010

- Section 3 Objects

-s. 3(a) Is it desirable to give 'full responsibility' to the MDBA, which consists of two members and four part-time members? Could this concentrate the power in the hands of a small group of interest holders and how would we ensure they would act in the interests of the health of the river as whole? How would the interests of the environment be balanced against those of the economy?

-s. 3(a) What is the effect of managing the Basin as a 'single system' and why isn't it managed this way at all times?

s. 3 (b) By granting 'broader powers' than under the current arrangement, will the health of the whole eco-system be given priority?

- Section 4 Constitutional basis for the Act

If this is the basis for the legislation, why do those sections not provide the basis for intervention under the *Water Act 2007*? It is lack of legislation or political will that is constraining action to bring the floodwaters down through the system?

- s.4(2)(a) the words 'apply even more strongly' need to be rephrased
- s.4(2)(b) 'equitably' appears to refer to a balance between the competing environmental, conservation and irrigation interests. What then is equitable? What is held in the balance? How are the variables weighted?
- s.4(2)(c) What are the 'impediments' and why haven't they been dealt with already?

- Section 5 Interaction the Water Act

Should this Bill be proposed as an amendment to the *Water Act 2007*?

- Section 7 Interpretation

- s.7(1) Given that 'water plan, arrangement or agreement' means <u>any</u> arrangement that affects water entitlements and allocations, under this Bill the MDBA would have the

power to make any arrangement under s.17 and suspend or vary any of arrangements in s.18. This power would be exercised by the two full time and four part time members of the MBDA. Are there any limits on their power? Can their decisions be reviewed?

- Section 9 Extreme crisis

- s.9(1) Drafting error: 'subsection (1) or (2)' should be 'subsection (2) or (3)'
- s.9(2) and s. 9(3) According to the criteria we are already in extreme crisis. I would argue that is an accurate assessment of the state of the southern MDB but are water level and allocation percentage sufficient criteria? Should there just be one threshold definition of 'extreme crisis' or should there be a series of definitions for different of levels of crisis, each with corresponding levels of 'responsibility' and power given to the MDBA?

It is of concern that given the criteria for 'crisis' re water levels being below sea level in Lake Alexandrina has been reached, a possible solution would be to open the barrages and let in salt water. This would solve the crisis according to the definition without addressing the actual problem and would adversely affect the health of the lake.

The criteria should be considered in the context of the Basin Plan and objects as specified in s.3(d)(11) of the *Water Act 2007*. Note that water levels are artificially affected by the structures put in place along the river and thus whether or not there is a crisis can be affected by man-made factors.

- Section 10 Chief Executive's advice

The powers of the CEO require clarification. Why is the process one of referral then a ministerial declaration to trigger the act?

- Section 11 Advice to Minister

-s.11 Is it a drafting error that s.11(2) does not specify a 14 day time frame for action that is specified in s.11(1)?

- Sections 12 and 13 Declarations

I note the definition of legislative instrument[1]. Sections 12 and 13 provide that the declaration beginning and ending the period of crisis should be done by legislative

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[1] http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/9B30EC6E4DE0DD86CA2575ED000A78D4
It is common for an Act of Parliament to allow some other person or body to make a law on matters of detail under an Act. Such a law is called a legislative instrument. The Legislative Instruments Act 2003 requires legislative instruments to be registered and published on the Federal Register of Legislative Instruments (a part of ComLaw) and tabled in Parliament. They are normally disallowable, which means that either House of Parliament may stop their operation by a vote within a set period after they have been tabled. They have a great variety of titles; regulations are legislative instruments, but so are many things called determinations, guidelines, rules, orders and other names.

instrument but it relies on both houses of parliament agreeing and this is unworkable in a bipartisan system such as ours. If it's an emergency, the standing government should have a right to declare it.

Given that s.12 and s.13 specify 'by legislative instrument', declarations made under these sections are likely to qualify for judicial review under the AD(JR) Act. Is this correct? I would argue that the decisions should be reviewable.

- Section 15 Objects of Part

- s.15 (a) Is it desirable to give the MDBA, overall control/full responsibility of the water resources? The MDBA may make decisions, including but not restricted to, decisions for the purposes outlined in s.15(a)(i)-(iv) and s.15(b). The powers given to the MDBA appear to be undefined in this section.

- Section 16 Effect of Part

- s.16(2) says the Water Act is subject to this Act. Might it be sounder to have this Act as an amendment of the *Water Act 2007*. In that way the Water Act would not be read independently of the Water Bill and the Water Bill could be ignored or go unnoticed?

- Sections 17 and 18 Crisis powers and functions of Authority

Under s.17 and 18 it is unclear whether the CEO may act in his own discretion or whether the other members of the MDBA need to vote on a resolution (or the MDBA needs to undergo any other internal process) before the direction/declaration by the CEO can proceed.

A direction/declaration under these sections is 'not a legislative instrument'. Is the Bill attempting to exclude any judicial review of these decisions under the AD(JR) Act? Whether these sections would be successful in excluding judicial review depends on the interpretation by the courts of 'decisions of an administrative character <u>made under an enactment</u>' and whether judicial review would be possible under the Judiciary Act or the Constitution. We would argue that the decisions should be reviewable.

- Section 19 Crisis powers

- s.19 Considering the practicalities, how effective would it be for the MDBA to be responsible for any implementation and compliance issues?

- Section 20 General powers of Authority

What are the implications and risks of giving the MDBA such undefined power? This is a matter of some concern given the history of the mismanagement that caused the current crisis.

- Section 21 Matters to which Authority must have regard

- s. 21 The matters outlined in s.21(a)- (l) specifies those matters to which the CEO 'must have regard'. The CEO does not need to undertake a balancing

exercise of the various criteria. If judicial review of the CEO's direction/declaration were to occur, the failure to have regard to one of those matters, may be a sufficient ground for review of the decision.

The definition of critical human needs in the Water Act is inadequate for the purposes of this section if the goal is to privilege the environment and I would argue that must be the object of the legislation. The other interest groups have powerful lobbies but the environment is always held in the balance or traded against other interests

S 21(c) and (d) (re critical human needs and environment needs) should refer to the whole of the MDB including the MMLLC.

The *Water Act 2007* defines critical human needs in s. 86A(2) as *the needs for a minimum amount of water, that can only reasonably be provided from Basin water resources, required to meet: (a) core human consumption requirements in urban and rural areas; and (b) those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs.*

The problem with defining critical human needs thus is that (b) can encompass a range of requirements and reflects historical factors and the relative power of various interests. Are pigs or orange groves critical in this sense for (b)?

I further note that in s.86A(4) that 'Conveyance water' is water in the River Murray System required to deliver water to meet critical human water needs as far downstream as Wellington in South Australia.

Thus, below Wellington, i.e. in Lakes Alexandrina and Albert and the Coorong, critical human needs are at the mercy of whatever water reaches the area. There is no requirement to service the critical human needs in the *Water Act 2007*.

4. Fresh Water Futures

Rivers die from the bottom up and the River Murray is at Code Catastrophic. There is water that could be brought down through the system to flush the accumulated salts and nutrients. This would require stepping back from the established sharing rules and understanding that the recent floodwaters are the opportunity to reset the system. The health of the system as a whole would need to be given priority over all other interests. In the long term, flushing the system is to the advantage of all who rely on the eco-system, human and non-human.

The Water (Crisis Powers and Floodwater Diversion) Bill 2010 could be an important part of resolving the current crisis but, as we have been arguing, it needs to be clear how 'balance' is to be struck; what criteria are used in declaring a crisis; in whose interests decisions are made and by whom and; whether such decisions are reviewable.