GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

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Committee Secretary
Environment, Communications and the Arts Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Secretary

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

Thank you for the invitation to make a submission to the Committee's inquiry into the Water (Crisis Powers and Floodwater Diversion) Bill 2010.

We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

If you have any questions relating to this submission, or if we can be of any assistance to the Consultation Committee, please do not hesitate to contact us.

Yours sincerely,

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Our submission seeks to make two main points with respect to the Water (Crisis Powers and Floodwater Diversion) Bill 2010 ('the Bill'):

1. The Bill, as currently drafted, is problematic in terms of constitutional validity; and
2. The Bill is likely in breach of the Murray-Darling Basin Intergovernmental Agreement ('the IGA') and, in any event, is contrary to the cooperative nature of the existing regulatory scheme.

A The Constitutional Basis for the Bill

The Bill seeks to supplement the existing powers of the Murray-Darling Basin Authority (MDBA) with additional powers that are capable of being exercised in periods of 'extreme crisis' (section 9). These additional powers, set out in Part 3, are of a broad nature, and significantly expand the MDBA's existing authority.

It is highly questionable whether the Bill, as drafted, confers these 'crisis powers' on the MDBA in a manner that is constitutionally valid. Section 4(1) purports that the constitutional support for the extension of the existing powers of the MDBA are those which the Commonwealth enjoys under section 51 of the Constitution, plus any implied legislative powers of the Commonwealth. We agree that these heads of power (which are the same as those which section 9 of the *Water Act 2007* (Cth) also asserts as the constitutional basis for that particular Act), in combination, give the Commonwealth significant legislative capacity in the area of water management.[1] In particular, the powers with respect to corporations and interstate trade and commerce (sections 51(xx) and 51(i)) may empower the federal government to regulate constitutional corporations engaged in irrigation or other forms of water use, and to intervene in water markets. It may be that these powers would be sufficient to enable the Commonwealth to legislate for a special scheme that would operate only during periods of extreme crisis. However, we are not satisfied that the Bill is drafted in a manner that takes advantage of such powers through establishing a clear constitutional connection to them.

Currently, management of the Murray-Darling Basin is supported by the referral of State legislative power, as set out in the IGA and as expressly recognised in section 18E of the *Water Act*. The difficulty with this Bill is that it seeks to augment the powers of the MDBA without regard to the need for further referrals from the States, or for the adjustment of existing referrals. In the absence of clarification of the extent of Commonwealth legislative power, the failure of the Bill to acknowledge the existing scheme's reliance on State referrals raises additional constitutional uncertainty. The Bill's silence on State referrals also contradicts the cooperative nature of that scheme, a point we address in the next section.

The attempt in section 4(2) of the Bill to state 'the basis for the extended application of Commonwealth legislative powers to meet the objects' of the Bill is without constitutional significance.[2] The three justifications offered are political or ecological in character and, however much one may agree or disagree with them in that sense, they cannot affect the scope of the Commonwealth's legislative capacity.

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[1] On the extent of Commonwealth legislative power with respect to the management of water in Australia's rivers, see Paul Kildea and George Williams, 'The Constitution and the Management of Water in Australia's Rivers', Paper delivered at Supreme and Federal Court Judges' Conference, Canberra, 25 January 2010 (see attached).

[2] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 205 (McTiernan J).

B Cooperative federalism and breach of IGA

The other difficulty with the Bill is that it fails to acknowledge or comply with the requirements of the *Water Act 2007* or the Murray-Darling Basin Intergovernmental Agreement (IGA) which supports that Act. In doing so, it undermines the cooperative nature of the existing regulatory framework.

In the referring legislation that supported the 2008 amendments to the *Water Act 2007*, the referring States acknowledged the ability of the Commonwealth Parliament to subsequently 'expressly amend' that Act using the legislative powers it enjoys under the Constitution.[3] They did not refer a power of amendment to the Commonwealth which it could exercise except in accordance with the meaning of 'express amendment', which was defined as follows:

> "express amendment" of the Commonwealth Water Act means the direct amendment of the text of Parts 1A, 2A, 4, 4A, 10A and 11A of that Act or of definitions of terms used in those Parts (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act or by an instrument under a Commonwealth Act, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of those Parts or those definitions.[4]

The Bill risks falling foul of this stipulation by referring States regarding express amendment because it does not purport to directly amend the *Water Act 2007* by the insertion of text, but rather would operate as a standalone enactment that enhanced the powers of the MDBA in periods of 'extreme crisis'. In so doing, the Bill would effectively constitute an amendment of the MDBA's existing powers, as supplemented by the State referrals supporting the parts listed in the above definition, but it would achieve this through 'the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of those Parts or those definitions'.[5] The objection to this is that it would take the Bill outside of the approval process set down in clause 3.5.1(b) of the IGA which provides that:

> the Commonwealth will not introduce or support a Bill that would repeal or amend any referred provision, or a definition used in a referred provision, or make, repeal or amend any referred regulation (the legislative proposal), unless all referring Basin States affected by the legislative proposal first approve the legislative proposal.

Assuming the Commonwealth Parliament possessed legislative power to pass the Bill independently of the State referrals (which we have argued above is uncertain), the failure to comply with the States' requirements would not itself make the Bill invalid. But it would nevertheless constitute a breach of the terms of the underlying IGA under which the States agreed to refer the legislative power necessary for the extensions of the *Water Act 2007*.

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3 *Water (Commonwealth Powers) Act 2008* (NSW), s 4(4).

4 *Water (Commonwealth Powers) Act 2008* (NSW), s 3.

5 For judicial interpretation of an essentially similar provision see *Thomas v Mowbray* (2007) 233 CLR 307, [454].

As the present powers, functions and duties of the MDBA are supported in part by the provisions referred by the States in 2008 (again, see *Water Act* 2007, s18E), this clause would apply to any attempt to further extend them since doing so would constitute an amendment, albeit indirect, of those referred provisions. A failure to secure the agreement of the 'referring Basin States' would be a breach of the IGA.

This likely breach of the IGA highlights a broader problem with the Bill with respect to cooperative federalism. The manner in which the Bill seeks to augment the powers of the MDBA undermines the cooperative approach that has been a hallmark of Basin management since Federation. The Murray-Darling Basin was the subject of the very first intergovernmental agreement in Australia, made in 1914. Since then, the Commonwealth and relevant State governments have continued to address the challenges facing the Basin through cooperative federalism. The 2008 IGA and the *Water Act 2007* continue this practice. This is evident not only in the provisions cited above, but also in the fact that any amendment to the IGA requires a consensus decision of Commonwealth and Basin State representatives on the MDB Ministerial Council (as recognised by section 18C). We submit that this is not just a matter of political nicety. The cooperative approach has been pursued, in part, due to uncertainty surrounding the scope of Commonwealth power and the limitations of State power over such a vast river system. Against this context, the cooperative approach has been considered to be in the interests of all parties because it was seen as the most likely to deliver stability and certainty to the management of the Basin. A Commonwealth-initiated scheme of the sort contemplated by this Bill would almost certainly invite a challenge on the grounds of constitutional validity and, in doing so, place that stability and certainty at risk.

C Conclusion

This Bill is problematic in terms of constitutional authority and appears to ignore the history of efforts to manage and protect the Basin which, from 1914 to 2008, have all demonstrated the inescapable need for collaboration between governments. Given uncertainties surrounding the scope of Commonwealth legislative power in this area, the Bill's aims would best be secured through necessary adherence to that tradition and the pursuit of its goals through, rather than outside of, the existing framework for intergovernmental management of the Basin.