



**MURRAY-
DARLING BASIN
ROYAL COMMISSION**

Commissioner Bret Walker SC

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Dr Jane Doolan
Commissioner
Mr John Madden
Associate Commissioner
Productivity Commission
Locked Bag 2, Collins Street East
MELBOURNE VIC 8003

Sent by email: basin.plan@pc.gov.au

Dear Commissioners

Re: Murray-Darling Basin Plan: Five-Year Assessment, Draft Report

1. I refer to your draft report dated August 2018 following your inquiry this year under s.87 of the *Water Act 2007 (Cth)* (**Water Act**) into the effectiveness of the implementation of the Basin Plan and Water Resource Plans (**Draft Report**).
2. While by no means the only matters of relevance in your Draft Report germane to my Commission, I read with interest your draft findings and recommendations concerning efficiency measures, supply measures and the recent SDL adjustment, the Northern Basin Review, and subsequent amendment to the Basin Plan. I am inquiring into both the merits and legalities of these matters.
3. I read with equal interest your findings and recommendations concerning the current institutional and governance arrangements for the Murray-Darling Basin Authority, which are also matters of relevance to my Commission.
4. I have noted however that your Draft Report does not deal with the following matters:
 - (a) the determination of the “Environmentally Sustainable Level of Take” (**ESLT**);
 - (b) the legality or otherwise of the recent SDL adjustment; or
 - (c) the legality or otherwise of the amendment based on the Northern Basin Review.
5. Part of my Commission has involved receiving considerable evidence about how the ESLT was determined by the MDBA. This has involved considering matters of both fact (what was done, why it was done etc) and law (the proper construction of the Water Act, including the definition of ESLT).

Murray-Darling Basin Royal Commission

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6. Additionally, as well as receiving evidence in relation to factual matters concerning supply measures and the SDL adjustment, I am considering the legality of this adjustment. The same applies to the Northern Basin Review and 70GL amendment to the Basin Plan.
7. I am concerned that your Draft Report does not deal with the matters I have raised in [4] above. Not only would inquiry into them seem to be required by your terms of reference as set out on page v of your draft report, they seem to me to be an essential part of what is required of you pursuant to s.87 of the Water Act.
8. I appreciate that on a very narrow construction of s.87 it may be said that you are directed to only inquire into the effectiveness of the *implementation* of the Basin Plan. However, I presently fail to see how this can be done faithfully to the text of the provision unless inquiry is also made into the matters referred to in [4] above. In short, the effectiveness of the implementation of the Basin Plan appears to me to be inextricably connected to the proper determination of the ESLT (and hence the long-term average sustainable diversion limit), and to the lawfulness of that part of the Plan, and the lawfulness of the SDL adjustment and recent amendment. The Basin Plan cannot be effectively implemented if, for example, important parts of it are unlawful. It also cannot be effectively implemented if the 2750GL originally said to be required to be recovered for the environment in late 2011 does not in fact represent an “environmentally sustainable level of take”. That would totally corrupt the setting of the long-term average sustainable diversion limit for the Basin, and hence corrupt a central component of the Basin Plan itself.
9. I invite you to respond to the matters I have raised above. I do so as I currently consider your inquiry and draft report has been done under a misdirection as to the extent of the inquiry required under s.87. This is a matter I intend to comment upon in my Final Report. It is for this reason that I have raised the matter with you.
10. I would be grateful if you could provide me with any response to the above by Friday, 12 October 2018.

Please don't hesitate to contact the Commission's Senior Solicitor, Ms Joanne Masters (08 8207 1488), should you require any clarification of the above.

Yours sincerely



Bret Walker
Commissioner