

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
ATTORNEY-GENERAL'S DEPARTMENT

**Program 1.1**

**Question No. 60**

**Senator Barnett asked the following question at the hearing on 22 February 2011:**

**Senator BARNETT**—All right. Can you table both those letters [the letter from the CEO of the MDBA of 26 November 2010, and the response of 3 December 2010]?

**Mr Wilkins**—I will take that on notice. It may actually do exactly what Mr Faulkner said we were trying to avoid, and that is disclose constitutional advice.

**Senator BARNETT**—I cannot see how that is possible.

**Mr Wilkins**—Because I think it actually talks about the content of the advice in some of the letters. But let us have a look and see if we can—

**Senator BARNETT**—I cannot see how that is possible if what Mr Faulkner is telling us is correct, that they are not releasing that constitutional advice to the authority.

**Mr Faulkner**—I think the point the secretary is making is that it may have been necessary to describe what was in the advice which we were suggesting ought not be disclosed. Prudence dictates that we just give that some consideration.

**Senator BARNETT**—All right.

**The answer to the honourable senator's question is as follows:**

The letter from the Chief Executive of the Murray-Darling Basin Authority to the Secretary of the Attorney-General's Department is attached. This letter is actually dated 1 December 2010 rather than 26 November 2010; we wish to correct the evidence given to the Committee on 22 February 2010 in that regard.

The Department's reply to the 1 December letter, dated 3 December 2010, is also attached. Two sentences have been deleted from the Department's letter as their disclosure may prejudice the Commonwealth's legal interests.



## Office of the Chief Executive

TRIM Ref: D10/34950

Roger Wilkins AO  
Secretary  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Dear Mr Wilkins

The Murray-Darling Basin Authority (the Authority) has sought advice from the Australian Government Solicitor on economic and social considerations under the *Water Act 2007* (copy **enclosed**) and is currently considering whether or not to release the advice on public interest grounds.

Whilst the Authority did not specifically seek advice in relation to a constitutional law issue, the advice does raise matters relating to constitutional and international law. As you are aware, the legal services directions require the Authority (as an FMA Agency) to consult with the Attorney-General's Department on matters relating to constitutional or international law.

Could your Department please provide advice in relation to the possible release of the enclosed advice.

Yours sincerely

A handwritten signature in black ink that reads "Rob Freeman".

Rob Freeman  
Chief Executive

1 /12/2010

- cc. Dr Paul Grimes, A/g Secretary of the Department of Sustainability, Environment, Water, Population and Communities
- cc. Mr Robert Orr, QC, Chief General Counsel, Australian Government Solicitor



Australian Government  
Attorney-General's Department

Deputy Secretary  
Strategic Policy and Coordination

3 December 2010

Mr Rob Freeman  
Chief Executive  
Murray Darling Basin Authority  
GPO Box 1801  
CANBERRA ACT 2601

Dear Mr Freeman

I refer to your letter to Mr Roger Wilkins AO about the Attorney-General Department's position in relation to the possible disclosure of the advice of 26 November 2010 enclosed with your letter.

You would be aware that, under the Administrative Arrangements Order, the Attorney-General and the Attorney-General's Department are responsible for law and justice. This covers, in particular, responsibility for constitutional law and international law. Under the Legal Services Directions 2005, made by the Attorney-General under the *Judiciary Act 1903*, constitutional and international law advice may be provided to the Government only by the Solicitor-General, the Attorney-General's Department and the Australian Government Solicitor (AGS). Under the Directions, agencies must notify the Attorney-General's Department of all significant legal matters. Agencies must also notify the Department of all requests for constitutional advice and AGS must provide the Department with copies of all constitutional advice it provides. The Attorney-General has a right under the *Judiciary Act* to intervene in any constitutional case in any Australian court.

These arrangements are designed, in particular, to ensure that the Attorney-General and the Attorney-General's Department can properly co-ordinate the Australian Government's engagement with constitutional issues. This is of critical importance because constitutional power is at the heart of the Government's capacity to implement policy. An adverse decision of the High Court in relation to particular governmental action, or a Commonwealth legislative scheme, has the potential to remove altogether the Commonwealth's (and the Government's) capacity to operate generally in an area. It is for that reason that decisions about constitutional risk in relation to the development and defence of particular legislative and administrative programs are of such general importance.

The provision of constitutional advice, whether it relates to proposed legislation, executive action or litigation, is obviously integral to the development of the Government's policy or position on a particular issue. However, for the reasons just outlined, its significance and implications will usually not be limited to the particular case. Such advice represents the Government's view about the Government's capacity to implement policy, not just in the particular case, but in like cases. The general implications of release of even older constitutional advice, relating to arrangements which no longer exist, can be very significant.

[REDACTED]

If thus

exposes not only matters in relation to which the Commonwealth could be expected to claim legal professional privilege in any litigation surrounding this scheme, but matters which may have implications for other schemes supported by the external affairs and other powers.


Any suggestion that these issues may be reduced in significance by release only of the 'summary' advice dated 30 November 2010 would, in my view, be problematic. One obvious risk would be that release of that advice would lead to questions about waiver of privilege in the 26 November advice.

On that basis, we consider that the advice in question should not be released. On the same basis, it would not be appropriate to take the matter further without discussing it with the Attorney-General's Department, as it would be necessary to raise the matter with the Attorney-General. You may be aware that we have previously provided advice in very similar terms to the Department of Sustainability, Environment, Water, Population and Communities.

The action officer for this matter is Jeff Murphy, A/g Assistant Secretary, Constitutional Policy Unit, who can be contacted on 02 6141 3530.

I have copied this letter to Dr Paul Grimes, A/g Secretary of the Department of Sustainability, Environment, Water, Population and Communities.

Yours sincerely

A handwritten signature in cursive script that reads "Renée Leon". The signature is written in dark ink and is positioned to the right of the typed name.

Renée Leon