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Mr Tom Howe QC  
Chief Counsel, Dispute Resolution  
Australian Government Solicitor  
Locked Bag 35  
KINGSTON ACT 2604

**Sent by email: [tom.howe@ags.gov.au](mailto:tom.howe@ags.gov.au)**

Dear Mr Howe

**Re: Murray-Darling Basin Royal Commission**

I refer to your letter of 16 May, advising that the AGS now acts for the Commonwealth and the MDBA.

I note that your clients are considering my letters of 3 May, requesting copies of legal advice relating to construction of the Water Act 2007, and your reference to the long-standing Commonwealth practice not to waive privilege over legal advice provided to the Commonwealth or Commonwealth agencies.

Whilst I note that longstanding practice, I note that the agency to which the advice was given, in this case the MDBA, has revealed to the public at large not only the fact of the advice, but the effect of the advice.

To that end, I invite your attention to the following:

- In a Ministerial Statement issued on 25 October 2010, the Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities was quoted to say that “The MDBA has been reported as saying that the Act requires a focus on environmental issues first, with limited attention to social and economic factors. For this reason I sought legal advice from the Australian Government Solicitor to determine whether the interpretations referred to publicly by the MDBA matched the requirements of the Act.... It is clear from this advice that environmental, economic and social considerations are central to the Water Act and that the Basin Plan can appropriately take these into account.”<sup>1</sup>

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<sup>1</sup> The Hon. Tony Burke MP, ‘Murray Darling Basin Reform – Interpretation of the Water Act 2007’ (Media Release, 5 October 2010), 3.

- In a question without notice to the Hon Tony Burke MP, the Hon Christopher Pyne MP asked, “The chairman of the Murray-Darling Basin Authority [Mike Taylor] has publicly said that he advised the minister for water prior to the release of the guide that the authority’s interpretation of the Water Act put the environment ahead of social and economic factors. If so, why did the minister wait until after the release of the guide to seek his own legal advice?” Mr Burke replied, “When that issue was first raised with me by Mike Taylor in a meeting which I think was held here in Parliament House, I asked the department to consider whether that was also their view.... It was not their view and they spoke to the Murray-Darling Basin Authority, advancing their opinion. There was a difference in opinion between my department and the authority.”<sup>2</sup>
- On 25 October 2010 Minister Burke released to the public an advice obtained from the Australian Government Solicitor and headed “The role of social and economic factors in the Basin Plan”, authored by Robert Orr QC, Chief General Counsel and Helen Neville, Senior General Counsel.
- In a media release issued on 26 October 2010, the MDBA stated that “The Chair of the Authority, Michael Taylor AO, confirmed that the Authority is closely studying the AGS advice released by the Minister [on 25 October 2010] and will clarify with the AGS any divergence between that advice and the position previously advised.” Mr Taylor is quoted to say that “to the extent that this latest advice suggests that the Authority has greater leeway in relation to social and economic considerations than previously advised, we welcome the advice and will certainly take that into account in our further work on the proposed Basin Plan.”<sup>3</sup>
- An article by Lauren Wilson published in *The Australian* on 27 October 2010, titled ‘Lower water cuts on table’, stated that MDBA Chairman Mike Taylor “defended the [MDBA’s] earlier reading of the Water Act -- which he claimed failed to give him enough scope to consider social and economic factors -- saying his authority had sought legal advice from the Australian Government Solicitor every step of the way.... [He] told the Australian the new legal advice [released by the Minister on 25 October 2010] could affect the recommended cuts to water allocation at the lower end of the spectrum. ‘Certainly the range, the bottom end of the 3000[GL], was based on taking only environmental issues into account and we made that quite clear,’ he said. ‘But clearly socio-economic impacts can be considered simultaneously to the environment, (and) that will mean we actually could review that 3000 number down.’”<sup>4</sup>
- A media release issued on 7 December 2010 by the MDBA, in the name of Michael Taylor AO, stated that “The Guide [to the Proposed Murray-Darling Basin Plan] was developed with full regard to the requirements of the Water Act, and in close consultation with the Australian Government Solicitor. However, the Authority has sought, and obtained, further confirmation that it cannot

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<sup>2</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, Tuesday 26 October 2010, 1551.

<sup>3</sup> Murray-Darling Basin Authority (“MDBA”), ‘MDBA welcomes Minister’s Statement’ (Media Release, 26 October 2010) <<https://www.mdba.gov.au/media/mr/mdba-welcomes-ministers-statement>>.

<sup>4</sup> Lauren Wilson, ‘Lower water cuts on table’, *The Australian* (online), 27 October 2010 <<https://www.theaustralian.com.au/national-affairs/lower-water-cuts-on-table/news-story/b34b679313a0575c86833a5f4200c80d>>.

compromise the minimum level of water required to restore the system's environment on social or economic grounds.”<sup>5</sup>

- At a hearing of the Senate Legal and Constitutional Affairs References Committee on 18 May 2011, Mr Rob Freeman, Chief Executive of the MDBA, commented on legal advice the MDBA had received about the meaning of ‘productive base of the water resource’ in the definition of ‘environmentally sustainable level of take.’ He stated that “the authority actually took legal advice on the definition of productive base.... The legal advice that we have is very clear that the productive base is not the economic base of that water resource but actually the broader productive base in both an economic and environmental sense.”<sup>6</sup>
- In an answer provided on 2 June 2011 to a question on notice asked at that hearing on 18 May 2011, Mr Freeman stated, “The Australian Government Solicitor has provided eight advices to the Authority in relation to the role of social and economic factors in relation to the Basin Plan. The advice was provided on 4 December 2008, 15 May 2009, 2 November 2009, 16 March 2010, 15 June 2010, 26 October 2010, 26 November 2010 and 30 November 2010.”
- In its report of 10 June 2011 entitled ‘A Balancing Act: Provisions of the *Water Act 2007*’, the Senate Legal and Constitutional Affairs References Committee recommended “that the Australian Government publicly release the legal advice on the Water Act 2007 provided by the Australian Government Solicitor to the Murray-Darling Basin Authority on 26 November 2010 and 30 November 2010, and any other relevant legal advice, as a matter of urgency”.<sup>7</sup>
- In an article by Peter Hannam in the Sydney Morning Herald dated 2 May 2018, Phillip Glyde, the Chief Executive of the MDBA, is quoted as saying that the MDBA was “aware” of the issues raised about the proper construction of the Water Act in the Royal Commission’s Issues Paper 2, but “considers that the Basin Plan 2012 was developed consistent with the requirements of the Water Act 2007.”<sup>8</sup>
- In the same article, David Littleproud, the Minister for Agriculture, was quoted to say that the Federal Government was also “aware” of the issues raised in Issues Paper 2, and that “The government considers the Basin Plan 2012 including the SDL adjustment instrument have been developed consistent with the requirements of the Water Act 2007.”<sup>9</sup>

In light of the positions shown by these statements, it may be that any entitlement to claim legal professional privilege has been waived by the MDBA. As a matter of policy and substance in any event, the matter at hand would appear thoroughly to justify

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<sup>5</sup> MDBA, ‘Plan for the Murray-Darling Basin – Role of Authority Chair’ (Media Release, 7 December 2010) <<https://www.mdba.gov.au/media/mr/plan-murray-darling-basin-role-authority-chair>>.

<sup>6</sup> Evidence to Senate Legal and Constitutional Affairs Committee, Canberra, Wednesday 18 May 2011, 60 (Mr Rob Freeman).

Commonwealth of Australia, *Official Committee Hansard*, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Wednesday 18 May 2011, 60.

<sup>7</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Provisions of the Water Act 2007*, 16 March 2011, ix.

<sup>8</sup> Peter Hannam, ‘Trust us: Changes to Murray-Darling plan may face legal challenges’, *The Sydney Morning Herald* (online), 2 May 2018 <<https://www.smh.com.au/environment/conservation/trust-us-changes-to-murray-darling-plan-may-face-legal-challenges-20180502-p4zcv.html>>.

<sup>9</sup> *Ibid.*

modifying the longstanding Commonwealth practice. In particular, it may not be fair to the authority and perhaps to both past and present office holders and senior staff of the authority to deny them the capacity to rely on the material in such advices to justify a critical part of their administration of the Water Act.

I would be grateful for your advice by close of business on Thursday, 24 May 2018 in relation to your clients' attitude to providing me with the advices sought, in order that I might consider how best to proceed in that regard.

I invite your office to liaise with my Senior Instructing Solicitor, Joanne Masters, on telephone (08) 8207 1488 to that end.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bret Walker', written in a cursive style.

**Bret Walker SC**  
**Commissioner**

cc: *Ms Kathryn Graham, Senior General Counsel*  
*Kathryn.graham@ags.gov.au*