MURRAY-
DARLING BASIN
ROYAL COMMISSION

Commissioner Bret Walker SC

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Dear Attorney

I am writing to raise with you some important implications of the High Court fixing the hearing of the proceedings brought by the Commonwealth and the MBDA against me (as Royal Commissioner) and South Australia. The hearing has been fixed in the October sittings.

As you would be aware, I have entered a submitting appearance in those proceedings and am taking no active part. However, as the Royal Commissioner, I regard myself as required to act as a model litigant. As well, personally and professionally I am obliged to deal properly with the Court.

The proceedings concern my issue of summonses to some MDBA employees, and for the production of documents from the MDBA and the Commonwealth. In effect, the relief sought against me is to avoid the coercion asserted by those summonses. The purpose, of course, of the summonses was to obtain material that I may use to respond to the Terms of Reference upon which I am required to report.

The summonses to appear to give evidence, particularly, entail requirements of procedural fairness as a matter of law, essential to my lawfully carrying out my duty as Royal Commissioner. Put generally, they will require a decent period of notice to attend (so as to permit, for example, consideration and arrangement of possible legal representation), sufficient time at hearings for applications or arguments about legal representation and the extent of involvement at a hearing by witnesses' lawyers (for example by way of questioning by those lawyers), and most importantly subsequent notification of the possibility of any adverse finding or comment following hearings so as to allow witnesses a reasonable opportunity to make submissions to deflect or answer them.

These requirements of procedural fairness are to be observed according to the particular circumstances, and are in that sense flexible. They cannot be put to one side, however, and so I have tried provisionally to estimate the kind of sequence of events – and especially their timing – on the basis of the minimum provisions that I would consider reasonable.

In the event that the High Court were to find in favour of the defendants, and thus to dismiss the proceedings, the summonses in question may need to be replaced, because their stipulated dates for compliance have long passed. Whether by way of their replacement, or amendment so as to extend those dates for compliance, the intended coercion by the summonses remains as the substantive subject matter of the High Court proceedings. Thus, the case stated for the High Court, in substance, presents a narrative to the effect that I have asserted a coercive power which I intend to enforce, unless I am restrained by the High Court from doing so.

That is the state of affairs which presents a real controversy to be decided by the High Court exercising the judicial power of the Commonwealth. It is fundamental that the judicial power cannot be exercised by way of so-called judicial advice, especially in the sense of matters that are moot or truly hypothetical.

In this case, it would be moot or hypothetical for the Commonwealth to seek to have the High Court rule on a coercive power, in the absence of a real prospect of it being exercised. The present question is whether we have been placed in that position by the effect of the calendar.

The date fixed for the Full Court hearing produces, I think, on my estimate of a reasonable timetable, the practical impossibility of enforcing summonses to the MDBA and Commonwealth. That is because of my duty to ensure procedural fairness, properly prepare for and take evidence from witnesses, deliver a report, and finalise the Commission's work by 1 February 2019. In making this estimate, I have considered but not given much weight to the not unknown but rarely seen possibility of the High Court making orders immediately at the conclusion of a hearing. That is, I have assumed some time, perhaps very short indeed, for the Justices to consider the case before making orders, let alone delivering reasons.

It may be relevant for your consideration of these matters for me to note that the general topic to which the impugned summonses relate is the existence or extent, if any, of a basis in the best available scientific evidence for the critical establishment of the environmentally sustainable level of take and, subsequently, the adjustment of the dependent sustainable diversion limit. These are central elements of the legislated scheme that I am required to consider according to the specific terms of reference.

A deal of evidence and substantial submissions have already been received by the Commission directed to these topics. On my current and necessarily provisional view of these materials, it will be possible for me to report without the benefit of the materials and evidence sought by the summonses in question.

Naturally, I would much prefer to obtain that benefit on two grounds. First, I would much prefer to report having had the benefit of receiving evidence (including documents), from not only the scientists and others who have already given evidence to the Commission, but from relevant people at the MDBA and other Commonwealth agencies such as the CSIRO. The Commission is aware of relevant witnesses who want to give evidence, but are presently unwilling to unless compelled. Second, I would prefer to hear directly from relevant people before drawing inferences about their conduct.

It follows that I am concerned about maintaining in the High Court proceedings the appearance of a continued and real intention by me to exert the coercive effect of the summonses. I cannot see how I could fairly do so and comply with my duty to report on or before 1st February 2019.

The burden of complying with the summonses is such that, if they will not be useful, it would be quite wrong for me to maintain them in force. The only proper course, for me as Royal Commissioner, is to withdraw them as soon as I reach the view that I will not be able to derive assistance from them.

If I withdraw the summonses, including by making clear that I do not intend to replace or extend them, I respectfully suggest that both defendants in the High Court proceedings must immediately inform the plaintiffs and the Court of this occurrence. I expect that it will raise the question whether the proceedings will thereby become moot, so that they cannot continue. I also expect that there is a very high prospect that withdrawal of the summonses will render the proceedings moot in the view of the Court.

The question whether the stipulated date for me (or any substituted Royal Commissioner) to report should be extended is entirely a matter for the Government. If the Government were to decide that an appropriate extension will definitely be made so as to permit fair use to be made of the material and evidence sought under the summonses in question, I regard it as completely proper for the proceedings to continue. On that basis, the proceedings have a solid foundation in that a successful outcome for the defendants would have the utility requisite to the High Court's exercise of judicial power.

If the Government were not to decide to proceed in this way, in my opinion the contrary will be the case.

I regret the timing of matters beyond our control has led to this issue arising, and to its urgency. I have already benefitted greatly from discussions with the Solicitor-General, for which I am very grateful. I would also be grateful if we could discuss the position.

Yours sincerely

Bret Walker
Royal Commissioner