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Ms Kathleen Hainsworth
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SYDNEY NSW 2000

Sent by email: kathleen.hainsworth@csso.nsw.gov.au

Dear Ms Hainsworth

Re: Request for clarification of NSW Government submission & invitation to attend hearings

Thank you for forwarding the NSW Government's submission to the South Australian Murray-Darling Basin Royal Commission dated 22 May 2018.

In addition to that submission, I note your correspondence dated 5 June, 6 June, 21 July and 13 August 2018, purporting to address my requests for additional information of 16 May 2018.

I note that almost nothing in your six page submission, attached papers and subsequent correspondence satisfactorily addresses matters relevant to my terms of reference, with perhaps the exception of some matters concerning compliance, enforcement and metering.

In that regard, I note the express statement on page 3 of the submission that "The State of NSW has no submissions to make in relation to those areas of focus in Issues Paper 1 which concern matters relying upon expert opinion. The State of NSW does not intend to make a submission in response to Issues Paper 2."

I would be assisted in reporting on my terms of reference if the NSW Government would provide me with answers to the attached questions relevant to my terms of reference, noting that in some cases, you are asked to comment on matters touching expert opinion and Issues Paper 2.

As you would be aware, the public hearings for the Commission commenced on 18 June 2018. A great deal of evidence is now before the Commission in the form of sworn testimony, expert reports, written submissions and other documents. Much of the evidence has been called or provided by eminent scientists.

The time for my report is 1 February 2019 (which, with printing time, effectively means my report must largely be finished by early December this year).

All of the questions I have posed are matters in relation to which, I anticipate, the State Government has a ready answer and as such, I anticipate you will be in a position to provide a timely response. Further, they are all matters of importance to this Commission, and are likely to be the subject of comment in my final report.

To that end, and based on the considerable body of evidence now before me (which is available on the Commission's website), the NSW Government should proceed on the basis that the possibility exists that I may reach conclusions adverse to and critical of it in relation to various issues including, but not limited to:

- The setting of the long term average sustainable diversion limit;
- The sustainable diversion limit adjustment mechanism and the associated supply and efficiency measures proposed by the NSW Government;
- NSW progress regarding Water Resource Planning.

Accordingly, I require any written responses to the attached questions to be provided to me in person at a public hearing. An opportunity to appear before me for that purpose will be afforded to the NSW Government in the week commencing 24 September 2018. Simultaneously at that time, I will facilitate any desire of the NSW Government to be heard on these matters. The person who attends should be prepared to respond, either from the bar table, or under oath, to additional questions from both Senior Counsel Assisting and myself.

Please advise my Senior Instructing Solicitor, Ms Masters, by no later than close of business on **Friday, 14 September 2018**, whether or not the NSW Government intends to engage with my questions by attending before me.

Given the public nature of this Royal Commission, I note that this letter, my list of questions and any response by you will be published on the Commission website. That approach is also consistent with the public nature of the State Government's submission.

Yours sincerely

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

Bret Walker
Commissioner

Questions for New South Wales in Response to Submission

1. Does the NSW Government accept that, when enacted in November 2012, the long-term average Basin-wide sustainable diversion limit in the Basin Plan reflected an “environmentally sustainable level of take” as that term should be understood from its definition in the *Water Act 2007* (Cth)? If the answer to this question is yes, please advise me of the scientific basis for that view, noting that the Basin Plan must be developed in accordance with s 21 of the Water Act and, in particular, s 21(4)(a) and (b).
2. Does the NSW Government consider the recent SDL Adjustment of 605GL to be lawful? In answering this question, I would be grateful if you could consider the fact that the adjustment of 605GL has already been made to the sustainable diversion limit, and yet many of the supply measures it is based on are only at a concept stage. In particular, I would be interested to understand the NSW Government’s view as to whether, in those circumstances, a long-term average sustainable diversion limit for the Basin Plan continues to reflect an “environmentally sustainable level of take” within the meaning of that term in the Water Act.
3. Is the NSW Government satisfied that the supply measures comply with the environmental equivalency test outlined in the Basin Plan? If so, please advise me of the scientific basis upon which this view is held.
4. Does the NSW Government have an opinion as to whether the 450GL of so-called “up-water” (see s 7.09 of the Basin Plan) can be obtained through proposed efficiency measures, whether off-farm or on-farm? If so, what is the scientific basis upon which this view is held?
5. In relation to the recent Northern Basin Review which resulted in a 70GL reduction in recovery of water from the environment from 390GL to 320GL in the Northern Basin, does the NSW Government hold the view that the “toolkit” measures outlined in the Northern Basin Review are equivalent to a saving of water of 70GL? If so, please provide me with the scientific basis upon which this view is held.
6. In relation to the recent SDL Adjustment of 605GL under the Basin Plan, neither the Basin Authority nor the states made available to the public or the Commonwealth Parliament the business cases for the supply measures, or the MDBA’s analysis of those business cases, prior to the Senate considering a disallowance motion. Does the NSW Government hold the view that it was appropriate for the business cases and MDBA analysis of those cases:
 - a. Not to be made available to the public generally and if so, on what basis;
 - b. Not to be made available to Senators prior to voting on the disallowance motion and if so, on what basis?
7. In its recently published draft report concerning a five-year assessment of the Basin Plan, the Productivity Commission made the following findings and recommended the following matters upon which I seek your view:
 - a. “The 2024 deadline for supply projects is highly ambitious, if not unrealistic”. Does the NSW Government agree? If not, why not?
 - b. In relation to efficiency measures, “The proposed constraints projects are unlikely to be fully operational by 2024 and may not achieve the required flow rates at key sites to deliver the enhanced environmental outcomes”. Does the NSW Government agree? If not, why not?
 - c. Still on efficiency measures, “there is a material risk that recovering the additional 450GL could be significantly more expensive than anticipated...the benefits and

costs of the program as a whole have not been assessed”. Does the NSW Government agree? If not, why not?

- d. Draft recommendation 5.2 states “the Department of Agriculture and Water Resources should release a new strategy for recovering the additional 450GL in a no-regrets fashion in early 2019”. Does the NSW Government agree that a new strategy is required for recovering the additional 450GL? If not, why not?
- e. As is noted at page 96 of the draft report, recovering water through so-called efficiency measures is significantly more expensive than recovering water through the buyback of water entitlements.
 - i. Does the NSW Government hold the view that further water recovery under the Basin Plan should be by efficiency measures only, rather than the buyback of water entitlements?
 - ii. If so, what is the justification for the significant extra cost to the tax-payer of efficiency measures over buybacks?
- f. At page 113 of the draft report, “the hydro-cues” supply measure is mentioned. As stated by the Productivity Commission: “realising the full benefit of hydro-cues is critically dependent on implementing constraints projects...which are highly unlikely to be completed by 2024”.
 - i. What level of confidence does the NSW Government have that constraints projects will be completed by 2024?
 - ii. If that level of confidence is low, why did the NSW Government support the supply measure at the Basin Officials Committee?
- g. Commencing at page 289, the Commission addresses the issue of “Have institutional and governance arrangements been effective?”
 - i. Does the NSW Government agree with the draft findings at 14.1 (page 300) concerning key deficiencies in institutional and governance arrangements?
 - ii. Does the NSW Government agree with draft recommendation 14.2 recommending a restructure of the Murray-Darling Basin Authority?

SDL Adjustment Mechanism

Menindee Lakes Water Saving Project

8. How did the NSW Government, as a member of the Basin Officials Committee (**BOC**), satisfy itself that the Menindee Lakes Water Saving Project business case met the following criteria required by the *Phase 2 Assessment Guidelines for Supply and Constraint Business Case Measures*:
 - a. 3.1.1 – It will “achieve equivalent environmental outcomes with a lower volume of held environmental water than would otherwise be required”;
 - b. 4.4.1 – It “includes an ecological assessment that is detailed enough to provide a clear picture of the likely ecological benefits of the project, including some quantitative assessment where this is possible”;
 - c. 4.4.2 – “There is a demonstration that any adverse [ecological] impacts can will (sic) be managed, mitigated or are managed to acceptable levels”; and
 - d. 4.7.7 – “All significant operating risks and impacts have been identified and analysed, and robust treatments and mitigations proposed”.
9. Does the NSW Government have a view as to whether the Menindee Lakes Water Saving Project is capable of achieving “equivalent environmental outcomes”, as required by Basin

Plan ss 7.09(b), 7.15(1)(c) and 7.17(2)(a), in light of the fact that “the Menindee Lakes falls outside of the SDLAM framework for testing environmental equivalence.... Any trade-off of environmental outcomes associated with generating water savings at Menindee Lakes will not contribute to lower environmental outcome scores using the Ecological Elements method and therefore is not taken into account in determining the adjustment volume”? See *MDBA Analysis: Menindee Lakes Water Saving Project Phase 2 Business Case*, page 5.

10. The MDBA noted that it “would expect that a qualitative assessment be undertaken to confirm that the net environmental outcomes of the final proposal are environmentally equivalent”: see *MDBA Analysis: Menindee Lakes Water Saving Project Phase 2 Business Case*, page 5. Is the NSW Government aware of any such assessment having been commenced, completed, or made available to the BOC or the MDBA?
11. Why did the BOC decide to include the Menindee Lakes Water Saving Project in its notification of the supply measures package to the MDBA, in light of:
 - a. The large number of issues identified as needing to be resolved or about which “further detail [is] required” as listed at pages 10-11 of *MDBA Analysis: Menindee Lakes Water Saving Project Phase 2 Business Case*; and
 - b. The fact that a Phase 3 Confirmation Statement, which might address these issues, was not approved by the BOC before the notification was made?

Enhanced Environmental Water Delivery Project

12. The Royal Commission has received evidence that the Enhanced Environmental Water Delivery project should not be considered as a supply measure, because it represents an “unimplemented policy measure” in that it implements policies to credit return flows for downstream environmental use and allows the call of held environmental water from storage during unregulated flow events: see Basin Plan s 7.15(2). What is the NSW Government’s response to this?

MDBA Analyses of business cases

13. In relation to the MDBA analyses of business cases:
 - a. When were these made available to the BOC?
 - b. How did the BOC take these into account when assessing the proposals and finalising the package of proposals to be notified to the MDBA?

Implementation of supply measures

14. The Ministerial Council noted in its *Communique: Murray-Darling Basin Ministers meet in Albury* on 19 December 2017 that: “In relation to the implementation of SDL adjustment outcomes, Ministers requested officials finalise negotiations on a new Schedule to the 2013 Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin on agreed implementation arrangements”.
 - a. What is the status of these negotiations, and when does the NSW Government anticipate that the new Schedule will be agreed to?
 - b. What does the NSW Government understand will be included in that new Schedule?

SDL Adjustment Mechanism Process Review

15. The MDBA has published a slide show of a presentation delivered by Brett Tucker, Peter Davies and Graeme Turner titled 'SDL Adjustment Mechanism Process Review', delivered at the SDL Adjustment Technical Workshop on 28 June 2018.
- Has the NSW Government received any documents related to the findings of this review, other than this slide show, that it can provide to the Royal Commission?
 - Slide 14 states that "the SDLAM processes have been followed for all notified projects, however adaptations have been necessary for several complex supply measures where the required activities have thus far prevented resolution of some elements of the evaluation process." What does the NSW Government understand these "adaptions" to the process to have been?
 - Slide 5 states that "final funding for implementation of all projects is contingent upon satisfactory resolution of outstanding issues." What are the specific arrangements that provide for this linking of funding to the resolution of outstanding issues?

Water recovery

16. Does the NSW Government have a position in relation to whether the 1500GL 'cap' on buybacks should remain in place?

Monitoring and evaluation

17. On page 9 of its report titled '*Environmental Assets – 2017 Evaluation*', the MDBA stated:

"Currently, there is no suitable framework outlining how asset-scale information will be consistently reported by the states; nor how the MDBA will aggregate and evaluate asset-scale information to inform future Basin Plan Evaluations. This work should be developed as a matter of urgency in order to optimise consistency of reporting from states..."

And:

"Many of the current monitoring programs at the asset scale were established for a range of purposes and predominantly established prior to the Basin Plan. Therefore, there are not yet explicit linkages to the Basin-wide Environmental Watering Strategy, nor the priority assets and functions to be described in the Long Term Watering Plans.

[It is recommended that the MDBA and states] review alignment of existing asset-scale monitoring programs within the Basin-wide Watering Strategy and Long-Term Watering Plans' objectives and targets as they are finalised."

In relation to this statement:

- Is the NSW Government aware of any work being undertaken to develop a framework outlining how asset-scale information will be reported by the states and evaluated by the MDBA?
- Is the NSW Government confident that its own current monitoring arrangements are sufficient to enable the NSW Government to report on "the achievement of environmental outcomes at an asset scale" from July 2019, as required by Basin Plan Schedule 12 s 8?
- Does the NSW Government have any other comments to make regarding whether the current monitoring and evaluation programs and arrangements are sufficient to enable the states and the MDBA to measure the ecological impact of the Basin Plan?

Socio-economic outcomes

18. In June 2018, the Ministerial Council announced that “in relation to the potential for on-farm infrastructure efficiency measures, state and territory governments and the Commonwealth government will work to develop agreed additional program criteria to ensure neutral or beneficial socio-economic outcomes. Additional program criteria could take into account wider regional impacts and the impact of cumulative implementation of programs”: see *Communique: Murray-Darling Basin Ministers meet in Canberra*, 8 June 2018. In relation to this issue:
- a. What is the NSW Government’s position as to whether the definition of “socio-economic outcomes” should “take into account wider regional impacts and the impact of cumulative implementation of programs”?
 - b. What progress has been made by the Ministerial Council in relation to this work to refine this definition or develop additional program criteria?

Water resource plans

19. Please provide an update as to the status of the NSW Government’s Water Resource Plan development since its submission? What progress has been made since that time?
20. In the context of developing its Water Resource Plans, what steps is the NSW Government taking in relation to:
- a. The connectivity of Water Resource Plans across valleys, and between states; and
 - b. The protection of environmental flows?

Barwon-Darling Water Sharing Plan

21. What are the NSW Government’s intentions in respect of accreditation of the Barwon-Darling Water Sharing Plan, and what progress, if any, has been made in this regard?

Floodplain Harvesting

22. How much storage is likely to be approved for the purpose of granting floodplain harvesting access licences?