SA Dairyfarmers'
Association Inc

8D031

30 April 2018

Mr Bret Walker SC
Royal Commissioner
Murray-Darling Basin Royal Commission
GPO Box 1445
Adelaide SA 5001

Dear Commissioner,

Please accept this letter as the submission of the South Australian Dairyfarmers Association (SADA) with regard to the Murray-Darling Basin Royal Commission.

We understand that while you have all of the coercive and attendant powers of a Royal Commission we seek to offer this submission to assist the Commission with its deliberations through the lens of the dairy industry in South Australia.

The Constitution of the Royal Commission

As a matter openness on our part SADA made critical comments regarding the establishment of the Commission when it was announced by the South Australian Government. We expressed our concern that such a commission would have the effect of limiting public debate at a time that discourse should be at its most pronounced. Major contributors and witnesses who are called to give evidence before Royal Commissions may become more reluctant to speak publicly prior to giving evidence to a Royal Commission or while a Royal Commission is constituted.

Considering the matters which are subject to Senate disallowance motions or broadcast by national media outlets having experts in the sphere of influence feeling free to enter into the public debate is important as they bring temperance and evenness that is all too often absent.

We express full confidence in established authorities, such as the NSW ICAC, Police Force or any other state or Federal instrumentality in their capacity to deal with any alleged criminality within their jurisdictions and we made comment at the time of the 4 Corners Report into the Murray Darling that these events were not sufficient, within themselves, to enliven the justification for a Royal Commission.

Nevertheless, the South Australian Government determined that such a Commission should be formed.

Having made those observations nothing in our statements at the time served to reflect upon the integrity or honour of the Royal Commission that has been established. As we have with existing state and Commonwealth statutory authorities we also express full

confidence in the Royal Commission into the Murray-Darling Basin to do its work comprehensively, promptly and without any pre-established position.

It is with that presumption of integrity that we make our submission as any vehicle to advance the needs of South Australian dairy farmers is an opportunity embraced.

Terms of Reference and Issues Paper.

We note that the Royal Commissioner has seen fit to transmit an Issues Paper to guide submitters into the Commission's work regarding its work.

The Commission points out that the Terms of Reference tend towards a general in nature. SADA agrees with the Commission that an exhaustive exploration of the issued described in the Terms of Reference are beyond the resources and the time frame permitted. Therefore, SADA agrees with the need for an issues paper to refine consideration of the issues.

This refinement however, does preclude SADA from making comments that we would have otherwise sought to make regarding issues that are of import to SADA covering a number of areas.

Stated generally SADA is very, indeed extremely, supportive of the Murray-Darling Basin plan. One of our grounds for reluctance regarding even the establishment of the Royal Commission is the deep uncertainty that these sorts of investigations or reviews inflict upon our members in the lower reaches of the Murray River. It is no exaggeration to say that there are direct and pronounced mental health outcomes on our members arising from this uncertainty. SADA, through its trust body, the Dairy Industry Fund, currently pays for a support worker to attend to the mental health issues of its members who have suffered from stress that have accumulated over a number of years relating to poor outcomes in the dairy industry. A significant part of that stress has been created by ongoing uncertainty regarding the Murray-Darling Basin Plan which is now being read a little like novel Jaws catch phrase, "*Just when you thought it was safe to go back into the water….*"

The Issues Paper

SADA wishes to contribute to the issues paper but will not address all of the matters raised in the Issues Paper (c), (f), (i) and (l) specifically.

(c) Recovery of 450 Gigalitres for Enhanced Environmental Outcomes

Adelaide Desalination Plant (ADP) represents a source of water or up to 100 GL. The Ernst Young report which is currently operating at 8% of its capacity. This usage is merely aimed at keeping the plant ticking over at a minimum usage load.

SADA recently attended a public forum with the Australian Productivity Commission (Renmark 17 April 2018), and raised the issue of the Adelaide Desalination Plant. The presiding APC official was quick to discount the use of the Adelaide Desalination Plant on economic grounds asserting that the expense of such a source of water would quickly preclude it at a recommendation from the Productivity Commission.

Should the Productivity Commission discount the use of the desalination plant as a vehicle for recovery based on the cost argument alone SADA would urge the matter be considered as a genuine proposition for consideration. The rationale behind the Murray-Darling

scheme is not primarily an economic rationale but rather an environmental one. The use of water from the ADP should be used as an offset against South Australia's commitment to returning water in accordance with the Plan.

(f) Views of Indigenous People

With regard to this part of the Plan there are two language groups that have traditional connections to country along the Murray River (Millewa) in South Australia. Those groups are the Meru who have ancestry from what is the South Australian Border to Blanchtown, and the Ngarrindjeri.

SADA makes no observation about the status of the quality of any ownership or asserted ownership by these groups as those matters fall within the ambit of the appropriate state legislatures, regarding traditional ownership as expressed through Land Rights or Sacred or Heritage Sites legislation or within the ambit of the Commonwealth's Native Title Legislation.

SADA notes that provision has been made in Part 14 of the plan for Indigenous uses. We note that, as the Commission has noted in its Issues Paper, paragraphs 30 and 31 of Schedule 1 refers to, "…*spiritual, cultural, environmental, social and economic conditions*…", with regard to Indigenous considerations. We note that in Part 14 (10.52), there is no reference to "economic', considerations when contemplating Indigenous Values and Uses for the Murray's Waters. This is in the opinion of SADA an oversite that should be corrected.

Indigenous people, if they are going to be particularised in the way that they are in the plan, should not be robbed of the opportunities afforded by the plan to participate in the economic common wealth that is the Murray Darling Basin.

SADA would welcome indigenous owned and operated dairies in South Australia along the River Murray.

(i) Constitutional Basis for the Water Act

SADA wishes to make submissions regarding the Constitutional basis for the Water Act with particular comments focussed on the Commissioner's express interest regarding the powers vested in the Constitution to impose obligations on the basin states under the Plan without a s 51 (xxxvii) referral.

The paragraph invites an exploration of the Constitutional powers that are retained by the Commonwealth to make laws for the peace, order and good government of the Commonwealth (s51) and the operation of sections 98 and 100 of the Constitution.

The Constitution also incorporates some restraint on Commonwealth powers. Section 100 of the Constitution deals specifically with Commonwealth power in relation to water, and states:

> *The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.*

Section 100 of the Constitution is not a source of legislative power. It has all of the qualities of a restraint, which potentially places it into conflict with the provisions of s 51. What s 100 provides for is that where the Commonwealth passes a *'law or regulation of trade or*

commerce' which impacts upon rivers or waters, such Commonwealth Legislation must not diminish, the "*reasonable*" use of such water by a State or its residents.

The purpose[1] of s 100 lies in the value of the River Murray to New South Wales, Victoria and South Australia and the residents of those States, and their concerns as to the impact of the Commonwealth's legislative powers under s 51(i) (interstate and overseas trade and commerce) and s 98 (navigation and shipping) of the Constitution. This is reflected in the Federation debates of the time. Indeed s 100 is the product of compromise.

The conventions of 1891, 1897 and 1898 all grappled with this issue with various extreme views being postulated. Water rights were particularly topical during the 1897 convention because of a drought that occurred in Australia during the period of constitutional development. It appears it was an intended of the compromise reached in the federation debates between South Australia, NSW and Victoria.

South Australia's conventional delegates were anxious to have the Commonwealth's powers expanded as far as possible given that the Commonwealth would likely be prevented from passing legislation which was preferential from one state to another. This notion is captured in s 102.

South Australia argued in those conventions, with some success, for the Commonwealth to have power to facilitate trade and commerce, navigation and shipping on the River Murray (s 51(i) and s 98). Clearly there was an advantage to South Australia at the time to have rights regarding shipping when that shipping would need to come via the Murray mouth. New South Wales and Victoria conversely successfully argued for some limitation on this power to protect their 'r*easonable use'* of the water in the River Murray system (s 100).

It is likely that the word "*conservation*", in s 100 as contemplated by the section is more in the nature or retention or reservation by damming rather than the more current use of the word relating to environmental protection as the word has come to suggest in more recent decades. The flavour of the section and the debates of the conventions couched in the language of commerce.

Section 100 will not be relevant to significant aspects of the Water Act that are not laws of 'trade or commerce'. Where it is relevant, it only protects 'reasonable' use, nevertheless, as there only limited case law examining the operation of s 100 it is difficult to determine its merits compared to the head of power relied upon in the Tasmanian Dam case, namely, the external affairs power. S 100 is not a head of power, but rather a restraint regarding trade or commerce.

The Tasmanian Dam case casts little light on the application of s 100 as it only attracted the attention of four judges and of them Mason J was the most considered. His examination contended:

> *The prohibitions in ss 99 and 100 of the Constitution are plainly directed to the Commonwealth, not the States. It is unnecessary to decide whether s 100 guarantees to riparian States and their residents access to the use of the waters for the purpose mentioned or whether it merely imposes a restriction on the power of the Commonwealth when legislating under ss 51(i) and 98. It is however, appropriate to point out that in the form in which it is expressed s 100 does impose a restriction on the*

[1] Mason J noted in *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 154–155,

exercise of the Commonwealth legislative power, one which prevents the Commonwealth by a law or regulation of the kind described from abridging the rights of a State and its residents.[2]

The substance of the Tasmanian Dams Case was settled primarily on the operation of the external affairs powers of the Commonwealth. The established rule of the Tasmanian Dam case was that the external affairs power extended to Australia's treaty obligations being sufficient to enable the Commonwealth to enact legislation that had the effect of overriding the legislative capacity of a State invoking the supremacy provision of s 109.

That is now established law and there are a number of treaties that could be pointed to that would enable to the Commonwealth to legislate regarding the Murray-Darling Basin. These treaties are even referred to in the Murray-Darling Basin Plan. The primary treaty is the 1971 Ramsar Wetland Treaty and the consequential JAMBA, CAMBA, ROKAMBA and Bonn Convention are all referred to in Schedule 8 of the Plan.

Given the open-ended nature of the External Affairs power there is little to suggest that on Constitutional grounds that the Constitution prevents the Commonwealth from acting.

However, there have been a number of observations about the manifest shift in the Federation towards a presumption of ascendency that is being ascribed by the High Court to the Commonwealth. In a dissenting judgement Callinan J in *New South Wales v. The Commonwealth* (*The Work Choices Case*) observed:

There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society.... The Court goes beyond power if it reshapes the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s.128[3]

Other such comments of restraint have been expressed from the bench of the High Court. The expressing of such propositions by Justices of the High Court need be considered as boundaries are placed around decisions that effectively enhance Commonwealth power at the expense of the states.

The reference to the term "*trade or commerce*", has led to a substantial body of Constitutional law surrounding that phrase. *Prima facie*, were the High Court be asked to explore that notion with specific reference to s100, (and related sections), of the Constitution SADA would not hazard to offer any more than an inkling as to how the High Court would resolve such a question. A doctoral thesis, "*Defining Rights, Powers and Limits in Transboundary River Disputes: A legal Analysis of the River Murray*", by Adam Webster,[4] ran to 287 pages on that question. Generally, that document may be read as suggesting that the external affairs power would have ascendency it did not resolve it beyond a conclusion that it is a matter for the High Court.

It is beyond the capacity of SADA to equal or rival that effort. SADA's observations are more of a practical nature.

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[2] Mason J *Commonwealth v Tasmania* (1983) 158 CLR 1, 153

[3] (2006) 81 ALJR 34, 221 [797]

[4] Adelaide Law School University of Adelaide 2014

SADA does seek to address the issue from another more pedestrian, perhaps strategic perspective.

SADA is a strong supporter of the Murray Darling Basin Plan. We do note that in the issues paper the Royal Commission raises the spectre of a Commonwealth take-over of the plan as a consideration. Were the Commonwealth to do so they would be overriding the referral arrangements that are currently being relied upon to make the Plan possible. As explained such an exertion of power by the Commonwealth, if they chose to go down that path, would be most likely an expression of their 'external affairs' power as was the case in the Franklin River in the early 1980's.

Such a step would not have the support of SADA unless the Plan was already going to be aborted by the states. The issue is more complex than the Tasmanian Dams case because of the specific provisions of s100 of the Australian Constitution and there is little guiding case law which means the future of such and attempted takeover is simply uncertain.

Such uncertainty would mean that unless the plan was certain of collapse and the only course of action to save it was Commonwealth intervention, then the existing model with the states involved is preferred. However, a Commonwealth Plan would be better than no Plan.

If the Commonwealth chose to exert such power unilaterally and they lost the subsequent High Court case the Plan would be lost forever. That would represent a substantial blow to South Australia as a whole.

(I) Environmental and Ecological Health of the Murray Darling Basin.

SADA also expects the whole 3,200 Gigalitres to be delivered to the environment.

SADA is anxious to point out to the Commissioner that the farms at the Southern end of the Murray River particularly those farmers below Lock One at Blanchtown in South Australia. These farmers represent, in many ways the canary in the coal mine as far as the commercial users of water are concerned.

SADA is aware that restrictions applied to farms along the whole of the path of the Murray River are subject to restrictions under the Plan. Nevertheless, problems with water flow would become more apparent and sooner, with that group than any other group along the length of the Murray-Darling Basin.

We appreciate and accept that the 3,200 Gigalitres are aimed at supporting the environment and we make no claim against that water, but if there was less than the expected amount of water it is the farmers of the lower Murray and Lakes that would notice it first.

To date there have been 74 Scientific reports across the Basin in support of the Plan. Of those 74, eight have been conducted in the Coorong and Lakes at the end of Murray. Consequently, we at SADA, appreciate that there is much scientific work available to support the Plan the value of daily monitoring and observations by those who observe the river on a daily basis cannot be overstated and a system of communication with irrigators and farmers in South Australia be established to assist with the ongoing monitoring of the

Suggested Recommendations

- The full 3,200 G/L should come down the river.
- The use of the Adelaide Desalination Plant form part of SA's commitment to the Plan.
- That as part of overall monitoring the Murray-Darling Basin Authority regularly consult and communicate with primary producers below lock one with a view to full time daily reporting regarding conditions and issues relating to the River Murray.
- The word "economic", where appropriate, should be added to the provisions of the Plan with reference to indigenous people in Part 14 (10.52) of the Plan.

If you wish to discuss this response please don't hesitate to contact me via the office number .

Yours sincerely,

John Hunt
President SADA