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Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committees
Parliament House
Canberra ACT 2600

Dear Ms Dennett

Inquiry into the Provisions of the Water Act 2007

Please find attached my submission to the Committee's inquiry into the provisions of the *Water Act 2007*. I apologise for the late in submission. I found it necessary to commission legal advice on aspects of the Water Act as they relate to the ACT which is attached to the submission.

I note the Committee is planning a public hearing in Canberra on 18 May and would welcome the opportunity to appear there and discuss in much of the discussion on the Water Act and the Murray Darling Basin Plan.

Yours sincerely,

Vicki Dunne MLA

Submission to
Senate Standing Committee on Legal and Constitutional
Affairs

Inquiry into the Provisions of the *Water Act 2007*

by

Vicki Dunne MLA

Member for Ginninderra and Shadow Attorney-General
and Shadow Minister for Water in the Legislative Assembly
of the Australian Capital Territory

Introduction:

I welcome the opportunity afforded by the Committee's inquiry to address the gaps and ambiguity in *The Water Act 2007* (the Act).

In order to confidently develop a Plan for the Basin these issues must be addressed. We need to decide once and for all whether, under the Plan, the environment must take priority or whether there can be a balancing of economic, environmental and social factors. In addition to these more frequently discussed issues, we believe that there are factors that are unique to the Australian Capital Territory (ACT) which should be addressed by the Committee during this Inquiry.

The Murray Darling Basin Plan will have huge economic and social implications for the ACT. Successive territory governments have had a strong commitment to water resource management, water conservation and the maintenance of water security for the nation's capital. The ACT is not just the home of 350,000 Australians and an important regional centre, but the national capital and the seat of the Australian government. The development of a plan for the Murray Darling basin and its impact on the ACT is not only a matter of vital importance for Canberrans but is also of significant interest to the Commonwealth Parliament.

The ACT is the only jurisdiction that lies solely within the Murray Darling Basin. Canberra is the largest city in the basin and the seat of Government. Its water use is overwhelmingly urban, unlike other jurisdictions which mainly use water from the basin for agricultural purposes. The unique nature of the ACT and its legal underpinning has been ignored by the Act and the Murray Darling Basin Authority in the preparation of *Guide for the Murray Darling Basin Plan* (the *Guide*). The failure to take account of these unique factors must be addressed by amendment to the Act.

This submission contends that the Act needs to be amended to ensure the future water security of the ACT for its national capital purposes and its

regional role. The issues raised in this submission have gone largely unreported because most of the analysis of the *Guide* has been of the impact on agricultural uses rather than on urban areas where the capacity of further water efficiency is constrained.

The ACT and its water resources and their legislative underpinning:

Water has always been an important factor in the ACT. One of the major criteria for the selection of the site for the ACT was access to abundant water supplies. When the seat of the Commonwealth Government was established under s125 of the Constitution, the *Seat of Government Acceptance Act 1909* (Cwlth) and the *Seat of Government Surrender Act 1909* (NSW) marked out the boundaries and established the basic parameters for the operation of the Territory, including paramount rights (Schedule 1) to the waters of the Queanbeyan and Molonglo Rivers for Territorial purposes. An example of this principle in action is that the Commonwealth (in 1979) built the Googong Dam in NSW to provide water supply for the city of Canberra.

The *Australian Capital Territory (Self Government) Act 1988* (Cwlth) gave the ACT responsibility for a range of issues including water resources. Since self-government in 1989 there has been extensive work done by territory governments to secure and better husband our water resources. This includes the Water Resources Acts (ACT) of 1998 and 2007 and their associated water resources management plans and improved environmental flows. Action by Canberrans over the last 20 years has already seen reductions in per capita urban water use which is unrecognised in the *Guide*.

The recent, prolonged drought has prompted a \$500million investment in water supply augmentation through:

1. the enlargement of the Cotter Dam on the Cotter River which is currently under construction;
2. the Murrumbidgee to Googong Transfer Pipeline;
3. the transfer of water from the Cotter River system to Googong Dam through existing infrastructure; and
4. the purchase of water entitlements from Tantangara Dam.

Successive territory governments have worked with, and eventually become part of, the management of the Murray Darling Basin. The ACT became a full voting member of the Murray Darling Basin Commission in 2008. Each territorial government has recognised the importance of the ACT's role in the basin because we are, uniquely, located entirely within the basin and dependent entirely on the waters of the basin.

In 2008 the ACT also became subject to a cap on surface water extraction under the Murray Darling Basin Agreement. The current cap allowed the ACT to take 40 gegalitres (GL) of water per year net out of our rivers and to accrue annual credits or debits. The cap also had a modest growth factor to allow for population increases.

I have commissioned a legal opinion, *The Seat of Government Acceptance Acts, the Self Government Acts, the Murray Darling Basin Management Acts and the water supply of the ACT* (the opinion) (attached), which canvasses at length the complex interrelationship between these pieces of legislation and concludes that this has been overlooked in the drafting of the Act and the compilation of the Guide.

The Guide for the Murray Darling Basin Plan and its impact on the ACT

While a detailed analysis of the implications of the *Guide* is not within the remit of this Committee, it is necessary to give a brief outline of its impact to give some context to this submission.

Canberra is the largest population centre in the Murray-Darling Basin (with 17.5% of the basin's population), but extracts only about half of one per cent of the Basin's water.

The long-term average inflows in the ACT are 490 GL annually, with about half that legislated for environmental flows. There is minimal ground water use in the ACT. The ACT has long been a very frugal user of water. The ACT's long-term extraction of water is in the vicinity of 70GL/year for urban and agricultural uses with 30GL/year returned to the Murrumbidgee after use and treatment via the Lower Molonglo Water Quality Control Centre. It is estimated that there is another 10GL/year extra run-off because of Canberra's built form.

In summary, the ACT diverts 14% of its water resources and then returns about 6% of that water back into the environment.

In setting this policy for the ACT, the Authority:

1. Treated the ACT the same as the rest of the Murrumbidgee catchment despite having a different economic, social and economic profile;
2. Ignored Canberra's role as the seat of government
3. failed to recognise the critical human water needs of the ACT as required under the Act;
4. failed to include the ACT in any of their socio-economic analysis;
5. did not recognise the recently established cap for the ACT;
6. failed to recognise the substantial improvements in water efficiency already achieved by the ACT.

Despite the ACT being a separate jurisdiction with quite distinct water uses and needs, the Guide sets the sustainable diversions for the ACT as part of the entire Murrumbidgee catchment and proposes a 34% to 45% reduction in diversions to 21-26 GL/year. While the ACT has a record of increasing water efficiency, cut backs in urban water use of these proportions cannot be sustained without huge economic loss.

The effect of the implementation of the plan as currently proposed in the *Guide* would be to permanently plunge the ACT into permanent stage 3 or

even stage 4 water restrictions. Also, despite investing \$500million in water security projects, the ACT community would be unable to use the water in storage if the proposed cut in sustainable diversion limits were implemented.

The Act and the Guide: an ACT perspective

I will firstly address some of the more frequently raised issues in relation to the Act before dwelling on the issues that are uniquely relevant to Canberra.

The first of the Inquiry's terms of reference is to consider whether there are ambiguities that would "...prevent a Basin Plan from being developed on an equally weighted consideration of economic, social and environmental factors".

To this end this submission strongly endorses the submission from the Gilbert + Tobin Centre of Public Law, University of NSW to this Inquiry because it makes clear that irrespective of what may have said in discussion and in COAG agreements, the Act places environmental uses of the river system as the overriding concern.

The important element in the legislation is Section 21 which outlines the general basis on which the Basin Plan is to be developed. The first three subsections refer to Australia's international agreements, biodiversity, conservation etc. It is not until subsection 4 that there is any mention of socio-economic analysis, and even then there is still no mention of managing water for economic or social outcomes. This sections makes it clear that environmental outcomes are the priority for the Plan.

There has been considerable reliance by commentators who oppose the amendment of the Act that this needs to be read through the prism of the Objects in Section 3 which says, *inter alia*, that the Act must operate:

- in the national interest (S3(a));
- to give effect to relevant international agreements(S3(b)); and
- to optimise economic, social and environmental outcomes (S3(c)).

There is a contradiction between the clear process at Section 21 and the Objects which must be addressed especially because the operative clauses have more weight than an object clause.

The Commonwealth Parliamentary Counsel's website (www.pcc.gov.au/pccconf/papers/8-Paul-Lanspeary.pdf) provides a useful exposition on objects clauses which is worth quoting at some length for the Committee

Using objects clauses in drafting

45. Objects clauses have a legitimate role in promoting a purposive approach to interpretation. ... However, **drafters cannot rely on objects clauses to cover shortcomings in operative provisions.** Any perceived

inconsistency between the meaning of an operative provision and an objects clause will be resolved in favour of the operative provision....

47. Another potential misuse of an objects clause is as a description of the features of the legislative scheme in question. ...

48. An objects clause should focus on promoting a purposive approach. They should be used to guide the interpretation of the legislation. Ideally, they should be short and simple. Adding other material may obscure the message and could lead to confusion about what the purpose really is.

It is clear from this that objects clauses are not and should not be considered a catch-all or fix for shortcomings elsewhere in legislation. In the Act under consideration case, reliance on Section 3(c) is not sufficient to ensure that economic and social factors can have equal weight in the final Plan. Further it is the general view of the Parliamentary Counsel that there is a risk that a contrary assertion could be read down by a court.

The clear emphasis on the environment over social and economic factors in the Act means that, in the case of the ACT, there is that no recognition of the impact on the ACT's Seat of Government function or economy that would be caused by the substantial reductions in diversions proposed under the Plan.

RECOMMENDATION:

That the Act be amended to raise in prominence the need to optimise the economic, environmental and social outcomes under Plan, so that all three are recognised as equally important.

One element of the *Guide* that has been largely overlooked in the commentary is that entire catchments are treated in an entirely undifferentiated way. The Authority has selected entire catchments as *water resource plan areas* for the purposes of the Act. In doing so it could be said that it has taken a one-size-fits-all approach and has not looked at the gross, let alone the fine-grained, variations across catchments. This is nowhere more obvious than in the ACT.

As stated above, the ACT has high levels of legislated environmental flows and low diversions. In addition, more than 80% of the ACT's modest diversion is for urban use compared to a basin-wide average of 4%. In addition the ACT, which supports high levels of population with very low water use, is treated the same as the rest of the Murrumbidgee catchment. Further the *Guide* excludes the ACT from any of its modelling because it was believed that its inclusion would skew the results.

RECOMMENDATION:

That the Water Act 2007 be amended to require the Authority, in developing the Plan, to separate the different uses and different diversion rates across sub-catchments.

That the Water Act 2007 be amended to ensure that socio-economic modelling is done on a subregional level and not just on a Basin-wide basis.

The major matter that this submission brings to the attention of the Committee is the failure of the Act and the *Guide* to take into consideration the unique position of the ACT and Canberra in the nation and in the Basin.

As stated above, I have commissioned advice from KM Corke and Associates, an ACT-based public policy and administrative law consultancy, on the interaction of the Act with the range of legislation and agreements that underpin the ACT's water supply and security.

The Advice is self-explanatory and in summary concludes that "... for the reasons recognised in 1909, the *Water Act* must be amended to remove any doubt that the critical water needs of the ACT are, if not 'paramount', must certainly be assured, notwithstanding any other provision contained in the *Water Act*, in much the same way as the Commonwealth has used the National Capital Plan to protect the water needs of Canberra."

RECOMMENDATION:

That the Water Act 2007 be amended to make clear the critical water needs of the Australian Capital Territory are protected in the same way they were in 1909.

K.M. Corke and Associates

Analysis and Design of Legislation - Submission to Parliamentary Committees
Advice on Law Reform and Changes to Administrative Practices

KMC

**The Seat of Government Acceptance Acts, the Self
Government Acts, the Murray Darling Basin
Management Acts and the water supply of the ACT**

April 2011

THE SEAT OF GOVERNMENT ACCEPTANCE ACTS, THE SELF GOVERNMENT ACTS, THE MURRAY
DARLING BASIN MANAGEMENT ACTS AND THE WATER SUPPLY OF THE ACT

SUMMARY OF ADVICE

The seat of government acceptance acts

The phrase *the right of the State or of the residents therein to the use and control of the waters of the Queanbeyan and Molonglo Rivers and their tributaries which lie to the east of the Goulburn to Cooma Railway subject and secondary to the use and requirements of the Commonwealth (which are hereby declared to be paramount) for all the purposes of the Territory* contained in clause 4 of the Agreement between NSW and the Commonwealth annexed to the *Seat of Government Acceptance Act 1909* should be read as restraining NSW from land use decisions prejudicing the ACT's access to water from the relevant sources.

Such a reading would be consonant with the way the preamble to the *Canberra Water Supply (Googong Dam) Act 1974* is presented and reflects the structure of the Cross Border Water Resources Agreement.

It should finally be noted that the 'paramount' provision contained in the 1909 agreement in any event only relates to the waters of the Molonglo and the Queanbeyan rivers and **not** to the water resources of the Cotter River or any other water source located on what is now known as Territory Land.

The self government acts

The ACT Executive acts as a delegate of the Commonwealth for the purposes of the administration of the Googong Dam and has otherwise had 'passed' to it responsibility for water on territory land.

That said, the Commonwealth:

- (a) has a residuary capacity to influence how the Territory can control water resources through the dominance of the National Capital Plan within the ACT self – government structure, discussed in Part 3 of this paper; and
- (b) has exercised it through the publication of Part 12.3(d) of the National Capital Plan (and reflected in the Cross Border Resources Agreement).

The Murray – Darling Basin Management Acts

The self – government concept attempts to treat the ACT to be, as far as practicable, a state of the federation.

The structure of the *Water Act 2007* clearly treats the ACT as a state, as evidenced by the structure of the definition of what is a 'basin state':

Basin State means the following:

- (a) New South Wales;
- (b) Victoria;
- (c) Queensland;
- (d) South Australia;
- (e) the Australian Capital Territory.¹

This means that there is an expectation that the ACT, as a Basin State, will have to manage its water resources in a manner consistent with the policy direction created by the provisions of the *Water Act*.

This poses challenges to the ACT.

¹ Section 4 of the *Water Act*

The Interaction between the seat of government acceptance, self government and Murray – Darling basin management suites of legislation

The interaction between the seat of government acceptance, self government and Murray – Darling basin management suites of legislation does not create a special requirement on the Commonwealth to make special arrangements for the ACT irrespective of the downstream needs of the Murray – Darling river in economic, conservation or social terms.

However:

- (a) the *Constitution* designates a need for the creation of a seat of government within NSW;
- (b) a choice was made to create a new city;
- (c) the new city was located in an inland area with low rainfall;
- (d) the land surrendered by NSW and the conditions imposed on the land use choices around Googong imposed by the 1909 agreement was intended to ensure the legitimate water needs of the Territory are protected; and
- (e) as is evidenced by the design of the National Capital Plan and the execution of the Cross Border Water Agreement, there is an acceptance the Commonwealth still has a role in ensuring the legitimate water needs of the ACT.

It follows that for the reasons recognised in 1909, the *Water Act* must be amended to remove any doubt that the critical water needs of the ACT are, if not 'paramount', must certainly be assured, notwithstanding any other provision contained in the *Water Act*, in much the same way as the Commonwealth has used the National Capital Plan to protect the water needs of Canberra.

**THE SEAT OF GOVERNMENT ACCEPTANCE ACTS, THE SELF GOVERNMENT ACTS, THE MURRAY
DARLING BASIN MANAGEMENT ACTS AND THE WATER SUPPLY OF THE ACT**

TABLE OF CONTENTS

Historical background 8

The seat of government acts and the Googong Dam Act 12

The self government acts 15

Other government agreements 18

Cross Border Water Resources Agreement..... 18

Murray – Darling Basin Agreement 21

Discussion and conclusion 25

The seat of administration suite of legislation and ACT water resources..... 25

The self government suite of legislation and ACT water resources..... 27

The Water Act 28

Conclusions 30

**APPENDIX 1 – Extract from the Summary of Legislative Responsibilities – Cross Border
Water Supply Agreement Between the ACT and NSW..... 32**

**APPENDIX 2 - Submission to Senate Standing Committee on Legal and Constitutional
Affairs inquiry into the Water Act 2007 from Gilbert + Tobin Centre of Public Law,
University of NSW (Submission 15)..... 37**

**THE SEAT OF GOVERNMENT ACCEPTANCE ACTS, THE SELF GOVERNMENT ACTS, THE MURRAY
DARLING BASIN MANAGEMENT ACTS AND THE WATER SUPPLY OF THE ACT**

Historical background

1.1 Section 125 of the *Constitution* says:

125. The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor. The Parliament shall sit at Melbourne until it meet at the seat of Government.

1.2 A number of sites were examined for suitability to be selected as the national capital.

1.3 Canberra was selected. A principal reason was the availability of water to support the creation of a new administrative capital.

1.4 The Murray – Darling Basin Commission (the body preceding the Murray – Darling Basin Authority) suggested:

The availability of water played a major role in the selection of a location for the Australian Capital Territory (Pegrum 1983, 129-149). This is why the ACT includes the Cotter River catchment and why, under the Seat of Government Act 1908, the ACT has

paramount right to the water in the Molonglo and Queanbeyan rivers, which New South Wales is required to protect for the use of the ACT..²

- 1.5 One of these reasons for seeking paramount water rights was the insistence of Charles Scrivener, the surveyor of the site selected to be the ACT:

During a series of conferences with NSW government staff over the shape of the seat of government territory, the Commonwealth also heeded Scrivener's advice about water supply. New South Wales retained the town of Queanbeyan, the mines at Captains Flat and the Cooma-Bombala railway which became the eastern boundary of federal land, Water catchment boundaries were shifted to take in the Gudgenby and Naas Rivers instead of the Queanbeyan River and the entire territory was surrendered to the Commonwealth in October 1909..... At Scrivener's insistence, the Commonwealth claimed all water rights to the Queanbeyan River catchment. Googong Dam has since been constructed on the site he suggested and serves as Canberra's main water supply...³

- 1.6 This technical advice support's Scrivener's prudence:

During the site-selection process (1899-1909), the establishment of a water supply for Canberra was seen as paramount. The source had to be identified, and infrastructure designed and built, before other major works could proceed. The boundary of the ACT was drawn to enclose the water catchments of the Cotter and the Gudgenby-Naas rivers. The catchment of the Queanbeyan River was not included in the ACT (see §4.1.2, below) and access to the waters of the Murrumbidgee River was excluded. The process of "securing Canberra's water supply" determined the Territory's actual size, shape, topography, hydrogeology and ecology—and so determined its long-term carrying

² Part 2.1.1 of Chapter 5 of *Managing the Murray-Darling Basin – Murray Darling Basin e-resources 2005* http://www2.mdbc.gov.au/subs/eResource_book/chapter5/p2.htm accessed 2 April 2011. The work drew from Pegrum, R. (1983) *The Bush Capital: How Australia Chose Canberra as its Federal City* Hale & Iremonger Ltd, Sydney.

³ *Finding a Site for Australia's 'Seat of Government'* published in *National Library of Australia News* December 2006 p.10

capacity. A large proportion of the land area of the ACT is steep and characterised by poor soils—water catchment terrain that is unsuitable for agricultural pursuits.

These early decisions have resulted in the creation of a community that does not have the resource base to be self-supporting. The Commonwealth seat of government could have been constructed within an existing viable city (as has been typical in other countries). Furthermore, such an approach would have minimised infrastructure and other development costs and would have isolated the Commonwealth from issues related to the maintenance and development of the host city. But the construction of a new city in an inland area of low rainfall, necessitated a relatively large area of land and has led to high infrastructure and development costs.⁴

1.7 This is also noted:

When the boundary of the ACT was established in 1909, it did not enclose the neighbouring township of Queanbeyan or the Queanbeyan River catchment. There were two reasons why the NSW town and the catchment were excluded from the federal territory. The first was the strong belief in States' rights on the part of many delegates to the Constitutional Conventions in the 1890s. This attitude resulted in a general reluctance to give the new Commonwealth more territory and resources than was deemed necessary. The second reason, argued by a Senator from Western Australia, was that the expense of buying the freehold property of an established town (Queanbeyan) would be enormous (Brennan 1971:23). It was believed that a more economical proposition was to deal, as far as possible, with Crown Lands and unimproved rural freehold land.

Even though Queanbeyan remained outside the ACT, the security of Canberra's water supply was increased by inclusion of the waters from the Queanbeyan and Molonglo River catchments. The Commonwealth was given right to the water from these catchments "to provide an auxiliary source of water power". The *Seat of Government Act, 1909*, reflected this decision. Later, in 1926, Queanbeyan was connected to the ACT reticulated water-supply system. In 1973, with construction of Googong Dam, the

⁴ ANU and ACTEW *Catchment and Community: Towards a Management Focused Dynamical Study of the ACT Water System (2006) p.17*

Commonwealth exercised its right to use the water of the Queanbeyan River. However, the Commonwealth has no jurisdiction over land-use practices in the catchment, which lies wholly in New South Wales.

The seat of government acts and the Googong Dam Act

- 2.1 The seat of government suite of legislation is the legal mechanism establishing the ACT.⁵
- 2.2 The *Seat of Government Acceptance Act 1909* (Cth) incorporates by annexure the agreement between NSW and the Commonwealth (**the 1909 agreement**) in which that portion of NSW surrendered by NSW to create the ACT was identified.
- 2.3 A number of the clauses impose a number of requirements on NSW, including granting the Commonwealth the right to:
- (a) build a railway from the ACT to Jervis Bay; and
 - (b) use the Snowy River to generate electricity (and to get the electricity to the Territory) for the use of the seat of government.⁶
- 2.4 However, relevant to this advice the most important clauses are clauses 2 – 4, which read:

2. The right of the State or of the residents therein to the use and control of the waters of the Queanbeyan and Molonglo Rivers and their tributaries which lie to the east of the Goulburn to Cooma Railway **shall be subject and secondary to the use and requirements of the Commonwealth (which are hereby declared to be paramount) for all the purposes of the Territory**, and the State shall consent to the construction by the Commonwealth in the State of such works as are necessary for those purposes.

⁵ The *Seat of Government Act 1908* declares the Commonwealth Government's decision to make the Yass – Canberra area the place of the seat of government. The *Seat of Government (Administration) Act 1910* deals with which NSW laws continued after the creation of the ACT and creates an ordinance making power for the Governor-General. The *Seat of Government Act 1922* makes amendments to the NSW – Commonwealth agreement establishing the seat of government not relevant to this discussion

⁶ Clauses 7 – 10 of the Agreement

3. The State shall reserve from sale, lease, and occupation (except with the concurrence of the Commonwealth) all Crown lands within the catchment areas of the Queanbeyan and Molonglo Rivers.
4. The State shall not pollute and shall protect from pollution the waters of the Queanbeyan and Molonglo Rivers throughout their whole course above the Territory.

(Emphasis added)

2.5 It is further noted the preamble to the *Canberra Water Supply (Googong Dam) Act 1974* (Cth)

WHEREAS the Agreement dated 18 October 1909 made between Australia and the State of New South Wales and set out in the First Schedule to the *Seat of Government Acceptance Act 1909-1973* provides for the surrender by that State and the acceptance by Australia of certain territory described in clause 1 of that Agreement, being the territory now known as the Australian Capital Territory:

AND WHEREAS that Agreement also provides, amongst other things, that the right of the State of New South Wales or of the residents therein to the use and control of the waters of the Queanbeyan and Molonglo Rivers and their tributaries which lie to the east of the Goulburn to Cooma Railway shall be subject and secondary to the use and requirements of Australia (which are thereby declared to be paramount) for all the purposes of the Australian Capital Territory and that that State shall consent to the construction by Australia in that State of such works as are necessary for those purposes:

AND WHEREAS it is desirable, for the purpose of ensuring an adequate supply of water to the Australian Capital Territory, to construct a dam and other works for the storage and conveyance of the said waters of the Queanbeyan River:

AND WHEREAS Australia has acquired, for the purposes of the construction of such a dam and other works, certain land in the State of New South Wales referred to in this Act as the "Googong Dam Area";

BE IT THEREFORE ENACTED by the Queen, the Senate and the House of Representatives of Australia, as follows:

The self government acts

- 3.1 The passage of the self government acts during 1988 conferred on the ACT responsibility for water resources as well as Territory Land as defined in the *Australian Capital Territory (Planning and Land Management) Act 1988*.⁷
- 3.2 The Corin, Bendora and Cotter Dams are on Territory land.
- 3.3 Section 25 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (the **planning and land management act**) requires the ACT to establish a Territory Plan.
- 3.4 Subsection 25(2) and section 26 of the planning and land management act provides that the Territory Plan cannot be inconsistent with the National Capital Plan.
- 3.5 Part III of the planning and land management act requires the Commonwealth Minister with administrative responsibility for the act to make the National Capital Plan.
- 3.6 Part 12.3(d) of the National Capital Plan says:
- (d) Subject to any future Commonwealth Government policy decisions on the matter, waters over which the Commonwealth has paramount rights shall be supplied only to users within the ACT and the presently gazetted area of Queanbeyan.⁸

⁷ Section 37 and Schedule 4 to the *Australian Capital Territory (Self-Government) Act 1988*

⁸ Page 133 of the *National Capital Plan*

3.7 Section 4 of the *Canberra Water Supply (Googong Dam) 1974* provides:

4 Functions of the Executive

Subject to this section, the Executive may, **on behalf of the Commonwealth**, carry out, either alone or in association with other persons, the planning and provision of a dam, pipelines and other works and facilities for:

- (a) the collection, diversion and storage of water in the Googong Dam Area;
- (b) the conveyance and supply of water from that Area for use in the Territory or in a place that is the subject of an agreement under subsection 12(2) for the conveyance and supply of water;
- (c) the treatment and purification of water supplied or to be supplied from that Area; and
- (d) the prevention of the pollution of water supplied or to be supplied from that Area;

and of works and facilities for the accommodation in that Area of persons employed by the Territory or by a Territory authority in connexion with the protection or regulation of that Area or with the operation and maintenance of any such dam, pipelines, works or facilities in that Area.

3.8 Under the self government legislation there is no overriding executive power of direction reserved to the Commonwealth. The Commonwealth therefore has no statutory power to direct the ACT in relation to water resources under the control of the Territory other than water on or under National Land.

- 3.9 It follows that even though the ACT Executive is responsible for Googong Dam 'on behalf of the Commonwealth' it does not mean the Commonwealth Executive could direct the ACT on how to manage the Googong's resources.
- 3.10 The NSW, Commonwealth and ACT governments published a document entitled *Summary of Legislative Responsibilities – Cross Border Water Supply Between the ACT and NSW*, which satisfactorily discussed the effect the self government suite of legislation has on the administration of ACT water resources. A relevant extract is contained in **Annexure 1**.

Other government agreements

Cross Border Water Resources Agreement

- 4.1 This agreement governs how the ACT supplies water to Queanbeyan.
- 4.2 The memorandum of understanding executed for the agreement reads:

2 PREAMBLE

- 2.1 Under the *Seat of Government Acceptance Act 1909* (Cth), the Commonwealth gained the land and water now comprising the Australian Capital Territory (the ACT) and paramount rights to certain waters of the Queanbeyan and Molonglo Rivers in New South Wales (NSW). The waters of the Queanbeyan catchment were subsequently specifically developed through the construction of Googong Dam for paramount supply of water for the ACT.
- 2.2 Control of the waters of the Googong Dam is vested in the Territory Executive by the *Canberra Water Supply (Googong Dam) Act 1974* (Cth). However the prior agreement of the Commonwealth and NSW is required for any supply of Googong Dam water to a place in NSW. New developments in NSW are subject to planning approval under laws of the State.
- 2.3 In 1999/2000, the then Minister for Territories, Senator the Hon Ian Macdonald, stated that no additional supplies of Googong Dam water could be provided to any new development in NSW without an agreed strategy for integrated water supply. It is sensible to consider the supply of water from ACT dams and Googong Dam as one supply.

4.3 Clause 6 of the Agreement reads in part:

6 ADDITIONAL SUPPLY OF ACT WATER TO NSW

- 6.1 The Territory and the State will, by written agreement between them, subject to agreement by the Commonwealth and NSW consistent with S12(2) of the *Canberra Water Supply (Googong Dam) Act 1974*, agree to the supply of ACT water, where:
- 6.1.1 such supply is to service population growth over the next 30 years in the ACT-NSW cross border region as expressed from time to time in the Canberra Spatial Plan, the Territory Plan and the ACT/NSW Cross Border Region Settlement MoU; and
 - 6.1.2 such additional areas are consistent with developing the National Capital as a compact and sustainable city;
 - 6.1.3 the provision of such supply would be in accordance with the settlement principles contained in the ACT/NSW Cross Border Region Settlement MoU, as amended from time to time;
- 6.2 The Parties will work cooperatively together to facilitate approval and construction of any new water infrastructure required in order to secure future water supplies agreed in accordance with clause 6.1.
- 6.3 In addition to complying with the existing legislative obligations of the Parties, including the paramount rights of the Commonwealth to certain NSW waters under the *Seat of Government Acceptance Act 1909* (Cth), the conditions of supply of water under an agreement made under clause 6.1 are to include the following principles:
- 6.3.1 that the Territory has the capacity within its available water resources to supply into the ACT/NSW Cross Border Region, having regard to existing allocations, allowing for necessary

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- environmental flows and meeting its Murray Darling Basin, Council of Australian Governments and other water related intergovernmental commitments from time to time;
- 6.3.2 that additional water supplies from ACT waters into NSW are taken from the NSW Cap under the Murray Darling Basin allocations;
- 6.3.3 that there is compliance with legislative requirements from time to time within the Queanbeyan and Molonglo catchments, recognising Googong Dam as a priority catchment for the supply of potable water;
- 6.3.4 that catchment management, including in catchments to which ACT water may be supplied in the future, embraces emerging best practice to protect appropriate down stream flows and water quality;
- 6.3.5 that urban development is directed to areas that are consistent with the ACT/NSW Cross Border Region Settlement MoU and subsequent ACT/NSW Cross Border Region Settlement Strategy, as amended from time to time;
- 6.3.6 that those persons to whom ACT water is to be supplied are subjected to the same demand management principles and measures as recipients in the ACT;
- 6.3.7 that the cost of providing additional infrastructure to access ACT water is not borne by the Territory;
- 6.3.8 that other costs of providing services to NSW residents benefiting from ACT water supply are agreed between the Territory and the State and met other than by the Territory;

- 6.3.9 that those persons to whom ACT water is to be supplied are subject to the same charging regimes as users in the ACT from time to time, including the water abstraction charge; and
- 6.3.10 that yield and water quality in the Molonglo and Queanbeyan (including Jerrabomberra) catchments is managed to take into account the Commonwealth's paramount rights and the urban water supply nature of the Queanbeyan catchment, without compromising NSW sovereignty

Murray – Darling Basin Agreement

- 4.4 The Commonwealth and the ACT are both signatories to the Murray – Darling Basin Agreement, which is incorporated by annexure into the *Water Act 2007* (Cth) – legislation designed to manage and ration the water resources of the Murray – Darling basin.
- 4.5 For the purposes of the Water Act, the ACT is regarded as a 'Basin State'.⁹
- 4.6 Subsection 9A(4) provides that some elements of the Water Act, as it relates to the ACT, relies on the territories power contained in section 122 of the *Constitution*.
- 4.7 Part 2 of the *Water Act* creates the concept of the Basin Plan.
- 4.8 For the purposes of this advice, this extract from the Murray – Darling Basin Authority *Guide to the Basin Plan* satisfactorily sets out the effect of the Water Act on basin states:

1.4 Role of the Basin states

The Australian Government and Basin states (Queensland, New South Wales, the Australian Capital Territory, Victoria and South Australia) are signatories to the Murray–Darling Basin Agreement, the purpose of which is to promote and coordinate

⁹ Section 4 (definitions) of the Water Act

effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Basin. Signatories to this agreement have membership on the Murray–Darling Basin Ministerial Council and as such are an integral part of the planning and management process.

As the holders of data, information and knowledge about the Basin’s water resources and environmental assets, Basin states play a key supporting role in relation to the Basin Plan’s development. Basin states must be and are being consulted in the preparation of the proposed Basin Plan.

After the Basin Plan is adopted, the Basin states will continue to administer water entitlement and allocation arrangements through their water resource plans. These water resource plans will be progressively reviewed under state and territory legislation and amended so that they are consistent with the Basin Plan’s diversion limits and other requirements. A process of accreditation will be used to ensure that the water resource plans are consistent with the Basin Plan — this involves the Murray–Darling Basin Authority (MDBA) providing advice to the Commonwealth Water Minister as to whether the water resource plan is consistent with the Basin Plan.

Basin states must act consistently with the Basin Plan, which will require them to undertake various activities such as monitoring, evaluation and planning for environmental watering. The Water Act requires the Basin states to report annually on compliance with the plan’s diversion limits.¹⁰

- 4.9 The ACT was critical of the contents of the Guide to the current Plan published to assist the framing of the initial Basin Plan, indicating in a submission to the Murray – Darling Basin Commission:

The ACT Government supports the overarching goal of the proposed Basin Plan to return water to the environment as a necessary action to ensure the sustainability of the Basin. However, it has a number of concerns with the inequitable approach the Guide takes to set the proposed surface water sustainable diversion limit (SDL) for the

¹⁰ Murray – Darling Basin Authority *Guide to the Basin Plan*, part 1.4 of Chapter 1 <http://thebasinplan.mdba.gov.au/guide/guide.php?document=technical-background&chapter=introduction> accessed 4 April 2011

ACT. The approach results in the ACT having the highest percentage of proposed water reductions of all Basin jurisdictions, despite its track record of sustainable water resource management.

The ACT's key concerns with the Guide include:

- no consideration for the ACT as a distinct water resource management area with a history of prudent water resource management;
- the designation of a net rather than gross SDL for the ACT, the only net SDL in the Basin, which undermines water reuse incentives;
- setting the ACT surface water SDL on the basis of the ACT Cap under the Murray-Darling Basin Agreement rather than the ACT Water Sharing Plan which actually describes the characteristics of the ACT water resource;
- lack of consideration for ACT critical human water needs or consideration of the importance of future population growth, particularly by setting proposed SDLs that can only be met with permanent water restrictions;
- the absence of any analysis of the socio-economic impacts of the proposed Basin Plan on the ACT region, despite this being required under the Water Act 2007;
- lack of consideration of the impact of the proposed Basin Plan on the ability of Canberra to perform its role as the National Capital;
- inaccurate assessment of ACT water interception activity; and
- the general inequitable treatment of the ACT compared to other SDL areas and Basin jurisdictions.¹¹

4.10 The ACT submission also made this observation:

¹¹ ACT Government *Submission to the Murray – Darling Basin Authority on the Guide to the Proposed Basin Plan* p.iii

4.1.3 Commonwealth commitment to Bridging the Gap

The Guide indicates that the Commonwealth intends to bridge any remaining gap between water that has been returned to the environment and what is required to be returned under the Basin Plan.¹²

The Commonwealth has also made public statements that it will bridge any remaining gap between current diversion limits and the final Basin Plan SDLs in order to provide certainty for water entitlement holders. The Commonwealth has indicated it intends to do this by buying the required volume of environmental water from willing sellers in each catchment to bridge any remaining gap – or by recovering the water through irrigation infrastructure efficiency upgrades.

The ACT is different from other Basin catchments in that it does not have a pool of water entitlements for sale, again reflecting how the ACT manages its water resources by giving priority to the environment. There is also no scope for the Commonwealth to recover water by funding irrigation works in the ACT.

The ACT Government considers that the options open to the Commonwealth to bridge the gap in the ACT are limited to purchasing water entitlements from connected downstream catchments, perhaps the lower Murrumbidgee, and gifting these to the ACT Government for consumptive use. Commonwealth Government options in relation to bridging the gap in the ACT and the Upper Murrumbidgee River catchment will need to be explored.¹³

4.11 The ACT's submission to the Authority **accompanies** this paper.

¹² MDBA 2010a, p.152.

¹³ Page 20

Discussion and conclusion

The seat of administration suite of legislation and ACT water resources

- 5.1 The historical background set out in Part 1 of this paper makes clear that water security was an important element to the decision to establish the national capital in the Yass – Canberra area.
- 5.2 The 1909 agreement clearly has provisions drawn to ensure the nascent territory had the ability to access water and to produce its own (hydro) electricity - the utilities necessary for a city to function.
- 5.3 The vital issue for determination is the effect of Clause 4 of the agreement, reading:
2. The right of the State or of the residents therein to the use and control of the waters of the Queanbeyan and Molonglo Rivers and their tributaries which lie to the east of the Goulburn to Cooma Railway **shall be subject and secondary to the use and requirements of the Commonwealth (which are hereby declared to be paramount) for all the purposes of the Territory**, and the State shall consent to the construction by the Commonwealth in the State of such works as are necessary for those purposes.
- 5.4 The agreement:
- (a) is annexed to an Act with a long title of *An Act relating to the Acceptance of the Territory surrendered by the State of New South Wales for the Seat of Government of the Commonwealth*; and
 - (b) deals with functional aspects that relates to the surrender of land to create a separate territory from an otherwise 'sovereign' jurisdiction such as access to water, power generation and the legal rights of landowners with property located within the surrendered area.

- 5.5 As the *ACT NSW Cross Border Water Resources Legislative Responsibilities Agreement* indicates:

By agreement, NSW has continuing obligations not to pollute and to protect from pollution the rivers throughout their whole course above the Territory, and, except with Commonwealth agreement, to preserve from sale, occupation and lease Crown lands within the catchment area of the Queanbeyan and Molonglo Rivers (clauses 3 and 4, First Schedule SOG Act)

NB: The Commonwealth's paramount rights are to 'water' and are non – statutory rights arising from the agreement between the two governments.¹⁴

- 5.6 The better view is that the term *subject and secondary to the use and requirements of the Commonwealth (which are hereby declared to be paramount)* for all the purposes of the Territory contained in clause 4 of the Agreement should be read as restraining NSW from land use decisions that prejudices the ACT's access to water from the relevant sources.

- 5.7 Such a reading would be consonant with the way the preamble to the *Canberra Water Supply (Googong Dam) Act 1974* is supplied and reflects the structure of the Cross Border Water Resources Agreement, and is confirmed by the presence of clause 11 of the 1909 Agreement, which reads:

11. The surrender of the Territory to the Commonwealth shall not be deemed to abridge the right of the State or of the residents therein to the reasonable use of the waters of the Murrumbidgee River for conservation or irrigation.

¹⁴ Pages 2 and 3 of the Agreement

- 5.8 It should finally be noted that the 'paramount' provision contained in the 1909 agreement in any event only relates to the waters of the Molonglo and the Queanbeyan rivers and **not** to the water resources of the Cotter River and any other water source located on what is now known as Territory Land.

The self government suite of legislation and ACT water resources

- 5.9 The 1999 ACT Water Resources Management Plan, prepared for the purposes of a COAG water resources management scheme preceding the Murray – Darling Basin agreement discussed the effect of the self government suite of legislation on water resource management in the following manner:

2.2 Water ownership

The *Seat of Government Acceptance Act 1909* (Commonwealth) gave the Commonwealth paramount, for all purposes of the Australian Capital Territory, paramount right to the waters of the Queanbeyan and Molonglo Rivers. The Commonwealth exercised this right over the waters of the Queanbeyan River with the passage of the *Canberra Water Supply (Googong Dam) Act 1974* (Commonwealth) which declared the Commonwealth rights are exercisable by the ACT Executive on behalf of the Commonwealth subject to conditions set by the Commonwealth Minister and also provided for the construction of Googong Dam. Through ACT self-government legislation, the *Australian Capital Territory (Planning and Land Management) Act 1988* (Commonwealth), the Commonwealth delegated its power to control the waters of the Queanbeyan River (and Googong Dam) to the ACT.

The *Australian Capital Territory (Self Government) Act 1988* effectively passed control of all water resources other than water on or under National Land to the Territory Executive. National land in the ACT includes Lake Burley Griffin, Majura Field Firing Range and CSIRO land.

The *Water Resources Act 1998* provides that the right to the use, flow and control of all Territory water is vested in the Territory. This consists of the waters of the Googong Dam catchment and all water on or under Territory land. The application of the Act is constrained by the Commonwealth legislation described above.

A further complication of water ownership in the ACT is that all water under leases of Territory land granted before 11 December 1998 is controlled by the lessee because such leases did not specifically exclude the right to such water. The Act provides that leases granted after 11 December 1998 cannot confer the right to control water.¹⁵

5.10 This states the legal position well – the ACT Executive acts as a delegate of the Commonwealth for the purposes of the administration of the Googong Dam and has otherwise had ‘passed’ to it responsibility for water on territory land.

5.11 That said, the Commonwealth:

- (a) has a residuary capacity to influence how the Territory can control water resources through the dominance of the National Capital Plan within the ACT self – government structure, discussed in Part 3 of this paper; and
- (b) has exercised it through the publication of Part 12.3(d) of the National Capital Plan (and reflected in the Cross Border Resources Agreement).

The Water Act

5.12 The self – government concept attempts to treat the ACT to be, as far as practicable, a state of the federation.

¹⁵ Environment ACT *Water Resources Management Plan* 16 August 1999 p.3

- 5.13 The structure of the *Water Act* clearly treats the ACT as a state, as evidenced by the structure of the definition of what is a 'basin state':

Basin State means the following:

- (a) New South Wales;
- (b) Victoria;
- (c) Queensland;
- (d) South Australia;
- (e) the Australian Capital Territory.¹⁶

- 5.14 It is well known that there is confusion about which of the competing public policy interests (social, economic, environmental) are to be given precedence when managing the water resources of the Murray – Darling basin.
- 5.15 One of the submitters to the Senate Legal and Constitutional Affairs Committee review to the *Water Act* was the University of New South Wales Gilbert + Tobin Centre of Public Law.
- 5.16 They concluded that environmental factors should be given precedence when developing the Basin Plan. The submission to the Committee is contained in **Appendix 2**.
- 5.17 This appears to be correct.
- 5.18 This means that there is an expectation that the ACT, as a Basin State, will have to manage its water resources in a manner consistent with the policy direction created by the provisions of the *Water Act*.
- 5.19 This poses challenges to the ACT.

¹⁶ Section 4 of the *Water Act*

-
- 5.20 As discussed in the ACT Basin Plan submission, any *Water Act* plan must ensure:
- (a) the ACT's critical water needs are met; and
 - (b) the population growth of Canberra, the Basin's largest population centre is taken into account.

Conclusions

- 5.21 The interaction between the seat of government acceptance, self government and Murray – Darling basin management suites of legislation does not create a special requirement on the Commonwealth to make special arrangements for the ACT irrespective of the downstream needs of the Murray – Darling river in economic, conservation or social terms.
- 5.22 However:
- (a) the *Constitution* designates a need for the creation of a seat of government within NSW;
 - (b) a choice was made to create a new city;
 - (c) the new city was located in an inland area with low rainfall;
 - (d) the land surrendered by NSW and the conditions imposed on the land use choices around Googong imposed by the 1909 agreement were particularly designed to ensure the legitimate water needs of the Territory are protected; and

(e) as is evidenced by the design of the National Capital Plan and the execution of the Cross Border Water Agreement, there is an acceptance the Commonwealth still has a role in ensuring the legitimate water needs of the ACT.

5.23 It follows that for the reasons recognised in 1909, the *Water Act* must be amended to remove any doubt that the critical water needs of the ACT are, if not 'paramount', must certainly be assured, notwithstanding any other provision contained in the *Water Act*, in much the same way as the Commonwealth has used the National Capital Plan to protect the water needs of Canberra.

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April 2011

APPENDIX 1 – EXTRACT FROM THE SUMMARY OF LEGISLATIVE RESPONSIBILITIES CROSS
BORDER WATER SUPPLY AGREEMENT BETWEEN THE ACT AND NSW

2. The Legislative Framework

Generally, Commonwealth and ACT legislation defines the powers of the ACT Government in managing water resources in the ACT and Googong Dam, while NSW law governs planning, development and environmental management in the wider catchment area including the Googong Dam Area.

2.1 Commonwealth legislation

2.1.1 Seat of Government

Under the *Seat of Government Acceptance Act 1909* (Cwlth - the SOG Act), an agreement between the Commonwealth and New South Wales governing the area which became the Australian Capital Territory was ratified. This agreement is a schedule to both the *Seat of Government Acceptance Act 1909* (Cwlth) and the *Seat of Government Surrender Act 1909* (NSW).

- The area of the ACT surrendered by NSW included the Cotter catchment and the Cotter, Bendora and Corin dams were subsequently built to provide water to Canberra.
- The agreement also provided the Commonwealth with paramount rights to the use and control of waters of the Queanbeyan and Molonglo Rivers and their tributaries which lie to the east of the Cooma-Goulburn railway, for all the purposes of the Territory (clause 2, First Schedule). The rights of NSW and its residents to the waters of this catchment are subject to and secondary to this paramount right.

By the agreement, NSW has continuing obligations to not pollute and to protect from pollution the rivers throughout their whole course above the Territory and, except with

Commonwealth agreement, to preserve from sale, occupation and lease Crown lands within the catchment areas of the Queanbeyan and Molonglo Rivers. (clauses 3 and 4, First Schedule, SOG Act).

NB The Commonwealth's paramount rights are to 'waters' not to an area of land, and are non-statutory rights, arising from the agreement between the two governments.

2.1.2 ACT Self-government

With the grant of self-government to the ACT in 1988, the responsibility to make strategic decisions about ACT water resources - to dispose of and use water in ACT dams - passed to the ACT, subject to any valid provision of the National Capital Plan.

The ACT Government gained responsibility for water resources, public utilities and Territory land under S 37 and Schedule 4 of the *ACT (Self Government) Act 1988*, and for the management of Territory land (including water in or on Territory land) under the *ACT (Planning and Land Management) Act 1988*. The Corin, Bendora and Cotter Dams are all on Territory land.

The power previously given to the Commonwealth Minister to supply water and electricity from the Territory to persons outside the Territory under S 12B of the *Seat of Government Administration Act 1910* was repealed by the *ACT Self-Government (Consequential Provisions) Act 1988*, with the intention that this role would become the responsibility of the ACT Government.

Under the self government legislation there is no overriding executive power of direction reserved to the Commonwealth. The Commonwealth therefore has no statutory power to direct the ACT on the supply and use of any water resources under the control of the Territory (ie water within the Googong Dam Area and water resources in the Territory except those classified as National Land). The fact that under s.29(1) of the *ACT (Planning and Land Management) Act*, the ACT is vested with responsibility for the management of Territory land 'on behalf of' the Commonwealth does not mean that the Commonwealth Executive has power to direct the ACT in the performance of that role. Although, as a matter of law as owner of the Googong Dam Area, the Commonwealth has rights which it could exercise if it so wished, either to provide water itself or to engage another entity to provide water on its behalf, as a matter of reality the Commonwealth is unlikely to wish to do so.

2.1.3 The National Capital Plan/Lake Burley Griffin

The object of the National Capital Plan, administered by the National Capital Authority, is to ensure that Canberra and the Territory are developed in accordance with their national significance. The National Capital Plan, gazetted in 1990 under the *ACT (Planning and Land Management) Act 1988*, sets out planning principles and policies for the development of the National Capital, including general policies to be implemented throughout the Territory (eg land use, national and arterial road systems), planning and design conditions in Designated Areas, and special requirements in other areas desirable in the interests of the National Capital. The Commonwealth and the Territory cannot act inconsistently with the National Capital Plan (s 11). The Territory Plan must be consistent with the National Capital Plan.

The Plan states (Principle 12.3 (d)) that '*subject to any future Commonwealth Government policy decisions on the matter, waters over which the Commonwealth has paramount rights shall be supplied only to users within the ACT and the presently gazetted area of Queanbeyan*'.

- This provision reflects then Commonwealth policy regarding cross border water supply, which was modified by Minister Macdonald's policy decision in 1999-2000 to supply Googong Dam water to the Weetalibah development. The Minister decided that no further such agreements would be entered into by the Commonwealth to supply water to places in NSW until an integrated water supply strategy was in place.

Appendix E of the Plan places water quality, stream flow and diversion limits on uses from ACT controlled water resources.

Appendix G imposes special requirements for the Namadgi National Park Area, which includes the major Cotter River reservoirs. These restrict the use of the catchment areas of the specified reservoirs, and the use of the reservoirs themselves, to water collection and supply and impose limits on land use.

- The Plan only applies within the Territory's borders and, in referring to Commonwealth paramount waters, does not constrain the ACT in the use of either ACT Dams or Googong Dam.
- The Plan currently constrains the use of catchments in the ACT to protect water quality, but it is unlikely, given the context of ACT self government arrangements, that these provisions constrain the ACT Government's disposal of the water from the ACT dams.

The National Capital Authority manages National Land within the ACT, including Lake Burley Griffin. The Lake is nationally significant as the centrepiece of Walter Burley Griffin's plan for Canberra and as the setting for the Parliament of Australia. The Lake also has heritage listing under the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999*. The Authority's *Water Resource Management Policy and Strategy* provides the framework for the *Lake Burley Griffin Abstraction Plan June 2004*, the management plan for the Lake. Adequate environmental flows in the Molonglo River catchment are essential to preserving the Lake as a feature of the National Capital.

2.1.4 Googong Dam

Under the *Canberra Water Supply (Googong Dam) Act 1974* (the Googong Dam Act), the Googong Dam was built on the Queanbeyan River on land acquired by the Commonwealth. The Act defines the Googong Dam Area^[1], 5000 hectares of land comprising the dam and its foreshores, within the larger catchment area identified by the SOG Act.

The Googong Dam Act regulates the use and disposal of water from the Googong Dam Area. It provides that waters from the Googong Dam Area are primarily and principally for use in the Australian Capital Territory, although water can be supplied to places in NSW subject to Commonwealth agreement (see below). The ACT has overall management responsibility for water supply and land management within the Googong Dam Area. It also has power to carry out works in NSW necessary for Territory water supply.

NB The ownership of the Googong Dam Area is currently in the process of transfer from the Commonwealth to the ACT Government (ACTEW). This transfer will mean that Googong Dam Area, and neighbouring Commonwealth freehold land, will become freehold land owned by the ACT, rather than a Commonwealth place within the meaning of the *Commonwealth Places (Application of Laws) Act 1970*. The Googong Dam Act will continue to govern the primary use of Googong Dam Area waters, subject to some consequential changes.

Key features of the Googong Dam Act (see extracts at Attachment 1) are:

- Subject to S 12, the rights to use and dispose of all waters in the Dam area are exercised by the Executive (ie the ACT Government) on behalf of Australia (ie the Commonwealth Government) [s 11(1) and (2)];
- Sections 4 and 5 give the ACT Government the required powers to perform functions, including the supply of water from the Googong Dam Area for use under a s 12 (2) agreement. These powers are discretionary.
- Water stored in the Dam is primarily and principally for use in the Territory [s 12(1)];
- Supply of water to a place other than in the ACT is subject to s 12(1), and to agreement between the Commonwealth Minister and NSW (s 12(2));
- The Commonwealth Minister may authorise the ACT Executive to exercise the rights of Australia under any such agreement.

There is no power under the Googong Dam Act which would allow the Commonwealth to direct the ACT to actually provide water from the Googong Dam Area to any place in NSW in accordance with any s 12(2) agreement under the Googong Dam Act. The fact that the ACT manages the Dam and the Googong Dam Area means that for practical purposes the ACT's agreement is needed for any cross border water supply.

.....

4. Conclusions

The conclusions below provide the basis for moving forward with the development of an integrated water supply strategy :

- 4.1 The Commonwealth maintains direct interests in protecting the future development of the ACT, and the paramount right to certain catchment waters in NSW. Although with self government many water management powers passed to the ACT Government, the paramount rights assigned to the Commonwealth did not.
- 4.2 The Commonwealth Minister has no expressed statutory power to direct the ACT Government in the performance of its water supply and management functions, whether water is sourced from within the ACT or from the Googong Dam Area. The approval of the Commonwealth Minister, and that of NSW, is however required before the ACT can provide Googong Dam water to any place in NSW.
- 4.3 The objective of the National Capital Plan is to ensure that Canberra and the Territory are managed and developed in accord with their national significance. Adequate water supply is crucial to further development. While the actions of the ACT Government are bound by valid planning provisions of the National Capital Plan, the Plan does not apply to actions or land outside the Territory. Current provisions in the Plan relating to paramount rights water or catchment areas are unlikely to constrain the ACT Government in its disposal of waters but do constrain land use within the ACT catchments.
- 4.4 With existing infrastructure, supply to Queanbeyan and adjacent areas of NSW will necessarily include water sourced from the Googong Dam. Therefore, the provisions of the Googong Dam Act apply to this cross border supply.
- 4.5 As there is no S 12(2) agreement in writing between Australia and NSW, and no authorisation of the Territory by the Australian Government Minister, the current water supply to Queanbeyan and the Ridgeway is inconsistent with the *Canberra Water Supply (Googong Dam) Act 1974*. Existing arrangements should be formalised by way of a Commonwealth/NSW agreement under s 12(2) of the Act once an agreed IWSS is in place. This should include conditions relevant to contemporary circumstances and good practice including catchment management. It is likely that such an agreement could be achieved through an exchange of letters.

**APPENDIX 2 - Submission to Senate Standing Committee on Legal and Constitutional Affairs
inquiry into the Water Act 2007 from Gilbert + Tobin Centre of Public Law, University of NSW
(Submission 15)**

16 March 2011
Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Inquiry into Provisions of the Water Act 2007

Thank you for the invitation to make a submission to the Committee's inquiry into the provisions of the *Water Act 2007* (Cth). We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

Our submission draws on material published in a recent, peer-reviewed journal article on this topic: Paul Kildea and George Williams, 'The Water Act and the Murray-Darling Basin Plan' (2011) 22 *Public Law Review* 9-14.

The *Water Act 2007* (Cth) and the Basin Plan

In this submission we focus on legal issues concerning the permissible scope of the Murray-Darling Basin Plan, which we see as critical to any consideration of the potential socio-economic impact of the Murray-Darling Basin Authority's *Guide to the Proposed Basin Plan*. The question of whether the Murray-Darling Basin Authority (MDBA), in developing its Guide to the Plan (and later its Draft Plan and final Plan), must give environmental considerations precedence over social and economic factors has emerged as a contentious issue in recent public debate. How this question is answered has obvious ramifications for both the final shape of the Plan and its impact on regional communities and the environment.

In our view, the MDBA and the Minister are obliged to take into account social and economic factors when preparing the Plan, but in doing so they must give environmental considerations precedence. This view is supported by an examination of both the *Water Act 2007* (Cth) and the underlying constitutional basis of its provisions, upon which we elaborate in the following paragraphs.

Social and economic factors and the Basin Plan

Section 21 of the *Water Act* sets out the basis on which the Basin Plan is to be developed. The MDBA and the Minister must take into account social and economic factors. However, s 21(1) of the *Water Act* states that environmental concerns as reflected in key international conventions have primacy in the making of the Plan: The Basin Plan... must be prepared so as to provide for giving effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources).

The term 'relevant international agreement' is defined in section 4(1) and includes several environmental treaties, including the Ramsar Convention on wetlands and the Convention on Biological Diversity. Some of the specific obligations arising under these treaties, such as the conservation of declared Ramsar wetlands in the Basin, are detailed in sections 21(2) and (3).

The primacy of the international agreements is further reflected in the objects of the Act, as set out in section 3:

The objects of this Act are:

- (a) to enable the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources in the national interest; and
- (b) to give effect to relevant international agreements...; and
- (c) in giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes...

The broad purposes of the Basin Plan as set out in the Act are expressed in similar terms.

Section 21(4) confirms the relevance of social and economic factors to the Plan, but its opening words ('subject to subsections (1), (2) and (3)') clarify that these factors must be read against the overarching obligation to give effect to international agreements. The provision states:

Subject to subsections (1), (2) and (3), the Authority and the Minister must, in exercising their powers and performing their functions under this Division:

- (a) take into account the principles of ecologically sustainable development; and
- (b) act on the basis of the best available scientific knowledge and socio-economic analysis; and

(c) have regard to the following:

(i) the National Water Initiative;

(ii) the consumptive and other economic uses of Basin water resources;

...

(v) social, cultural, Indigenous and other public benefit issues...

Section 22 sets out in more detail some of the matters that must be included in the Basin Plan, including the long-term average sustainable diversion limits for the Basin water resources. The 2008 amendments to the Act also introduced a new requirement having regard to 'critical human water needs'.

Constitutional basis of the *Water Act*

The *Water Act* thus affirms the relevance of social and economic considerations while also making clear that they are secondary to the MDBA's and Minister's obligation to give effect to the relevant international agreements.

This reflects the primary constitutional basis of the Act: that is, the federal Parliament's power to enact laws with respect to 'external affairs' in section 51(xxix) of the *Constitution*, and in particular the aspect of the power that enables the federal parliament to pass laws to implement obligations assumed by the federal executive under international treaties and conventions.

As the High Court has made clear on a number of occasions, a law based upon the external affairs power must be 'reasonably capable of being considered appropriate and adapted to implementing the treaty'. If a law does not pass this test, it will be struck down by the Court as being unconstitutional.

Advice to Water Minister Tony Burke, prepared by the Australian Government Solicitor in October 2010, was consistent with this construction of the *Water Act*. It provided that '[t]he overarching objective of the Act and the Plan is to give effect to relevant international agreements'. In addition, it found that the terms of the key treaties provide an indirect avenue for the Commonwealth to take into account social and economic factors. This arises from the fact that both the Convention on Biological Diversity and the Ramsar Convention on wetlands appear to frame their environmental obligations in ways which permit consideration of social and economic factors.

For example, the Convention on Biological Diversity commits members to, as far as possible and as appropriate, 'regulate or manage biological resources important for the conservation of biological diversity... with a view to ensuring their conservation and sustainable use'.⁶ The term 'sustainable use' is defined in the Convention to mean 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, *thereby maintaining its potential to*

*meet the needs and aspirations of present and future generations.*⁷ As the AGS advice stated, both Conventions 'establish a framework in which environmental objectives have primacy but the implementation of environmental objectives allow consideration of social and economic factors'.

In summary, the *Water Act*, both as to its own terms and when read in light of its constitutional underpinnings, recognises that a Basin Plan must be prepared to give effect to the relevant international conventions. In doing so, social and economic factors must also be taken into account. However, these latter factors cannot be given such weight as would prejudice the faithful implementation of the international environmental conventions upon which the validity of the Act depends.

Looking ahead: Constructing the Basin Plan

This suggests a clear legal path for the construction of a Basin Plan. First, the Plan must be prepared to implement the relevant international conventions. Second, in doing this, some social and economic factors can be taken into account in the meeting of the core environmental objectives. Third, once the threshold of compliance with the international conventions has been met, social and economic factors may generally be taken into account to the maximum remaining extent possible.