



Fourth Respondent's Defence to Amended Statement of Claim

NSD1201 of 2023

Federal Court of Australia
District Registry: New South Wales
Division: General

MURRAY LOWER DARLING RIVERS INDIGENOUS NATIONS (ACN 118 364 079)

Applicant

COMMONWEALTH OF AUSTRALIA AND ORS

Respondents

A. JURISDICTION

1. The Fourth Respondent admits the allegation in paragraph 1 of the Amended Statement of Claim filed on 19 April 2024 (ASOC).

1A. The Fourth Respondent admits that the Applicant seeks but denies the Applicant is entitled to the relief referred to in paragraph 1A of the ASOC.

B. THE PARTIES

2. The Fourth Respondent admits the allegations in paragraph 2 of the ASOC.

3. In response to paragraph 3 of the ASOC, the Fourth Respondent:

a. admits that the Applicant has standing to seek the relief sought in the Originating Application; and

b. otherwise denies the allegations in that paragraph.

4. The Fourth Respondent admits the allegations in paragraph 4 of the ASOC.

5. The Fourth Respondent admits the allegations in paragraph 5 of the ASOC.

6. The Fourth Respondent admits the allegations in paragraph 6 of the ASOC.

6A. The Fourth Respondent does not plead in response to paragraph 6A of the ASOC because it contains no allegations against it.

7. The Fourth Respondent admits the allegations in paragraph 7 of the ASOC.

Filed on behalf of (name & role of party)	The State of NSW, Fourth Respondent		
Prepared by (name of person/lawyer)	Nick Ridout		
Law firm (if applicable)	NSW Department of Planning and Environment		
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C. STATUTORY FUNCTIONS

8. The Fourth Respondent admits paragraph 8 of the ASOC but relies on the *Water Act 2007* (Cth) (**Water Act**) for its full force and effect.
9. The Fourth Respondent admits paragraph 9 of the ASOC but relies on the *Water Act* for its full force and effect.
10. The Fourth Respondent admits paragraph 10 of the ASOC but relies on the *Water Act* for its full force and effect.
11. The Fourth Respondent admits paragraph 11 of the ASOC but relies on the *Water Act* for its full force and effect.

CA. LEGAL STATUS OF WATER RESOURCES BASED ON LAWFUL EXERCISE OF STATUTORY FUNCTIONS

12. ~~In response to paragraph 12 of the SOC, the Fourth Respondent:~~

- ~~a. says that the “Basin Plan” referred to in s 34(1) is defined in s 4 of the Water Act as the Basin Plan adopted by the Minister under s 44 (as amended from time to time);~~
- ~~b. says that the Basin Plan adopted at the time of the impugned decisions was the Relevant Basin Plan as defined in paragraph 13 of the SOC;~~
- ~~c. otherwise admits the paragraph; and~~
- ~~d. relies on the Water Act for its full force and effect.~~

The Fourth Respondent admits paragraph 12 of the ASOC but relies on the Water Act for its full force and effect.

12A. In response to paragraph 12A of the ASOC, the Fourth Respondent:

- a. says that under s 63(3) of the Water Act, having regard to ss 34(1), 55(2) and 56, the power and duty of the Authority is to consider the extent to which a proposed water resource plan is consistent with the relevant Basin Plan and, in view of the extent of that consistency, prepare and provide recommendations to the Minister as to whether she should accredit the proposed water resource plan;
- b. says that under s 63(5) of the Water Act, the power and duty of the Minister is to consider the proposed water resource plan and recommendations given to her under s 63(3) and either accredit the plan or not accredit the plan;
- c. says that under s 63(6) of the Water Act, the Minister is obliged to accredit a water resource plan under s 63(5) if, having regard to the plan and the recommendations given to her under s 63(3) in accordance with ss 56(3) and 63(5), she has reached a state of reasonable satisfaction that the plan is consistent with the relevant Basin Plan; and

d. otherwise denies the allegations in the paragraph.

12B. In the premises of paragraph 12A above, the Fourth Respondent denies the allegations in paragraph 12B of the ASOC.

D. REQUIREMENTS OF THE BASIN PLAN

13. The Fourth Respondent admits the allegations in paragraph 13 of the ASOC.

14. In response to paragraph 14 of the ASOC, the Fourth Respondent:

- a. admits that paragraph 14 paraphrases some of the requirements contained in the ~~Relevant~~ Basin Plan;
- b. relies on the terms of the ~~Relevant~~ Basin Plan for their full force and effect; and
- c. otherwise denies the allegations in the paragraph.

14A. In response to paragraph 14A of the ASOC, the Fourth Respondent:

- a. relies on the terms of the Basin Plan for their full force and effect; and
- b. otherwise denies the allegations in the paragraph.

DA. THE STATUTORY DUTY AND THE STATUTORY CONTEXT FOR THE EXERCISE OF STATUTORY FUNCTIONS

14B. In response to paragraph 14A of the ASOC, the Fourth Respondent:

- a. refers to and repeats paragraph 12A above;
- b. relies on the Water Act for its full force and effect; and
- c. otherwise denies the paragraph.

14C. In response to paragraph 14C of the ASOC, the Fourth Respondent:

- a. refers to and repeats paragraph 12A above;
- b. relies on the Water Act for its full force and effect; and
- c. otherwise denies the paragraph.

14D. In the premises of paragraph 14B and 14C above, the Fourth Respondent denies paragraph 14D of the ASOC.

E. THE 2020 VERSION OF THE ~~FIRST~~ PROPOSED WATER RESOURCE PLAN

15. The Fourth Respondent admits the allegations in paragraph 15 of the ASOC.

16. The Fourth Respondent does not know and therefore cannot admit the allegations in paragraph 16 of the ASOC.

17. The Fourth Respondent admits the allegations in paragraph 17 of the ASOC.

18. The Fourth Respondent admits the allegations in paragraph 18 of the ASOC.
19. The Fourth Respondent admits the allegations in paragraph 19 of the ASOC.
20. In response to paragraph 20 of the ASOC, the Fourth Respondent:
- a. admits that in the 2021 Notice of Grounds (as defined in paragraph 19 of the ASOC) the Authority indicated it was not satisfied certain requirements in ss 10.52(1), 10.52(2), 10.53 and 10.54 of the then applicable version of the Basin Plan had been met;
 - b. relies upon the terms of the 2021 Notice of Grounds for their full force and effect; and
 - c. otherwise denies the allegations in that paragraph.
21. The Fourth Respondent admits the allegations in paragraph 21 of the ASOC.

F. THE PREPARATION OF THE PROPOSED FIRST FRACTURED ROCK WATER RESOURCE PLAN

F.1 The FRWRP concerned water resources within an area of land included in the traditional lands of 29 First Naitons

22. The Fourth Respondent admits the allegations in paragraph 22 of the ASOC.
23. The Fourth Respondent admits the allegations in paragraph 23 of the ASOC.
- ~~24. In response to paragraph 24 of the SOC, the Fourth Respondent:~~
- ~~a. says that the allegations are vague, embarrassing and ought be struck out; and~~
 - ~~b. under cover of that objection:

 - ~~i. relies on the terms of the Proposed Water Resource Plan provided to the Authority on or about 14 July 2022 (**2022 PWRP**) for their full force and effect; and~~
 - ~~ii. otherwise, denies the allegations in the paragraph.~~~~
- ~~25. In response to paragraph 25 of the SOC, the Fourth Respondent:~~
- ~~a. says that the 2022 PWRP recorded at Section 1.3.1 that:

 - ~~i. the Fourth Respondent sought to engage with the Tati Tati Nation via a nominated delegate of the Applicant;~~
 - ~~ii. the engagement was not able to be progressed due to difficulties in maintaining contact with the Tati Tati Nation through the delegate;~~
 - ~~iii. in November 2019 the Tati Tati Nation expressed interest in involvement in the process on the basis of payment for workshop attendees, but the 2022 PWRP noted that this was not a model used as part of the First Nation engagement by~~~~

~~the Fourth Respondent although the Fourth Respondent does cover a range of costs associated with engagement;~~

~~iv. the Fourth Respondent sought permission from the Tati Tati Nation to consider relevant information supplied as part of the Victorian Water Resource Plans, and that while in principle support had been received no explicit permission had been provided; and~~

~~v. in September 2020 further follow up was undertaken via the delegate to offer an additional opportunity for involvement, but no response had been received to indicate interest; and~~

~~b. otherwise admits the paragraph.~~

23A. The Fourth Respondent admits the allegations in paragraph 23A of the ASOC.

23B. In response to paragraph 23B of the ASOC, the Fourth Respondent:

a. says that the allegations are vague, embarrassing and liable to be struck out;

b. under cover of that objection:

i. admits that Figure 1-5 of the FRWRP specifically identifies First Nations or “Traditional Owners groups” across the NSW portion of the Basin;

ii. relies on the terms of the FRWRP for their full force and effect; and

iii. otherwise does not admit the allegations in the paragraph.

23C. In response to paragraph 23C of the ASOC, the Fourth Respondent:

a. says that the allegations are vague, embarrassing and liable to be struck out;

b. under cover of that objection:

i. admits that Figure 1-5 of the FRWRP specifically identifies First Nations or “Traditional Owners groups” across the NSW portion of the Basin;

ii. relies on the terms of the FRWRP and the Basin Plan for their full force and effect;

iii. refers to and repeats the admissions made at paragraph 23A above; and

iv. otherwise does not admit the allegations in the paragraph.

23D. In response to paragraph 23D of the ASOC, the Fourth Respondent:

a. admits that each of the 29 First Nations within the water resource plan area of the FRWRP, including the Tati Tati Nation and the Barkandji Nation, were “relevant Indigenous organisations” for the purposes of Chapter 10 Part 14 of the Basin Plan;

- b. relies on the terms of the Basin Plan for their full force and effect; and
- c. otherwise denies the allegations in the paragraph.

23E. The Fourth Respondent admits the allegations in paragraph 23E of the ASOC but relies on the terms of the FRWRP for their full force and effect.

F.2 Native title rights and native title claims

23F. The Fourth Respondent admits the allegations in paragraph 23F of the ASOC but relies on the terms of the FRWRP for their full force and effect.

23G. In response to paragraph 23G of the ASOC, the Fourth Respondent:

- a. admits that it did not discuss general matters relating to native title when preparing the FRWRP with those First Nations which had not lodged an application or received a determination in respect of native title;
- b. relies on the terms of the FRWRP for their full force and effect; and
- c. otherwise denies the allegations in the paragraph.

23H. In response to paragraph 23H of the ASOC, the Fourth Respondent:

- a. refers to and repeats paragraph 23G above; and
- b. otherwise denies the allegations in the paragraph.

F.3 Consultation with First Nations for the purpose of preparing the FRWRP(s)

F.3.1 The Tati Tati Nation

23I. The Fourth Respondent admits the allegations in paragraph 23I of the ASOC but relies on the terms of the FRWRP for their full force and effect.

23J. In response to paragraph 23J of the ASOC, the Fourth Respondent:

- a. says that the FRWRP recorded at Section 1.3.1 that:
 - i. the Fourth Respondent sought to engage with the Tati Tati Nation via a nominated delegate of the Applicant;
 - ii. the engagement was not able to be progressed due to difficulties in maintaining contact with the Tati Tati Nation through the delegate;
 - iii. in November 2019 the Tati Tati Nation expressed interest in involvement in the process on the basis of payment for workshop attendees, but the 2022 PWRP noted that this was not a model used as part of the First Nation engagement by the Fourth Respondent although the Fourth Respondent does cover a range of costs associated with engagement;

- iv. the Fourth Respondent sought permission from the Tati Tati Nation to consider relevant information supplied as part of the Victorian Water Resource Plans, and that while in principle support had been received no explicit permission had been provided; and
- v. in September 2020 further follow up was undertaken via the delegate to offer an additional opportunity for involvement, but no response had been received to indicate interest; and

b. otherwise admits the paragraph.

23K. The Fourth Respondent admits the allegations in paragraph 23K of the ASOC but relies on the terms of the FRWRP for their full force and effect.

23L. The Fourth Respondent denies the allegations at paragraph 23L of the ASOC.

23M. In response to paragraph 23M of the ASOC, the Fourth Respondent:

- a. refers to and repeats paragraph 23J(a) above; and
- b. otherwise admits the paragraph.

23N. In response to paragraph 23N of the ASOC, the Fourth Respondent:

- a. refers to and repeats paragraph 23J(a) above;
- b. otherwise admits the paragraph.

23O. In response to paragraph 23O of the ASOC, the Fourth Respondent:

- a. relies on the terms of the Basin Plan for their full force and effect;
- b. refers to and repeats paragraph 23J(a) above; and
- c. otherwise denies the allegations in the paragraph.

23P. In response to paragraph 23P of the ASOC, the Fourth Respondent:

- a. relies on the terms of the Basin Plan for their full force and effect;
- b. refers to and repeats paragraph 23J(a) above; and
- c. otherwise denies the allegations in the paragraph.

23Q. The Fourth Respondent denies the allegations in paragraph 23Q of the ASOC.

23R. In response to paragraph 23R of the ASOC, the Fourth Respondent:

- a. relies on the terms of the Basin Plan for their full force and effect;
- b. refers to and repeats paragraph 23J(a) above; and
- c. otherwise denies the allegations in the paragraph.

F.3.1 The Barkandji Nation

23S. The Fourth Respondent admits the allegations at paragraph 23S of the ASOC.

23T. In response to paragraph 23T of the ASOC, the Fourth Respondent:

- a. says that the FRWRP recorded at Section 1.3.1 that:
 - i. the Fourth Respondent engaged with the Barkandji Nation through the Barkandji Native Title Group Aboriginal Corporation, which formally requested it be consulted directly (rather than through the Applicant) and advised that Barkandji and Maljangapa Traditional Owners should be consulted together;
 - ii. the Fourth Respondent conducted three face to face interviews with three Traditional Owners representing the Barkadji and Maljangapa Nations;
 - iii. refers to and repeats the admission at paragraph 23S above; and
- b. says that on or around 2 December 2021, the Barkandji Registered Native Title Prescribed Body Corporate Board declined to endorse the report for use as part of the FRWRP.
- c. otherwise admits the paragraph.

23U. In response to paragraph 23U of the ASOC, the Fourth Respondent:

- a. refers to and repeats paragraph 23T(a) and (b) above; and
- b. otherwise admits the paragraph.

23V. In response to paragraph 23V of the ASOC, the Fourth Respondent:

- a. relies on the terms of the Basin Plan for their full force and effect;
- b. refers to and repeats paragraph 23T(a) and (b); and
- c. otherwise denies the allegations in the paragraph.

23W. In response to paragraph 23W of the ASOC, the Fourth Respondent:

- a. relies on the terms of the Basin Plan for their full force and effect;
- b. refers to and repeats paragraph 23T(a) and (b); and
- c. otherwise denies the allegations in the paragraph.

23X. In response to paragraph 23X of the ASOC, the Fourth Respondent:

- a. relies on the terms of the Basin Plan for their full force and effect;
- b. refers to and repeats paragraph 23T(a) and (b); and
- c. otherwise denies the allegations in the paragraph.

23Y. In response to paragraph 23Y of the ASOC, the Fourth Respondent:

- a. relies on the terms of the Basin Plan for their full force and effect;
- b. refers to and repeats paragraph 23T(a) and (b); and
- c. otherwise denies the allegations in the paragraph.

23Z. In response to paragraph 23Z of the ASOC, the Fourth Respondent:

- a. relies on the terms of the Basin Plan for their full force and effect;
- b. refers to and repeats paragraph 23T(a) and (b); and
- c. otherwise denies the allegations in the paragraph.

G. MLDRIN'S ASSESSMENT OF THE FRWRP AGAINST BASIN PLAN REQUIREMENTS

26. The Fourth Respondent does not know and therefore cannot admit the allegations in paragraph 26 of the ASOC.

27. The Fourth Respondent admits the allegations in paragraph 27 of the ASOC.

28. In response to paragraph 28 of the ASOC, the Fourth Respondent:

- a. relies on the terms of the MLDRIN Report (within the meaning of paragraph 27 of the ASOC) for their full force and effect; and
- b. otherwise denies the allegations in that paragraph.

H. THE RECOMMENDATION AND ACCREDITATION DECISIONS

29. The Fourth Respondent admits the allegations in paragraph 29 of the ASOC.

30. The Fourth Respondent admits the allegations in paragraph 30 of the ASOC.

31. The Fourth Respondent admits the allegations in paragraph 31 of the ASOC.

31A. The Fourth Respondent denies the allegations in paragraph 31A of the ASOC.

I. GROUND FOR RELIEF SOUGHT

1.1 The Recommendation Decision

32. ~~In response to paragraph 23 of the SOC (including the grounds numbered (i) to (iv) appearing beneath that paragraph), the Fourth Respondent:~~

- ~~a. says that the allegations are vague, embarrassing and ought be struck out; and~~
- ~~b. under cover of that objection, denies the allegations.~~

The Fourth Respondent denies the allegations at paragraph 32 of the ASOC.

I.2 The Accreditation Decision

33. The Fourth Respondent denies the allegations in paragraph 33(a) of the ASOC, but does not plead to paragraph 33(b) of the ASOC.

I.3 The Instrument

34. The Fourth Respondent denies the allegations in paragraph 34 of the ASOC.

H. ORDERS SOUGHT

35. In the premises, the Fourth Respondent:

- a. takes no position as to whether the Applicant is entitled to relief on the basis of the matters pleaded at ~~ground (iv) under~~ paragraph 33(b) of the SOC;
- b. otherwise denies that the Applicant is entitled to the relief sought in its Originating Application filed on 24 October 2023 and says that the Originating Application should be dismissed.

Date: ~~23 December 2023~~ 24 April 2024



.....
Signed by Liyan Leow
Lawyer for the Fourth Respondent

This pleading was prepared by Craig Lenehan, Senior Counsel.

This amended pleading was prepared by Zelic Heger and Samuel Hoare.

Certificate of lawyer

I Liyan Leow certify to the Court that, in relation to the amended defence filed on behalf of the Fourth Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~23 December 2023~~ 24 April 2024



Signed by Liyan Leow
Lawyer for the Fourth Respondent

NOTICE OF FILING

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AMENDED DEFENCE



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.