



Form 17  
Rule 8.05(1)(a)

**Amended Statement of Claim**

No. 1201 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

***Jurisdiction***

1. The Federal Court of Australia has jurisdiction to hear and determine this matter by reason of s 39B(1A)(c) of the *Judiciary Act 1903* (Cth).

1A. The Applicant claims orders that, inter alia, the *Water (Accredited Water Resource Plan – NSW Murray Darling Basin Fractured Rock) Instrument 2022 (Instrument)* purportedly made under the Water Act 2007 (Cth) (Water Act), to give effect to the NSW Fractured Rock Water Resource Plan (FRWRP), is invalid.

***The Parties***

- 2. At all material times, the Applicant (**MLDRIN**) is and has been:
  - a. a not-for-profit Australian public company, limited by guarantee;
  - b. a confederation of several First Nations from the south of the Murray Darling Basin.
- 3. MLDRIN has had a special interest in the subject matter of the proceedings, being the process leading up to, and the making and implementation of, the ~~*Water (Accredited Water Resource Plan – NSW Murray Darling Basin Fractured Rock) Instrument 2022 (Instrument)*~~. Instrument and has standing to bring the proceedings.

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Filed on behalf of (name & role of party) Murray Lower Darling Rivers Indigenous Nations (Applicant)  
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 (include state and postcode)

4. The First Respondent is the Commonwealth of Australia (**Commonwealth**).
5. The Second Respondent is the Commonwealth Minister for the Environment and Water (**Minister**) and is the Minister administering the Water Act 2007 (Cth) (**Water Act**).
6. The Third Respondent is the Murray Darling Basin Authority (**Authority**) constituted under the Water Act.

6A. Together, the First, Second and Third Respondents may be described as the **Commonwealth Respondents**.

7. The Fourth Respondent is the State of New South Wales (**the Basin State**).

***Statutory functions***

8. The Minister has the statutory function of, relevantly, accrediting a water resource plan prepared by a Basin State (within the meaning of s 4 of the Water Act) under s 63(5)(b)(i) of the Water Act-2007.
9. The decision of the Minister to so accredit a proposed water resource plan is a legislative instrument by operation of s 63(7)(b) of the Water Act.
10. ~~The~~ In the exercise of the statutory function to accredit a water resource plan, the Minister must accredit ~~a~~ the water resource plan if satisfied that the water resource plan is consistent with the relevant Basin Plan under s 63(6) of the Water Act.
11. The Authority has the statutory functions of:
  - a. Receiving a proposed water resource plan from a Basin State under s 63(1)(a) of the Water Act;
  - b. Considering a proposed water resource plan under s 63(3)(a); of the Water Act;
  - c. Preparing recommendations for the Minister on whether the proposed water resource plan should be accredited under s 63(3)(b) of the Water Act; and
  - d. Giving the proposed water resource plan and its recommendations to the Minister under s 63(4)(c) of the Water Act.
12. ~~The Authority and the Minister must perform their statutory functions and exercise their powers consistently with, and in a manner that gives effect to the Basin Plan by reason of s 34(1) of the Water Act.~~

**Legal status of water resources plan based on lawful exercise of statutory functions**

12. A water resource plan for a water resource plan area must be consistent with the relevant Basin Plan by force of 55(2) of the Water Act.

12A. A water resource plan that lacks content required to be included in a water resource plan by the relevant basin plan:

a. Would not be a water resource plan for the purposes of s 55(2) of the Water Act with the consequence that an instrument purportedly giving effect to that water resource plan would be invalid;

b. Would mean the proposed water resource plan given to the Authority:

i. could not have been lawfully considered by the Authority to be consistent with the Basin Plan for the purposes of 63(3)(a); and

ii. could not lawfully be recommended for accreditation under s 63(3)(b)-(c);

with the consequence that any recommendation decision in those circumstances would be invalid; and

c. Would mean that the Minister could not have reached a state of lawful satisfaction that the water resource plan was consistent with the relevant basin plan for the purposes of s 63(6) with the consequence that any accreditation decision in those circumstances would be invalid.

12B. On the premises from [12], a water resource plan that lacks content required by the relevant Basin Plan would mean invalidity of the plan and any associated recommendation decision and accreditation decision.

***Requirements of the Basin Plan***

13. The relevant Basin Plan for consideration in the course of the exercise of the statutory functions of the Authority and the Minister Commonwealth Respondents with respect to the NSW Fractured Rock Water Resource Plan (PWRP) FRWRP was the *Basin Plan 2012* version F2021C01067, registered on 27 October 2021 (**Relevant Basin Plan**).

14. The ~~Relevant~~ Basin Plan included the following requirements (**Basin Plan Requirements**):

a. *Consultation Requirement* means the requirement under ss 10.52(2) and 10.53(1) of the ~~Relevant~~ Basin Plan for consultation with relevant Indigenous organisations in order to fulfill the Determination Requirement and the Regard Requirements.

- b. *Determination Requirement* means the requirement under s 10.52(2) of the ~~Relevant~~ Basin Plan for:
- i. the social, spiritual and cultural values of Indigenous people that relate to the water resources of the water resource plan area (**Indigenous values**); and
  - ii. the social, spiritual, and cultural uses of the water resources of the water resource plan area by Indigenous people (**Indigenous uses**),
- to be determined (**Determined Values and Uses**).
- c. *Identification Requirement* means the requirement:
- i. under s 10.52(1) of the ~~Relevant~~ Basin Plan for a ~~Water Resource Plan~~ water resource plan to identify the objectives of Indigenous people in relation to managing the water resources of a water resource plan area and the outcomes for the management of the water resources of the water resource plan area that are desired by Indigenous people (**Identification Task**Content); and
  - ii. ~~in that including the Identification Task, Content by satisfying the Regard Requirement by having regard to Determined Values and Uses that arose from the Consultation Requirement in both:~~
- (1) having regard to the Determined Values and Uses; and
  - (2) having regard to the views of relevant Indigenous organisations with respect to the matters listed in s 10.52(2) of the Basin Plan.
- d. *Information Standard* means the requirement under s 10.49(1) of the ~~Relevant~~ Basin Plan for a water resource plan to be based on the best available information.
- e. *Native Title Consultation Requirement* means the requirement under s 10.53(1)(a) of the ~~Relevant~~ Basin Plan for a ~~Water Resource Plan~~ water resource plan to be prepared having regard to the views of relevant Indigenous organisations with respect to native title rights and native title claims in relation to the water resources of the water resource plan area.
- f. *Regard Requirements* means:
- i. First, the requirement under s 10.52(2) of the ~~Relevant~~ Basin Plan to have regard to the Determined Values and Uses in inclusion of the Identification Content in a water resource plan; and

- ii. Second, the requirement under s 10.53(1) of the Relevant Basin Plan to have regard to the views of relevant Indigenous organisations with respect to the matters identified under ~~ssection~~ 10.52, and the nominated additional matters under s 10.53(1)(a)-(f), when preparing a water resource plan.

14A. The Basin Plan Requirements are of two types:

- a. The specification of detail or required content to be included in a water resource plan (**Content Requirements**) which, relevantly, was the Identification Content; and
- b. Steps required for a Basin State to complete in order to:
  - i. obtain necessary information to satisfy both elements of the Regard Requirements; and
  - ii. to inform the Identification Content,

(together, the **Performance Requirements**) which, relevantly, were:

- iii. Compliance with the Consultation Requirement in order to fulfil or carry out the Determination Requirement and the Regard Requirements both on the Information Standard; and
- iv. Compliance with the Native Title Consultation Requirement on the Information Standard.

**The Statutory Duty and the statutory context for the exercise of Statutory Functions**

14B. The Authority and the Minister must perform their statutory functions and exercise their powers consistently with, and in a manner that gives effect to, the Basin Plan by reason of s 34(1) of the Water Act (**Statutory Duty**).

14C. Each of, or a combination of,:

- a. the Statutory Duty;
- b. because s 55(3) directs the Authority and Minister to have regard to the legislative framework in which a water resource plan operates;
- c. because s 56(1) directs the Authority and Minister to have specific regard to the Basin Plan and the extent to which a water resource plan is consistent with the Basin Plan;  
and

d. because the intended outcome of the exercise of the Authority and Minister's statutory functions is a water resource plan that is consistent with the relevant basin plan under s 55(2).

means that the Authority and the Minister, in the exercise of their statutory functions regarding the making of a proposed water resource plan, must determine:

e. that a proposed water plan includes all Content Requirements; and

f. that a proposed water resource plan, and any accompanying materials submitted by the Basin State in support of it, includes the information necessary to demonstrate that all steps taken by the Basin State to meet the Performance Requirements met the Performance Requirements.

14D. In the premises, a water resource plan that did not include all Content Requirements, or a water resource plan with accompanying information that did not include all information necessary to determine compliance with Performance Requirements,:

a. could not be lawfully recommended to the Minister by the Authority that it be accredited;

b. could not be lawfully accredited by the Minister; and

c. could not be the subject of a lawful instrument because the water resource plan would not be consistent with the relevant Basin Plan contrary to s 55(2) of the Water Act.

**The 2020 Version of the Proposed First Water Resource Plan**

15. On or about 9 April 2020, the Basin State gave a proposed water resource plan to the Authority for the making of a ~~Recommendation~~ recommendation under the Water Act (**the 2020 Version PWRP-FRWRP**).
16. In or around the second half of 2020, or early 2021, the Authority commissioned the Northern Basin Aboriginal Nations (**NBAN**) to carry out an assessment of the compliance of the 2020 Version PWRP-FRWRP with the Basin Plan ~~requirements~~ Requirements, specifically as to Chapter 10 Part 14.
17. In or around June to August 2021, NBAN provided an assessment report to the Authority (**NBAN Report**).
18. The NBAN Report included advice to the Authority that the 2020 Version PWRP-FRWRP should not be accredited.

19. On or about 31 August 2021, the Authority notified the Basin State in writing that it had identified ~~a number of~~ matters which it said might support a recommendation that the 2020 Version ~~PWRP~~FRWRP not be accredited and provided the Basin State with details of the grounds on which it considered it should recommend that the Minister not accredit the 2020 Version ~~PWRP~~FRWRP (**2021 Notice of Grounds**).
20. Included in the 2021 Notice of Grounds, the Authority represented to the Basin State that:
- a. because of the absence of a consultation report for the Barkandji/Maljangapa Nation, it could not confirm and was not satisfied that the 2020 Version ~~PWRP~~FRWRP complied with Basin Plan sections 10.52(1), 10.52(2), 10.53, or 10.54; and
  - b. the 2020 Version ~~PWRP~~FRWRP had only limited demonstration of the views of First Nations peoples, which was not consistent with section 10.53 of the Basin Plan.
21. Subsequent to receiving the Notice of Grounds, the Basin State withdrew the 2020 Version ~~PWRP~~FRWRP from assessment.

***The preparation of the proposed Fractured Rock Water Resource Plan***

22. In about 2022, the Basin State prepared the ~~PWRP~~FRWRP for the purpose of giving the ~~PWRP~~FRWRP to the Authority under the Water Act.
23. On or about 14 July 2022 the Basin State gave the ~~PWRP~~FRWRP to the Authority.
- ~~24. The PWRP did not include detail of any additional substantive consultation efforts of the Basin State to meet the Consultation Requirements.~~
- ~~25. The PWRP did not include a consultation report for the Tati Tati Nation.~~

***The FRWRP concerned water resources within an area of land included in the traditional lands of 29 First Nations***

- 23A. At all material times, the FRWRP was intended to be accredited under the Water Act and, to that end, to be a water resource plan for the water resource plan area that included the traditional lands, or distinct portions of the traditional lands, of 29 First Nations including the Tati Tati Nation and the Barkandji Nation.

Particulars

1. FRWRP, p 5.

- 23B. At the time of preparation of the FRWRP, First Nations or “Traditional Owners groups” across the NSW portion of the Basin were specifically identified in published diagrams.

Particulars

1. FRWRP, Figure 1-5, p 42.

23C. The diagrams identified relevant Indigenous organisations as First Nations or Traditional Owners groups. As such, or in any event as a consequence of the proper construction of the Consultation Requirement, First Nations within the water resources plan area were the relevant indigenous organisations required to be consulted to fulfill the Consultation Requirement.

23D. As such, 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 and were required to be consulted in accordance with the Consultation Requirement.

23E. In the preparation of the FRWRP and in the assessment of the FRWRP, both the Authority and the Basin State expressed that each of the 29 Nations were “relevant Indigenous organisations” for the purpose of Chapter 10 Part 14 of the Basin Plan and the Consultation Requirement.

Particulars

1. Murray Darling Basin Authority, *Water Resource Plan assessment report: Proposed NSW Murray-Darling Basin Fractured Rock Water Resource Plan* (October 2022) (**Authority Assessment Report**) pp 208, 215 (pp 228, 235 of the PDF format).
2. FRWRP, pp 33-34.

*Native title rights and native title claims*

23F. At the time of preparation of the FRWRP, the Basin State expressed, and so understood, that 8 of the 29 First Nations, being relevant Indigenous organisations, had lodged a native title application or received a determination.

Particulars

1. FRWRP p 28.

23G. In the preparation of the FRWRP, the Basin State determined that it was not appropriate to conduct general discussions about native title where a First Nation had not lodged an application or received a determination.

Particulars

1. FRWRP Schedule C, New South Wales Murray-Darling Basin Fractured Rock Consultation Report (**Schedule C Consultation Report**), p 15.



23H. As a consequence of that determination, the Basin State precluded itself from having regard to the views of 21 relevant Indigenous organisations, being First Nations who had not lodged a native title application or received a determination in relation to native title rights and/or native title claims, about native title rights and/or claims, which was contrary to the Native Title Consultation Requirement.

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

1. The Tati Tati Nation

23I. The FRWRP identifies the consultation the Basin State carried out with relevant Indigenous organisations between 2017 and November 2019.

Particulars

1. FRWRP Table 1-4 - Aboriginal consultation undertaken in respect of the NSWMDB Fractured Rock WRPA, pp 37-41.

23J. The FRWRP identifies that the Basin State did not consult with the Tati Tati Nation in relation to the 2020 Version FRWRP.

Particulars

1. FRWRP Table 1-4 Aboriginal consultation undertaken in respect of the NSWMDB Fractured Rock WRPA, pp 37-41.

23K. Following withdrawal of the 2020 Version FRWRP, the FRWRP did not record any additional or other consultation with the Tati Tati Nation on the content of the FRWRP.

Particulars

1. FRWRP p 6; Table 1-4 Aboriginal consultation undertaken in respect of the NSWMDB Fractured Rock WRPA, pp 37-41.

2. Schedule C Consultation Report, p 9-12.

23L. To the extent the FRWRP identified communications between the Basin State and a representative or representatives of the Tati Tati Nation about its desire to consult with the Tati Tati Nation, this did not constitute consultation with the Tati Tati Nation, as a relevant indigenous organisation, for the purposes of compliance with the Consultation Requirement.

23M. At all material times, the FRWRP did not include a consultation report for the Tati Tati Nation.

23N. As a consequence of the absence of the Consultation Report for the Tati Tati Nation, the FRWRP did not include any information relating to the Tati Tati Nation concerning the water resources within the traditional lands of the Tati Tati Nation.

Particulars

1. Schedule C Consultation Report, pp ii-iii, 9, 13.

23O. The Consultation Requirement and Regard Requirements required consultation with the Tati Tati Nation for the Basin State to determine Determined Values and Uses for the water resources of the lands within the Tati Tati Nation on the Information Standard.

23P. The Consultation Requirement and Regard Requirements required consultation with the Tati Tati Nation to enable the Basin State to have regard to the views of relevant Indigenous organisations with respect to the matters identified under s 10.52 of the Basin Plan when preparing the FRWRP on the Information Standard.

23Q. In consequence of the matter by which the FRWRP recorded no consultation with the Tati Tati Nation, set out above, the Basin State could not and did not comply with:

a. the Consultation Requirement; or

b. Regard Requirements; and

the Basin State:

c. did not determine Determined Values and Uses for the water resources of the lands within the Tati Tati Nation on the Information Standard; and

d. did not have regard to the views of relevant Indigenous organisations with respect to the matters identified under s 10.52 of the Basin Plan for the water resources of the lands within the Tati Tati Nation on the Information Standard.

23R. The FRWRP did not include the Identification Content of Determined Values and Uses for water resources of the lands within the Tati Tati Nation.

2. The Barkandji Nation

23S. The FRWRP identifies that, during June and October 2019 the Basin State held workshops with the Barkandji Nation for the purposes of preparation of the 2020 Version FRWRP.

Particulars

1. FRWRP Table 1-4 Aboriginal consultation undertaken in respect of the NSWMDB Fractured Rock WRPA, pp 37-41.

2. Schedule C Consultation Report, p 11.

23T. At all material times, the FRWRP did not include a consultation report for the Barkandji Nation.

Particulars

1. Schedule C Consultation Report, pp ii-iii, 8, 13.

23U. As a consequence of the absence of the Consultation Report for the Barkandji Nation, the FRWRP did not include any information relating to the Barkandji Nation concerning the water resources within the traditional lands of the Barkandji Nation.

23V. The Consultation Requirement and Regard Requirements required consultation with the Barkandji Nation for the Basin State to determine Determined Values and Uses for the water resources of the lands within the Barkandji Nation on the Information Standard.

23W. The Consultation Requirement and Regard Requirements required consultation with the Barkandji Nation to enable the Basin State to have regard to the views of relevant Indigenous organisations with respect to the matters identified under s 10.52 of the Basin Plan when preparing the water resource plan on the information standard.

23X. As no consultation report for the Barkandji Nation was included as part of the FRWRP or with the materials supporting the FRWRP, the Basin State could not and did not comply with the Regard Requirements and:

- a. did not determine Determined Values and Uses for the water resources of the lands within the Barkandji Nation on the Information Standard; and
- b. did not have regard to the views of relevant Indigenous organisations with respect to the matters identified under s 10.52 of the Basin Plan for the water resources of the lands within the Barkandji Nation on the Information Standard.

23Y. As a consequence, the FRWRP did not include the Identification Content of Determined Values and Uses for water resources of the lands within the Barkandji Nation.

23Z. As no consultation report for the Barkandji Nation was included as part of or with the materials supporting the FRWRP, the FRWRP and accompanying materials did not include all the information necessary for the Authority and/or the Minister to determine compliance with the Regard Requirements.

**MLDRIN's assessment of the FRWRP against Basin Plan requirements**

26. Subsequently, On or about 14 July 2022, after the Basin State gave the FRWRP to the Authority, the Authority commissioned MLDRIN to carry out an assessment of the

compliance of the ~~PWRP~~FRWRP with the Basin Plan requirements, specifically as to Part 14 of Chapter 10.

Particulars

1. Australian Government Commonwealth Contract – Services (Ref ID MD005968) between the Murray Darling Basin Authority and MLDRIN

27. On or about 31 August 2022 MLDRIN provided a report to the Authority (**MLDRIN Report**).
28. The MLDRIN Report conveyed the same, and additional, adverse reporting of the consultation efforts of the Basin State in meeting the Consultation Requirement (and ~~the~~ associated ~~Identification Requirement~~ concerns that the FRWRP did not provide the required content from the Content Requirements of the Basin Plan and Regard Requirement did not demonstrate compliance with the Performance Requirements of the Basin Plan), as had been included in the NBAN Report. The MLDRIN Report also included advice:
- a. that the ~~PWRP~~FRWRP was not compliant with the requirements of Chapter 10 Part 14 of the Basin Plan and should not be accredited;
  - b. that the ~~PWRP~~FRWRP did not include consultation reports for four Nations, including the Tati Tati Nation and the Barkandji Nation;
  - c. that, during consultations by the Basin State ~~that were conducted for the purposes of compliance with Chapter 10 Part 14 of the Relevant Basin Plan~~, it was not conveyed or made clear to many First Nations representatives that groundwater was within the scope of the consultation. It was reported that some First Nations representatives were unaware that their consultation was supposed to address both surface water and groundwater water resources;
  - d. that First Nations representatives who did not understand that groundwater was within the scope of the consultation efforts of the Basin State had reported that the stated objectives identified by the Basin State and listed in their Nation consultation reports, and ~~referred to which were listed in~~ Section 1.3.1 of the ~~PWRP~~FRWRP were not of relevance to a ~~groundwater water resource plan resources~~;
  - e. that several First Nations had raised concerns to it, and to NBAN, of major consultation oversights of the Basin State during the 2020 and 2021 ~~assessments~~ consultation efforts, and advised that the Basin State had failed to undertake further consultation to remedy the problem before submitting the ~~PWRP~~FRWRP to the Authority for a recommendation decision;

- f. that MLDRIN’s critical assessment and adverse advice about the Basin State’s Chapter 10 Part 14 consultation on other proposed groundwater water resource plans -being plans that MLDRIN had assessed and reported on to the Authority in 2020 and 2021- was transferrable to the ~~PWRP~~-FRWRP. This was because the Basin State had carried out a global consultation effort with relevant Indigenous organisations across all of the then proposed water resource plan areas, and concerning all then draft water resource plans, but had failed to undertake any further or more detailed consultation efforts to remedy any of these problems ~~identified in those advices~~ before submitting the ~~PWRP~~ FRWRP.

### **The Recommendation and Accreditation Decisions**

29. On or about 21 October 2022 the Authority made a decision to recommend that the Minister accredit the ~~PWRP~~-FRWRP (**Recommendation Decision**).
30. On or about 8 November 2022 the Authority wrote to the Minister and recommended that the Minister accredit the ~~PWRP~~-FRWRP.
31. On or about 15 November 2022 the Minister decided to accredit the ~~PWRP~~-FRWRP (**Accreditation Decision**) and caused the Instrument to be made.
- 31A. The Recommendation Decision was, in part, based on:
- a. a consideration of fairness to the Basin State that it ought not be required to address the adverse advice included in the MLDRIN Report; and
  - b. the expression of commitment from the Basin State to undertake further future consultation with relevant indigenous organisations on the operation of the FRWRP, and that the Basin State could then include the Identification Content based on the Determined Values and Uses of other First Nations or include the otherwise missing Identification Content at a later date.

### Particulars

1. Authority Assessment Report, pp 11, 208 (pp 20, 228 of the PDF format).
2. Murray Darling Basin Authority, Meeting 168 – 21 October 2022, *Recommendation for the proposed NSW Murray-Darling Basin Fractured Rock (groundwater) water resource plan*, pp 8-9.
3. FRWRP pp. 6, 19, 28.
4. FRWRP Schedule C Consultation Report, p 13.

## *Grounds for Relief Sought*

### **The Recommendation Decision**

32. ~~On the grounds provided below, the~~The Recommendation Decision was not lawfully made because:

a. ~~the PWRP-FRWRP is and was not consistent with the requirements of Part 14 or Part 12 of Chapter 10 of the Basin Plan. Accordingly, the Authority could not make the Recommendation Decision because this would not be a performance of its function, or an exercise of its power, consistent with, and in a manner that gives effect to, the Basin Plan consistent with the requirements of s 34(1) of the Water Act. in that:~~

i. Content Requirements were not included being the Identification Content of Determined Values and Uses for water resources of the lands within the Tati Tati and Barkandji Nations; and

ii. The FRWRP did not demonstrate that Performance Requirements were satisfied being:

(1) The Consultation Requirement – which was not satisfied as the Basin State had not consulted the Tati Tati Nation; and

(2) The Regard Requirements – which was not satisfied as the Basin State had not had regard to Determined Values and Uses for water resources within the lands within the Tati Tati and Barkandji Nations, and had not had regard to the views of the Tati Tati and Barkandji Nations with respect to the matters identified under s 10.52 of the Basin Plan, and had not otherwise included in the FRWRP or its supporting materials the information necessary for the Authority to determine compliance with the Regard Requirements;

(3) The Native Title Consultation Requirement – which was not satisfied because the Basin State had precluded itself from having regard to the views of 21 relevant Indigenous organisations, being First Nations who had not lodged a native title application or received a determination in relation to native title rights and/or native title claims.

b. Because any conclusion reached by the Authority that the FRWRP should be recommended for accreditation was unreasonable in the exercise of the statutory functions of the Authority.

### **~~Grounds of challenge to the Recommendation Decision~~**

~~(i) — Because of the failure of the Basin State to consult with relevant Indigenous organisations, specifically the Tati Tati Nation.~~

#### Particulars

~~1. — The Basin State:~~

~~a. — failed to consult on the content of the PWRP with the Tati Tati Nation contrary to the Consultation Requirement of the Basin Plan;~~

~~b. — thereby failed to satisfy the Determination Requirement with respect to the PWRP;~~

~~c. — thereby failed to satisfy the Regard Requirement with respect of the PWRP; and~~

~~d. — thereby failed to include in the PRWP information sufficient to comply with the Identification Requirement under the Basin Plan.~~

~~2. — As the Information Standard applied, the PWRP did not satisfy the Information Standard for the Identification Requirement due to the failure of the Basin State to satisfy the Consultation Requirement for the Tati Tati Nation.~~

~~(ii) — Because the PWRP was not prepared having regard to the views of relevant Indigenous organisations on native title rights or native title claims contrary to the Native Title Consultation Requirement. Instead, the Basin State determined that it was not appropriate to conduct general discussions about native title where a Nation had not lodged an application or received a determination.~~

~~(iii) — Because any conclusion reached by the Authority that the PWRP should be recommended for accreditation was unreasonable in the exercise of the statutory functions of the Authority, having regard to the obligations under ss 34(1), 55(2) and 56(1)(b), to assess the PWRP for consistency with the Basin Plan and to exercise its powers consistent with, and in a manner that would give effect to, the Basin Plan.~~

### ~~The Accreditation Decision~~

#### Particulars

1. The Recommendation Decision was based on:

- a. A consideration of whether it was “fair” for the Basin State to meet the adverse advice contained in the MLDRIN Report ~~that was in addition to the adverse advice in the NBAN Report~~; and
  - b. Representations from the Basin State, in the ~~PWRP-FRWRP~~, that it would provide opportunities for future consultation with some of the relevant Indigenous organisations for whom consultation reports had not been included in the ~~PWRP-FRWRP~~ and could in the future amend the ~~PWRP-FRWRP~~ to incorporate ~~objectives and outcomes~~ the Identification Content which was:
    - i. an admission that the Consultation Requirement had not been met; ~~and~~
    - ii. ~~an unlawful deferral of the Identification Requirement Content~~ to a later amendment; and
    - iii. deferral of the ~~Regard Requirement, Requirements~~ to a later date.
2. In accounting for the considerations expressed in (1), the Authority:
- a. ~~did not address the relevant legal questions of whether the FRWRP included the Content Requirement and included the information necessary to demonstrate compliance with the Performance Requirements reasonably reach the required state of satisfaction on consistency as to the Basin State’s performance of the Consultation Requirement (and any associated Determination Requirement, Identification Requirement and Regard Requirement) and hence of the consistency of the PWRP with the Relevant Basin Plan; or; and~~
  - b. reached any that state of satisfaction of consistency of the FRWRP with the Basin Plan by asking a wrong question or questions, being the manner by which the reasoning proceeded as explained in (1).

### **The Accreditation Decision**

33. ~~On the grounds provided below, the The Accreditation Decision was not lawfully made because the PWRP is and was not consistent with the requirements of Part 14 or Part 12 of Chapter 10 of the Basin Plan. Accordingly, the Minister could not make the Accreditation Decision:~~
- a. The applicant repeats the grounds asserted in respect of the Recommendation Decision;  
and



- b. The Minister did not have the FRWRP before her at the time of her making the Accreditation Decision so could not carry out the exercise of consideration of the content of the FRWRP for consistency with the Basin Plan as required by ss 34(1), 55(2), and 63(6) of the Water Act.
- a. ~~Because this would not be a performance of her function, or an exercise of her powers, consistent with, and in a manner that gives effect to, the Basin Plan consistent with the requirements of s 34(1) of the Water Act;~~
- b. ~~Because it accredited a water resource plan that was not consistent with the relevant Basin Plan contrary to s 55(2) of the Water Act; and~~
- e. ~~Because any conclusion reached as to being satisfied that the PWRP was consistent with the Basin Plan was not reasonable or involved a constructive failure to exercise s 63(6) and/or s 63(5)(b)(i) of the Water Act.~~

### **~~Grounds of challenge to the Accreditation Decision~~**

- (i) ~~Because of the failure of the Basin State to consult with relevant Indigenous organisations, specifically the Tati Tati Nation.~~

#### Particulars

1. ~~The Basin State:~~
- a. ~~failed to consult on the content of the PWRP with the Tati Tai Nation contrary to the Consultation Requirement of the Basin Plan;~~
- b. ~~thereby failed to satisfy the Determination Requirement with respect to the PWRP;~~
- e. ~~thereby failed to satisfy the Regard Requirement with respect of the PWRP;~~  
and
- d. ~~thereby failed to include in the PRWP information sufficient to comply with the Identification Requirement under the Basin Plan.~~
2. ~~As the Information Standard applied, the PWRP did not satisfy the Information Standard for the Identification Requirement due to the failure of the Basin Plan to satisfy the Consultation Requirement for the Tati Tati Nation.~~
- (ii) ~~Because the PWRP was not prepared having regard to the views of relevant Indigenous organisations on native title rights or native title claims contrary to the Native Title Consultation Requirement. Instead, the Basin State determined that it was not appropriate to~~

~~conduct general discussions about native title where a Nation had not lodged an application or received a determination.~~

- ~~(iii) Because any conclusion reached by the Minister that the PWRP was consistent with the Basin Plan was unreasonable in the exercise of her statutory functions, having regard to the obligations under ss 34(1), 55(2), and 63(6), to assess the PWRP for consistency with the Basin Plan and to exercise its powers consistent with, and in a manner that would give effect to, the Basin Plan.~~

#### Particulars

1. ~~The Accreditation Decision was based on the Recommendation Decision which was based on:
 
    - a. ~~A consideration of whether it was “fair” for the Basin State to meet the adverse advice contained in the MLDRIN Report that was in addition to the adverse advice in the NBAN Report; and~~
    - b. ~~Representations from the Basin State, in the PWRP, that it would provide opportunities for future consultation with some of the relevant Indigenous organisations for whom consultation reports had not been included in the PWRP and could in the future amend the PWRP to incorporate objectives and outcomes which was:
 
      - i. ~~an admission that the Consultation Requirement had not been met; and~~
      - ii. ~~an unlawful deferral of the Identification Requirement, to a later amendment;~~
      - iii. ~~an unlawful deferral of the Regard Requirement, to a later date.~~~~~~
2. ~~In accounting for the considerations expressed in (1), the Minister:
 
    - a. ~~did not reasonably reach the required state of satisfaction on consistency as to the Basin State’s performance of the Consultation Requirement (and any associated Determination Requirement, Identification Requirement and Regard Requirement) and hence of the consistency of the PWRP with the Relevant Basin Plan; or~~
    - b. ~~reached that state of satisfaction by asking a wrong question or questions, being the manner by which the reasoning proceeded as explained in (1).~~~~
- ~~(iv) The Minister did not have the PWRP at the time of her making the Accreditation Decision so could not carry out the exercise of consideration of the content of the PWRP for~~

~~consistency with the Basin Plan as required by ss ss 34(1), 55(2), and 63(6) of the Water Act.~~

### Particulars

1. On or around 18 January 2023, MLDRIN submitted a Freedom of Information request to the Department of Climate Change, Energy, the Environment and Water seeking access to “All documents that were before the Minister (including without limitation any proposed decision brief (or similar document) and any attachments to it) for consideration when making the Accreditation Decision”.
2. On or around 17 February 2023, MLDRIN received a Decision in response to the Freedom of Information request. That Decision identified 10 documents within the scope of the request, being the Ministerial brief and 9 attachments to it.
3. The attachments to the Ministerial brief identified in the Decision did not include the PWRP-FRWRP.
4. On 9 March 2023 MLDRIN’s legal representatives sent a letter to the Minister asking whether the PWRP-FRWRP was before the Minister when she made the Accreditation Decision.
5. On 29 March 2023 MLDRIN’s legal representatives sent an email to the Minister, following up a response to the letter sent to the Minister on 9 March 2023.
- ~~6. As at the date of this Statement of Claim, MLDRIN has not received a response from the Minister regarding its letter dated 9 March 2023.~~
6. In their Defence to the Statement of Claim, the Commonwealth Respondents have pleaded that a copy of the FRWRP was delivered to an officer in the Minister’s office on 25 October 2022.
7. On 8 February 2024 MLDRIN’s legal representatives requested that the Commonwealth Respondents confirm if the FRWRP was physically before the Minister at the time of her making the Accreditation Decision.
8. As at the time of preparation of this Amended Statement of Claim, no response has been received to the request.

### **The Instrument**

34. In the circumstances, the Instrument is invalid because:

- a. The required statutory process for making the Instrument was not followed for the reasons given above; and
- b. The Instrument accredits a water resource plan that is not consistent with the Basin Plan contrary to s 55(2) of the Water Act.

***Orders sought***

1. A declaration that the Water (Accredited Water Resource Plan – NSW Murray Darling Basin Fractured Rock) Instrument 2022 (**Instrument**) is invalid and of no effect.
2. The decision of the Authority to recommend to the Minister that she accredit the proposed water resource plan being the NSW Fractured Rock Water Resource Plan (~~PWRP~~FRWRP) be quashed.
3. The decision of the Minister to accredit the ~~PWRP~~FRWRP be quashed.
4. In the alternative, an order to prohibit or restrain:
  - a. The Authority from acting on the decision to recommend to the Minister that she accredit the ~~PWRP~~FRWRP;
  - b. The Minister from acting on the decision to accredit the ~~PWRP~~FRWRP or on the recommendation of the Authority; and
  - c. The Respondents, their servants or agents, from acting in reliance on the Instrument.
5. Costs.
6. Any further or other order.

Date: ~~20 October 2023~~18 April 2024



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Signed by Emily Long  
Lawyer for the Applicant

This pleading was prepared by Emily Long, lawyer

**Certificate of lawyer**

I Emily Long certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~20 October 2023~~ 18 April 2024

A handwritten signature in black ink, appearing to be 'EL' followed by a long horizontal stroke.

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Signed by Emily Long  
Lawyer for the Applicant

## NOTICE OF FILING

### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)  
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COMMONWEALTH OF AUSTRALIA & ORS  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*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.