



Form 33
Rule 16.32

DEFENCE

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES

NO NSD1201/2023

MURRAY LOWER DARLING RIVERS INDIGENOUS NATIONS
Applicant

COMMONWEALTH OF AUSTRALIA
First Respondent

MINISTER FOR THE ENVIRONMENT AND WATER
Second Respondent

MURRAY DARLING BASIN AUTHORITY
Third Respondent

STATE OF NEW SOUTH WALES
Fourth Respondent

Preliminary

- A. Headings used in this Defence to the Applicant's Statement of Claim dated 20 October 2023 (**Statement of Claim**) are for convenience only and do not form part of the Defence.
- B. The First, Second and Third Respondents (the **Commonwealth Respondents**) do not plead to the particulars in the Statement of Claim.
- C. The Commonwealth Respondents plead to the numbered paragraphs of the Statement of Claim as follows.

Jurisdiction

1. The Commonwealth Respondents admit paragraph 1.

The parties

2. The Commonwealth Respondents admit paragraph 2.
3. As to paragraph 3, the Commonwealth Respondents:

Filed on behalf of the First, Second and Third Respondents.

File ref: 23007903

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- a. admit that the Applicant has standing to seek the relief sought in the Originating Application filed on 24 October 2023 (**Originating Application**); and
 - b. otherwise deny paragraph 3.
4. The Commonwealth Respondents admit paragraph 4.
 5. The Commonwealth Respondents admit paragraph 5.
 6. The Commonwealth Respondents admit paragraph 6 and say further that:
 - a. the Third Respondent (the **Authority**) is established under s 171 of the *Water Act 2007* (Cth);
 - b. the Authority has the functions and powers stated in ss 172-173 of the *Water Act 2007* (Cth); and
 - c. the Authority is a body corporate with perpetual succession and may sue and be sued in its corporate name under s 176(1) of the *Water Act 2007* (Cth).
 7. The Commonwealth Respondents admit paragraph 7.

Statutory functions

8. The Commonwealth Respondents admit paragraph 8 and say further that:
 - a. the Second Respondent (the **Minister**) may:
 - i. accredit a “water resource plan” that has been prepared by a “Basin State” (within the meaning of s 4 of the *Water Act 2007* (Cth)) under s 63(5)(b) of the *Water Act 2007* (Cth); or
 - ii. adopt a “water resource plan” that has been prepared by the Authority under s 69(1)(b) of the *Water Act 2007* (Cth);
 - b. where a “Basin State” has given the Authority a “proposed water resource plan” (within the meaning of s 4 of the *Water Act 2007* (Cth)) and asked the Authority to give it to the Minister for accreditation then the Authority must (under s 63(1)-(2) of the *Water Act 2007* (Cth)):
 - i. consider the “proposed water resource plan”;
 - ii. prepare recommendations for the Minister on whether the “proposed water resource plan” should be accredited; and
 - iii. give the Minister the “proposed water resource plan” and its recommendations;

- c. if the Authority gives the Minister a “proposed water resource plan” and its recommendations then the Minister (under s 63(5)-(6) of the *Water Act 2007* (Cth)):
 - i. must consider the “proposed water resource plan” and the recommendations; and
 - ii. may either accredit the “proposed water resource plan” or not accredit it – however, if the Minister is satisfied that the plan is consistent with the “relevant Basin Plan” (within the meaning of ss 55(2) and 56(2)-(2A) of the *Water Act 2007* (Cth)) then she must accredit it.
- 9. The Commonwealth Respondents admit the allegations in paragraph 9 and say further that, where the Minister makes a decision to accredit, or not to accredit, a “proposed water resource plan”, the decision (under s 63(7) of the *Water Act 2007* (Cth)):
 - a. must be made in writing; and
 - b. is a legislative instrument (however s 42 of the *Legislation Act 2003* (Cth) does not apply to it).
- 10. The Commonwealth Respondents admit paragraph 10.
- 11. As to paragraph 11, the Commonwealth Respondents:
 - a. repeat the matters in paragraphs 6 and 8 above; and
 - b. otherwise deny paragraph 11.
- 12. As to paragraph 12, the Commonwealth Respondents:
 - a. say that s 34(1) of the *Water Act 2007* (Cth) provides that the “Authority, and the other agencies of the Commonwealth, must perform their functions, and exercise their powers, consistently, and in a manner that gives effect to, the Basin Plan”;
 - b. say that the Minister is an “agency of the Commonwealth” for the purpose of s 34(1);
 - c. will rely on the *Water Act 2007* (Cth) for its full force and effect; and
 - d. otherwise deny paragraph 12.

Requirements of the Basin Plan

- 13. The Commonwealth Respondents admit paragraph 13.
- 14. As to paragraph 14, Commonwealth Respondents:

- a. say that they will rely on the Relevant Basin Plan (as defined in paragraph 13 of the Statement of Claim) for its full force and effect;
- b. say that the Relevant Basin Plan, among other things, states that:
 - i. a “water resource plan” must be based on the best available information and must identify and describe the significant sources of information on which it is based (s 10.49);
 - ii. a “water resource plan” must identify (s 10.52(1)-(2)):
 - A. the objectives of Indigenous people in relation to managing the water resources of the “water resource plan area”; and
 - B. the outcomes for the management of the water resources of the “water resource plan area” that are desired by Indigenous people;

such objectives and outcomes being identified having regard to:

 - C. the social, spiritual and cultural values of Indigenous people that relate to the water resources of the “water resource plan area” (**Indigenous values**); and
 - D. the social, spiritual and cultural uses of the water resources of the water resource plan area by Indigenous people (**Indigenous uses**),

as determined through consultation with relevant Indigenous organisations, including (where appropriate) the Murray Lower Darling Rivers Indigenous Nations (**MLDRIN**) and the Northern Murray-Darling Basin Aboriginal Nations;
 - iii. a person or body preparing a “water resource plan” may identify opportunities to strengthen the protection of Indigenous values and Indigenous uses in accordance with the objectives and outcomes identified under s 10.52(1), in which case the opportunities must be specified in the “water resource plan” (s 10.52(3));
 - iv. a “water resource plan” must be prepared having regard to the views of relevant Indigenous organisations with respect to the matters identified under s 10.52 and the following matters (s 10.53):
 - A. native title rights, native title claims and “Indigenous Land Use Agreements” provided for by the *Native Title Act 1993* (Cth) in relation to the water resources of the “water resource plan area”; and
 - B. “registered Aboriginal heritage” (meaning Aboriginal heritage registered or listed under a law of a “Basin State” or the Commonwealth that deals with the registration or listing of Aboriginal heritage, regardless of whether the law deals with the

listing of other heritage) relating to the water resources of the “water resource plan area”;

- C. inclusion of Indigenous representation in the preparation and implementation of the plan;
 - D. Indigenous social, cultural, spiritual and customary objectives, and strategies for achieving these objectives;
 - E. encouragement of active and informed participation of Indigenous people;
 - F. risks to Indigenous values and Indigenous uses arising from the use and management of the water resources of the “water resource plan area”;
- v. a “water resource plan” must be prepared having regard to the views of Indigenous people with respect to cultural flows (s 10.54); and
- c. otherwise deny paragraph 14.

The First Water Resource Plan

15. The Commonwealth Respondents admit paragraph 15.
16. As to paragraph 16, the Commonwealth Respondents:
- a. say that, on or about 28 May 2020, the Authority sought the advice of the Northern Basin Aboriginal Nations (the **NBAN**) as to whether the requirements of Pt 14 of Ch 10 of the then applicable version of the Basin Plan had been satisfied for the “proposed water resource plan” given by the Fourth Respondent (**NSW**) to the Authority on or about 9 April 2020 (the **2020 Plan**); and

Particulars

Letter from Dr Peta Derham (Acting Executive Director, Water Resource Planning and Accounting Division, Murray Darling Basin Authority) to Mr Fred Hooper (Chair, NBAN) dated 28 May 2020.

- b. otherwise deny paragraph 16.
17. As to paragraph 17, the Commonwealth Respondents:
- a. say that, on or about 7 August 2021, the NBAN provided to the Authority its report containing its assessment of whether the requirements of Pt 14 of Ch 10 of the then applicable version of the Basin Plan had been satisfied for the 2020 Plan (**NBAN Report**); and
 - b. otherwise deny paragraph 17.

18. The Commonwealth Respondents admit paragraph 18.
 19. The Commonwealth Respondents admit paragraph 19.
 20. As to paragraph 20, the Commonwealth Respondents:
 - a. say that Attachment A to the letter from Mr Andrew Reynolds to the Hon Melinda Pavey MP dated 31 August 2021 set out notice of the grounds on which the Authority then considered that it should recommend that the Minister not accredit the 2020 Plan (**Attachment A**);
 - b. say that Attachment A, among other things, stated that:
 - i. the 2020 Plan indicated that the objectives and outcomes of Aboriginal people in relation to the management of water resources in the “water resource plan area” were listed in the attachments to Schedule C of that document;
 - ii. by reason of a number of matters, including:
 - A. that representatives of the Barkandji Nation had advised that the “First Nation Consultation Report” for the Barkandji Maljangapa Nation submitted as part of the 2020 Plan had not been endorsed by the Barkandji Nation and had requested that that report not be considered as part of the 2020 Plan;
 - B. concerns raised in the NBAN Report; and
 - C. the absence of evidence relating to “cultural flows” in the “First Nation Consultation Report” for the Ngarabal Nation,
- the Authority was not satisfied that the requirements of ss 10.52(1)-(2), 10.53(1)-10.54 of the then applicable version of the Basin Plan had been satisfied; and

Particulars

Attachment A to letter from Mr Andrew Reynolds (A/g Chief Executive of the Murray Darling Basin Authority) to the Hon Melinda Pavey MP (NSW Minister for Water, Property and Housing) dated 31 August 2021 at pages 10 to 14.

- c. otherwise deny paragraph 20.

21. The Commonwealth Respondents admit paragraph 21.

The Fractured Rock Water Resource Plan

22. The Commonwealth Respondents do not know and so cannot admit paragraph 22.

23. As to paragraph 23, the Commonwealth Respondents:
- a. say that in mid-June 2022, NSW submitted the “NSW Fractured Rock Water Resource Plan” (the **2022 Plan**) to the Authority and requested that it give the “proposed water resource plan” to the Minister for accreditation; and

Particulars

Letter from the Hon Kevin Anderson (NSW Minister for Lands and Water) to Mr Andrew Reynolds (Chief Executive Officer, Murray Darling Basin Authority) dated 14 June 2022.

- b. on or about 14 July 2022, the Authority accepted the 2022 Plan for formal assessment; and
 - c. otherwise deny paragraph 23.
24. As to paragraph 24, the Commonwealth Respondents:
- a. say that the paragraph is vague and embarrassing and is liable to be struck out because the terms “substantive” and “additional” have no identified meaning; and
 - b. otherwise deny paragraph 24.
25. The Commonwealth Respondents admit paragraph 25 and say further that the 2022 Plan states that:
- a. NSW engaged in communications with representatives of the Tati Tati Nation;
 - b. NSW sought to engage with the Tati Tati Nation via a nominated MLDRIN delegate;
 - c. in November 2019, representatives of the Tati Tati Nation expressed an interest in engaging with NSW on the basis that attendees at consultation workshops would be paid;
 - d. NSW did not agree to pay attendees at consultation workshops because it does not adopt that model as part of its engagement with First Nations;
 - e. NSW sought permission to consider relevant information supplied by the Tati Tati Nation in relation to “water resource plans” prepared by the Victorian Government;
 - f. in-principle (but not explicit) permission was provided by the Tati Tati Nation for NSW to consider information of the kind described in sub-paragraph (e) above; and

- g. in September 2020, NSW again approached the Tati Tati Nation via a MLDRIN delegate to offer an additional opportunity for involvement but received no response to indicate further interest.

Particulars

2022 Plan at paragraph 1.3.1 (page 6).

- 26. As to paragraph 26, the Commonwealth Respondents:
 - a. say that, on or about 14 July 2022, the Authority sought the advice of the Applicant as to whether the requirements of Pt 14 of Ch 10 of the Relevant Basin Plan had been satisfied for the 2022 Plan; and
 - b. otherwise deny the allegations in the paragraph.

Particulars

Letter from Mr Tim Goodes (Executive Director, Basin Plan Portfolio, Murray Darling Basin Authority) to Mr Grant Rigney (Chair, Murray Lower Darling Rivers Indigenous Nations) dated 14 July 2022.

- 27. The Commonwealth Respondents admit paragraph 27.
- 28. As to paragraph 28, the Commonwealth Respondents:
 - a. admit, subject to sub-paragraph 28(b) below, that the MLDRIN Report and its covering letter include advice from the Applicant to the Authority that is broadly to the same effect as each of the statements in sub-paragraphs 28(a)-(f) of the Statement of Claim;

Particulars

Letter from Ms Karmen Jobling (Executive Officer, Murray Lower Darling Rivers Indigenous Nations) to Mr Andrew McConville (Chief Executive, Murray Darling Basin Authority) dated 31 August 2022 at pages 1, 3.

Murray Lower Darling Rivers Indigenous Nations "NSW MDB Fractured Rock WRP Assessment (August 2022)" at pages 2-3, 19, 22, 26, 40.

- b. rely on the MLDRIN Report for its full force and effect; and
 - c. otherwise deny paragraph 28.
- 29. The Commonwealth Respondents admit paragraph 29 and say further that:

- a. the recommendation from the Authority to the Minister to accredit the 2022 Plan was communicated by means of the following documents:
 - i. a letter to the Minister dated 8 November 2022;
 - ii. a document entitled “Recommendation on the accreditation of the proposed NSW Murray-Darling Basin Fractured Rock Water Resource Plan” dated 21 October 2022;
 - iii. a document entitled “Water Resource Plan assessment report, proposed NSW Murray-Darling Basin Fractured Rock Water Resource Plan” dated October 2022; and
 - iv. a document entitled “Proposed NSW Murray-Darling Basin Fractured Rock Water Resource Plan – Planned environmental water: Assessment of no net reduction (s. 10.28) in the level of protection” dated 21 October 2022

(together, the **Recommendation Documents**);

- b. they rely on the Recommendation Documents for their full force and effect;
- c. the Recommendation Documents outlined the reasons why the Authority was satisfied that the 2022 Plan was consistent with the Relevant Basin Plan as a whole (not just Pt 14 of Ch 10 of the Relevant Basin Plan in isolation).

30. The Commonwealth Respondents admit paragraph 30 and say further that they repeat the matters in sub-paragraphs 29(a)-(c) above.

31. The Commonwealth Respondents admit paragraph 31.

Grounds for relief sought

The Recommendation Decision

32. As to paragraph 32, the Commonwealth Respondents:

- a. say that the paragraph is vague and embarrassing and is liable to be struck out because:
 - i. it does not articulate, sufficiently or at all, the factual or legal basis on which it is asserted that:
 - A. the 2022 Plan was not consistent with the requirements of Pt 12 or Pt 14 of Ch 10 of the Relevant Basin Plan;
 - B. the decision made by the Authority pursuant to s 63(3) of the *Water Act 2007* (Cth) to recommend the 2022 Plan was not lawfully made;

- C. the decision made by the Authority pursuant to s 63(3) of the *Water Act 2007* (Cth) to recommend the 2022 Plan was a performance of the Authority's functions, or an exercise of its powers, that was inconsistent with, or was undertaken in a manner that failed to give effect to, the Relevant Basin Plan;
 - D. the Authority could not make a decision to recommend the 2022 Plan; or
 - E. how each of the different provisions in s 34(1), 55(2) and 56(1)(b) of the *Water Act 2007* (Cth) impose "obligations" on the Authority; or how each is alleged to have been breached by the Authority;
- ii. the paragraph (in particular sub-paragraphs 32(i) and (ii)) is premised on factual allegations that are not pleaded in paragraph 32 or in any other paragraph of the Statement of Claim; and
- b. otherwise deny paragraph 32.

The Accreditation Decision

33. As to paragraph 33, the Commonwealth Respondents:

- a. say that the paragraph is vague and embarrassing and is liable to be struck out because:
 - i. it does not articulate, sufficiently or at all, the factual or legal basis on which it is asserted that:
 - A. the 2022 Plan was not consistent with the requirements of Pt 12 or Pt 14 of Ch 10 of the Relevant Basin Plan;
 - B. the decision made by the Minister pursuant to s 63(5)(b)(i) of the *Water Act 2007* (Cth) to accredit the 2022 Plan was not lawfully made;
 - C. the decision made by the Minister pursuant to s 63(5)(b)(i) of the *Water Act 2007* (Cth) to accredit the 2022 Plan was a performance of the Minister's functions, or an exercise of her powers, that was inconsistent with, or was undertaken in a manner that failed to give effect to, the Relevant Basin Plan;
 - D. the decision made by the Minister pursuant to s 63(5)(b)(i) of the *Water Act 2007* (Cth) to accredit the 2022 Plan was not reasonable and involved a constructive failure by the Minister to exercise the powers conferred on her by s 63(5)(b)(i) of the *Water Act 2007* (Cth);
 - E. the Minister could not make a decision to recommend the 2022 Plan; or

- F. how each of the different provisions in ss 34(1), 55(2) and 63(6) of the *Water Act 2007* (Cth) impose “obligations” on the Minister; or how each is alleged to have been breached by the Minister;
- ii. the paragraph (in particular sub-paragraphs 33(i) and (ii)) is premised on factual allegations that are not pleaded in paragraph 33 or in any other paragraph of the Statement of Claim;
- b. say further that the Minister did have a copy of the 2022 Plan before her at the time that she made the decision to accredit that plan pursuant to s 63(5)(b)(i) of the *Water Act 2007* (Cth); and

Particulars

A copy of the “proposed water resource plan” which, when accredited, became the 2022 Plan was hand-delivered to the Minister’s Department Liaison Officer by an employee of the Authority on 25 October 2022.

- c. otherwise deny paragraph 33.
- 34. The Commonwealth Respondents deny paragraph 34.
- 35. The Commonwealth Respondents:
 - a. deny that the Applicant is entitled to the relief claimed on the grounds set out in paragraphs 1 to 34 above; and
 - b. say that the Originating Application should be dismissed.

Date: 20 December 2023



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Emily Nance
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the First, Second and Third Respondents

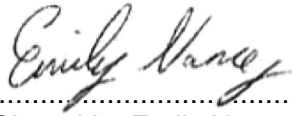
This pleading was prepared by Frances Gordon KC and Luca Moretti of Counsel.

CERTIFICATE OF LAWYER

I, Emily Nance, certify to the Court that, in relation to the defence filed on behalf of the First, Second and Third Respondents, the factual and legal material available to me at present provides a proper basis for:

1. each allegation in the pleading; and
2. each denial in the pleading; and
3. each non-admission in the pleading.

Date: 20 December 2023



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Signed by Emily Nance

AGS lawyer

for and on behalf of the Australian Government Solicitor
Lawyer for the First, Second and Third Respondents

NOTICE OF FILING

Details of Filing

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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.