

Statement of Claim

No. _____ 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).

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

Filed on behalf of (name & role of party)	<u>Murray Lower Darling Rivers Indigenous Nations (Applicant)</u>
Prepared by (name of person/lawyer)	<u>Emily Long</u>
Law firm (if applicable)	<u>Environmental Defenders Office Ltd</u>
Tel	<u>(02) 7229 0049</u> Fax _____
Email	<u>Nadja.Zimmermann@edo.org.au; Emily.Long@edo.org.au</u>
Address for service (include state and postcode)	<u>8.02, 6 O'Connell St Sydney, NSW 2000</u>

Statutory functions

8. The Minister has the statutory function of accrediting a water resource plan under s 63(5)(b)(i) of the Water Act 2007.
9. The decision of the Minister to accredit a proposed water resource plan is a legislative instrument by operation of s 63(7)(b) of the Water Act.
10. The Minister must accredit a 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);
 - 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.

Requirements of the Basin Plan

13. The relevant Basin Plan for consideration in the course of the exercise of statutory functions of the Authority and the Minister with respect to the NSW Fractured Rock Water Resource Plan (**PWRP**) 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 s 10.52(2) of the Relevant Basin Plan for consultation with relevant Indigenous organisations in order to fulfill the Determination Requirement.
 - 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 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**); and
 - ii. in that Identification Task, satisfying the Regard Requirement by having regard to Determined Values and Uses that arose from the Consultation Requirement.
- 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 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 Requirement* means:
 - i. the requirement under s 10.52(2) of the Relevant Basin Plan to have regard to the Determined Values and Uses; and
 - ii. 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 section 10.52.

The 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 (**the 2020 Version PWRP**).
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 with the Basin Plan 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 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 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 (**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 complied with Basin Plan sections 10.52(1), 10.52(2), 10.53, or 10.54; and
 - b. the 2020 Version PWRP 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 from assessment.

The Fractured Rock Water Resource Plan

22. In about 2022, the Basin State prepared the PWRP for the purpose of giving the PWRP to the Authority under the Water Act.
23. On or about 14 July 2022 the Basin State gave the PWRP 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.
26. Subsequently, the Authority commissioned MLDRIN to carry out an assessment of the compliance of the PWRP with the Basin Plan requirements, specifically as to Part 14 of Chapter 10.
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 and Regard Requirement), as had been included in the NBAN Report. The MLDRIN Report also included advice:
 - a. that the PWRP was not compliant with the requirements of Chapter 10 Part 14 of the Basin Plan and should not be accredited;

- b. that the PWRP did not include consultation reports for four Nations, including the Tati Tati 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 Nations that groundwater was within the scope of the consultation. It was reported that some Nations were unaware that their consultation was supposed to address both surface water and groundwater water resources;
 - d. that Nations who did not understand that groundwater was within the scope of the consultation efforts of the Basin State reported that the stated objectives identified by the Basin State and listed in their Nation reports, and referred to in Section 1.3.1 of the PWRP were not of relevance to a groundwater water resource plan;
 - e. that several Nations had raised concerns to it, and to NBAN, of major consultation oversights of the Basin State during the 2020 and 2021 assessments, and advised that the Basin State had failed to undertake further consultation to remedy the problem before submitting the PWRP 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. 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.
29. On or about 21 October 2022 the Authority made a decision to recommend that the Minister accredit the PWRP (**Recommendation Decision**).
 30. On or about 8 November 2022 the Authority wrote to the Minister and recommended that the Minister accredit the PWRP.
 31. On or about 15 November 2022 the Minister decided to accredit the PWRP (**Accreditation Decision**) and caused the Instrument to be made.

Grounds for Relief Sought

The Recommendation Decision

32. On the grounds provided below, the Recommendation 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 Authority could not make the Recommendation Decision because this would not be a performance of its function, or an exercise of its 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.

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.

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, 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 Authority:
 - 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).

The Accreditation Decision

33. On the grounds provided below, 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. 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
- c. 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;
 - 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 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.
4. On 9 March 2023 MLDRIN’s legal representatives sent a letter to the Minister asking whether the PWRP 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.

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**) be quashed.
3. The decision of the Minister to accredit the PWRP 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;
 - b. The Minister from acting on the decision to accredit the PWRP 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



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



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)
Date of Lodgment: 23/10/2023 5:58:45 PM AEDT
Date Accepted for Filing: 24/10/2023 11:17:07 AM AEDT
File Number: NSD1201/2023
File Title: MURRAY LOWER DARLING RIVERS INDIGENOUS NATIONS v
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.