Common Law Division
Supreme Court
New South Wales

Case Name:	**Doyle's Farm Produce Pty Ltd atf Claredale Family Trust & Ors v Murray Darling Basin Authority**
Medium Neutral Citation:	[2025] NSWSC 1070
Hearing Date(s):	11–12 September 2025
Date of Orders:	12 September 2025
Date of Decision:	12 September 2025
Jurisdiction:	Common Law
Before:	Faulkner J
Decision:	1. The Plaintiffs have leave to amend Annexure B to the Fourth Further Amended Statement of Claim in the form annexed to the Notice of Motion filed on 5 September 2025. 2. The Plaintiffs pay the costs thrown away by the amendment. 3. The parties are to confer and give such further instructions to Podger and Barma as contemplated by page 210 of Exhibit MAM-3 4. Grant liberty to apply by email to Faulkner J's Chambers in relation to Order 3.
Catchwords:	PRACTICE AND PROCEDURE – application for leave to amend – no question of principle
Legislation Cited:	*Civil Procedure Act 2005* (NSW), ss 56, 57, 58, 60, 64
Cases Cited:	*Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 *Dymocks Book Arcade Pty Ltd v Capral Ltd (formerly Alcan Australia Ltd) & anor* [2011] NSWSC 1423
Category:	Procedural rulings

Parties:	Doyle's Farm Produce Pty Ltd (ACN 119 734 539) (First Plaintiff) John Gerard Doyle (Second Plaintiff) Coobool Downs Pastoral Co Pty Ltd (ACN 002 806 617) (Third Plaintiff) Rodney James Dunn (Fourth Plaintiff) Valerie Jeanette Dunn (Fifth Plaintiff) Murray-Darling Basin Authority (Defendant)
Representation:	Counsel: T Bannon SC / D Sulan SC / S Hartford-Davis / S Hoare / D Morris (Plaintiffs) S Callan SC / T Prince SC / H Rogers / A Hall (Defendant) Solicitors: Banton Group (Plaintiffs) Ashurst (Defendant)
File Number(s):	2019/00150651
Publication Restriction:	Nil

JUDGMENT EX TEMPORE (REVISED)

1 This is an application for leave to amend.

Legal principles

2 The Court's power to grant leave is in s 64(1)(b) of the *Civil Procedure Act 2005* (NSW) which relevantly provides:

> **64 Amendment of documents generally**
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> (1) At any stage of proceedings, the court may order—
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> …
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> (b) that leave be granted to a party to amend any document in the proceedings.
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> (2) Subject to section 58, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings.

3 Whether indirectly by reason of s 64(2) or directly by reason of s 58(1), the Court must seek to act in accordance with the dictates of justice in the exercise of its discretion to grant leave. Section 58 provides:

> **58 Court to follow dictates of justice**
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> (1) In deciding—
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> (a) whether to make any order or direction for the management of proceedings, including—
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> (i) any order for the amendment of a document, and
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> (ii) any order granting an adjournment or stay of proceedings, and
>
> (iii) any other order of a procedural nature, and
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> (iv) any direction under Division 2, and
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> (b) the terms in which any such order or direction is to be made,
>
> the court must seek to act in accordance with the dictates of justice.
>
> (2) For the purpose of determining what are the dictates of justice in a particular case, the court—

(a) must have regard to the provisions of sections 56 and 57, and

(b) may have regard to the following matters to the extent to which it considers them relevant—

(i) the degree of difficulty or complexity to which the issues in the proceedings give rise,

(ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,

(iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,

(iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),

(v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,

(vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,

(vii) such other matters as the court considers relevant in the circumstances of the case.

4 The dictates of justice are informed by the overriding purpose and objects of case management. Sections 56(1) and (2) provide:

56 Overriding purpose

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

5 Section 57 provides:

57 Objects of case management

(1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects—

(a) the just determination of the proceedings,

(b) the efficient disposal of the business of the court,

(c) the efficient use of available judicial and administrative resources,

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

6 The concern apparent in s 64(2) with the determination of the real questions raised by or otherwise depending on the proceedings sits harmoniously with the overriding purpose of the just, quick and cheap resolution of the real issues in the proceedings in s 56(1). Section 57(1)(a) directs attention to a determination of the proceedings which is just. Section 58(2)(b) makes plain that the dictates of justice are to be determined having regard to the nature of the individual case. A similar requirement comes from s 60 which provides:

60 Proportionality of costs

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

7 These provisions provide a comprehensive framework within which the Court is to exercise its discretion about granting or not granting leave to amend. Neither party submitted that there was any authority which would cast light on the application of the above principles to the particular facts of this case. On each side that was an understandable approach given the complex factual matrix from which the dispute arises. The nature, content and volume of the evidence which has been adduced (both lay and expert), the allegations made by the Plaintiffs, the nature of the amendment for which leave is sought and the procedural context in which the application has been made are all relevant considerations.

8 Over the two days of hearing the amendment application, I was only referred to one case. The High Court's decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 was cited by both sides for the proposition that there needs to be an adequate explanation for why the application for leave to amend was not brought before the Friday on the fourth week of the trial.

Background

9 It is not necessary to go through the entire factual background of the case and it would delay further deciding the application were I to do so. There does not seem to be any controversy about the key events which I summarise as follows.

10 The Defendant's water year is from 1 June to 31 May. Throughout the 2018/2019 water year, there was a document backed by a spreadsheet which may be referred to as the Annual Operating Plan (**AOP**). The AOP went through a number of iterations with the rough frequency of one per month. Without deciding the status, meaning or purpose of the AOP generally, or any iteration in particular, and in an endeavour to adopt neutral language so as not to decide any relevant issue about which final submissions will be made in due course, each iteration of the AOP "contemplated" successively for each month:

(a) a particular storage level at Lake Victoria;

(b) a quantity of water to be bulk transferred from the Hume Dam to Lake Victoria measured in gigalitres;

(c) a flow rate at Yarrawonga Weir measured in megalitres per day; and

(d) the occurrence of in-channel environmental watering from time to time.

11 On 16 July 2018 the Defendant opened the forest regulators and in-channel watering commenced. On or about 1 August 2018 (more precision does not

currently matter) the Defendant commenced bulk transfers from the Hume Dam to Lake Victoria initially at a flow rate at Yarrawonga Weir of less than 9,500 ML/day. From 1 August 2018 until 10 August 2018 the Defendant continued bulk transfers at increasing flow rates at Yarrawonga Weir. From about 10 August 2018, the Defendant continued bulk transfers at flow rates at Yarrawonga Weir which hovered at about 9,500 ML/day and were within the range of 9,185 ML/day and 9,685 ML/day.

12 From about 31 August 2018 the Defendant continued bulk transfers at flow rates at Yarrawonga Weir which increased above 9,500 ML/day and continued at rates of about 15,000 ML/day, which transfers continued for a number of subsequent months. Also on 31 August 2018, in-channel watering ceased although the forest regulators remained open for the purpose of moving the operational water overbank through the Barmah-Millewa Forest.

13 Despite the bulk transfers which commenced on or about 1 August 2018, the quantity of water to be transferred from the Hume Dam to Lake Victoria as contemplated by the AOP for the month of August was not achieved. Further, the storage level at Lake Victoria as contemplated by the AOP for the month of August was not achieved.

14 The Plaintiffs contend that the low level of storage at Lake Victoria for the months of August and beyond gave rise to the need for bulk transfers above 9,500 ML/day at Yarrawonga Weir from 31 August and the following months, which caused water to go overbank and be lost in the Forest. The water lost overbank from 31 August 2018 is the basis for the Plaintiffs' claim for the 2018/2019 water year. They argue that had the Defendant acted with reasonable care the water would not have been lost, the allocation of each of New South Wales and Victoria would have been higher and each holder of a relevant water entitlement would have received more water that year.

15 The foregoing facts are sufficient for current purposes, apart from some detail relating to the capacity of the channel in the Forest downstream of Yarrawonga Weir, which I will address below.

16 I need to say something about the Plaintiffs' case on causation. For the purposes of causation of loss, it is not sufficient for the Plaintiff simply to say what the Defendant should not have done. The Plaintiffs have to put forward a case about what a reasonable river operator acting with reasonable care would have done so as to demonstrate that a different outcome would have ensued if the Defendant acted with reasonable care.

Issue

17 For the 2018/2019 water year, the Plaintiffs have made a number of arguments focusing on the Defendant's management of Inter-Valley Transfers (**IVT**) and the Goulburn Pulse which are not currently relevant. Another argument is a contention that a river operator acting with reasonable care would have commenced the bulk transfers from the Hume Dam to Lake Victoria both larger and earlier than 31 August 2018.

18 There is no dispute that this argument is already part of a case to the extent that the Plaintiffs contend that the bulk transfers should have been larger, up to a flow rate of 9,500 ML/day at Yarrawonga Weir. The brief summary of facts set out above suggest that by 11 August 2018 the Defendant was flowing water over Yarrawonga Weir at or about 9,500 ML/day.

19 The issue raised by the present amendment application is whether the Plaintiffs should be permitted to argue alternatively, and more favourably to their case on the quantum of the lost water, that the bulk transfers would have been up to a flow rate of 9,800 ML/day at Yarrawonga Weir (or 10,000 ML/day at Yarrawonga Weir depending upon one further degree of precision which is not yet necessary to explain).

20 By the amendment application, the Plaintiffs want to argue that the Defendant did not understand the implications of having the forest regulators open for in-channel watering on the quantity of water ending up in Lake Victoria, which was a further breach of duty. The period to which this issue is potentially relevant is 16 July 2018 to 31 August 2018 when the forest regulators were open for the purposes of environmental watering, although more focus is placed on the

period between 10 August 2018 to 31 August 2018 when bulk transfers were underway and the flow rate at Yarrawonga Weir had been ramped up to 9,500 ML/day plus or minus 200 ML/day to 300 ML/day. Had more water been transferred over Yarrawonga Weir during that period (for example, up to 9,800 ML/day) then the need for the loss-causing overbank transfers which commenced on 31 August 2018 would have been reduced or even eliminated.

21 It is not clear the magnitude of the difference in loss which is at issue in the amendment application but given the enthusiasm with which the argument has been undertaken, it may be inferred that it is material. It was certainly material by the time the allocation of water reached the individual irrigator. One of the named Plaintiffs, Mr Dunn, gave evidence that even a small increase in water makes a big difference to him.

22 For its part, the Defendant contends the case based on a failure to make bulk transfers above 9,500 ML/day prior to 31 August 2018 is a new case not contained in the pleading, which it is not prepared to meet and which will cause it prejudice if the Plaintiffs are now permitted to run it.

Current pleadings

23 Details of the pleadings are set out in my Judgment on 2 September 2025 and I will not repeat them here.

24 The amendment sought is the addition of a paragraph to Annexure B to the Fourth Further Amended Statement of Claim which contains the particulars of the breach of duty in the 2018/2019 water year alleged in paragraph 195.

25 Paragraph 195 states:

> "In the circumstances pleaded at Part H ([148A]-[185]) above, the MDBA breached the MDBA Duty of Care by:
>
> a. conducting the 2018 / 2019 Overbank Transfers; further or alternatively
>
> b. failing to operate the River Murray System so as to avoid making the 2018 / 2019 Overbank Transfers.

Particulars

…

Particulars are given in Annexure B to this Fourth Further Amended Statement of Claim."

26 Relevant to current purposes, Annexure B provides:

> "In the circumstances pleaded at Part H ([148A]-[185]) of this Third Fourth Further Amended Statement of Claim, the MDBA failed to do some or all of the following:
>
> …
>
> d. in planning to deliver South Australia's entitlement adjusted to reflect the trade in entitlement or allocation associated with the July/August 2018 Goulburn Pulse:
>
> i. give priority to refilling Lake Victoria using larger and earlier in-channel transfers in autumn, winter and spring in line with transfers planned in the AOPs for the Dry scenario (Ladson Report, Chapters 6.4.4 and 6.6.1);
>
> …
>
> iii. adhere to the actions and plans which its 2018-2019 AOP forecasts assumed for the Dry scenario (Ladson Report, Chapters 6.4.4 to 6.5.5);
>
> …"

27 In my Judgment on 2 September 2025, I rejected paragraph 343 of Dr Ladson's Second Report. That paragraph contained the following evidence:

> "Therefore, the MDBA could have safely increased releases from Yarrawonga without exceeding the threshold level at Picnic Point. This would have increased flow through the Barmah-Forest and increased the transfer to Lake Victoria. I estimate the extra volume that could have been transferred as 26 GL during August 2018. This is based on the loss associated with in-channel watering that I estimated at paragraph [339] above."

28 I rejected the paragraph for want of relevance in circumstances where I found at [44] of my Judgment that the allegation is not pleaded that there was negligence by the Defendant for not releasing water above 9,500 ML/day at Yarrawonga Weir but below 2.6m at Picnic Point (which appears to be the genesis of the 9,800 ML/day rate).

29 Whilst not in any way cavilling with that ruling, significant time was spent at the hearing of the amendment application addressing the terms of the Fourth Further Amended Statement of Claim. The Plaintiffs sought to explain their failure to plead the new allegation before the fourth week of the trial by submitting that their belief that the allegation was already pleaded was reasonably held.

Particular d(i)

30 For the reasons I gave in my Judgment on 2 September 2025, the new allegation is not within particular (d)(i).

31 In submitting that they had thought otherwise, the Plaintiffs pointed out that the "larger and earlier in-channel transfers" which it is already alleged the Defendant failed to use were transfers "in line with transfers planned in the AOPs for the 'dry' scenario". The Plaintiffs intended those words to be a reference to monthly transfers quantified in gigalitres which the successive iterations of the AOPs contemplated would occur as referred to above. The difficulty with that view is that the words in particular d(i) do not obviously have that meaning when the nature and content of the AOP is taken into account. As set out above, the AOP also contemplates a flow rate at Yarrawonga Weir (in terms and pictures) which are clearly no higher than 9,500 ML/day in the dry scenario for July and August 2018. Most relevantly, the AOP iteration for July 2018 states:

> "In the drier scenarios, 'translucent' releases of environmental water from Hume Reservoir are more likely to only contribute to flows within channel through the Barmah Choke (i.e. not exceeding 9,500 ML/day downstream release from Yarrawonga Weir). In all scenarios, during winter and spring while the flow is within channel, a portion of the 'translucent' releases is supplied through the Barmah-Millewa Forest regulators to facilitate watering of the major creek network within the forest."

32 There is no reference in the text of the AOP document to a transfer of a quantity of gigalitres from the Hume Dam to Lake Victoria for any particular month, although the Plaintiffs are able to demonstrate that the spreadsheet which stands behind the AOP document has a tab with a line item in which a quantity

of water is entered for each month in gigalitres. The Plaintiffs say that they intended to allege that the Defendant failed to transfer “in line” with that line item. Now to submit that a transfer of water to Lake Victoria above 9,500 ML/day at Yarrawonga Weir in July and August 2018 would have nonetheless been "in line" with the transfers planned in the AOP for the dry scenario may be both correct and incorrect. Such a transfer may be “in-line” with the line item in the spreadsheet but contrary to the text (and pictures) in the document. Depending on the meaning of the word "planned", it may be that particular (d)(i) is internally contradictory. This is especially so now that the Plaintiffs seek to enlist the particular as supportive of a new allegation which is in its terms an allegation about ML/day at Yarrawonga Weir. At the very least, particular (d)(i) is ambiguous.

33 For that reason the cross-references to Dr Ladson's First Report are important in the face of uncertainty about the text of particular (d)(i). The cross-references may be understood as being intended to be a source of clarification.

34 Section 6.4.4 is in Part 6.4 of Dr Ladson's First Report which is entitled "Deficiencies in the AOP Process for 2018/19". In Part 6.4 Dr Ladson gives his answer to the following question:

> “4. Were there any deficiencies in the key models, tools or processes utilised by the MDBA in planning and conducting of river operations in the Relevant Water Years? If so, how did those deficiencies impact on the operational decisions made by the MDBA in each of the Relevant Water Years which resulted in the need for and extent of Overbank Transfers?”

35 Section 6.4.4 contains evidence about a relatively simple proposition namely that the gigalitres which each iteration of the AOP contemplated would be transferred from the Hume Dam to Lake Victoria for each month was higher than the gigalitres which were in fact transferred for each of June, July and August 2018. Dr Ladson does not identify any reason for the divergence between what he calls the "forecast" and the actual. A fair summary of section 6.4.4 is in paragraphs 898 and 899:

> "898. In my opinion, there were deficiencies in the AOPs which reduced their predictive ability and utility. I discuss this at section 7.2 below.
>
> 899. However, in my opinion, there is a more basic and significant reason for the divergence between the AOP forecasts and the actual Lake Victoria levels in the 2018/19 year – namely, that the MDBA did not follow or implement the plans which underpinned the AOP forecasts."

36 Section 6.4.4 is concerned only with gigalitres each month. It does not address megalitres per day at Yarrawonga Weir.

37 Section 6.6.1 is within Part 6.6 of Dr Ladson's First Report where he gives his answer to the following question:

> "5. Did the MDBA have available to it any alternative decisions which could have avoided, or otherwise reduced the Overbank Transfers in each of the Relevant Water Years? If so, what were those alternative decisions, and to what extent would they have reduced the Overbank Transfers?"

38 Dr Ladson identifies five alternative decisions which he considers were available to the Defendant which alone or in combination would have avoided or reduced the overbank transfers upon which the Plaintiffs' claim is based. Four of the five are irrelevant for current purposes.

39 In its terms section 6.6.1 addresses the "alternative" referred to in particular (d)(i). The burden of Dr Ladson's evidence is that the Defendant could have made earlier and larger transfers from the Hume Dam to Lake Victoria. Dr Ladson addresses those two components separately, namely "earlier" and "larger". The total of Dr Ladson's evidence on "larger" transfers is contained in paragraphs 1075, 1076 and Figure 130 of his First Report:

> "1075. I also consider if there was capacity to transfer these additional volumes within the capacity of the Barmah Choke.
>
> 1076. The flow in the Murray River downstream of Yarrawonga Weir early in the 2018/19 water year is shown in Figure 130. This shows that the flow was below the capacity of the Barmah Choke from 1 June to 11 August 2018. If the river was run at Barmah Choke capacity for this whole period, the volume transferred would be an additional 300 GL. Therefore, in my opinion, there was sufficient capacity to transfer the water as proposed in the AOPs (i.e. up to 196 GL in the Dry scenario and up to 228 GL in the Very dry scenario)"

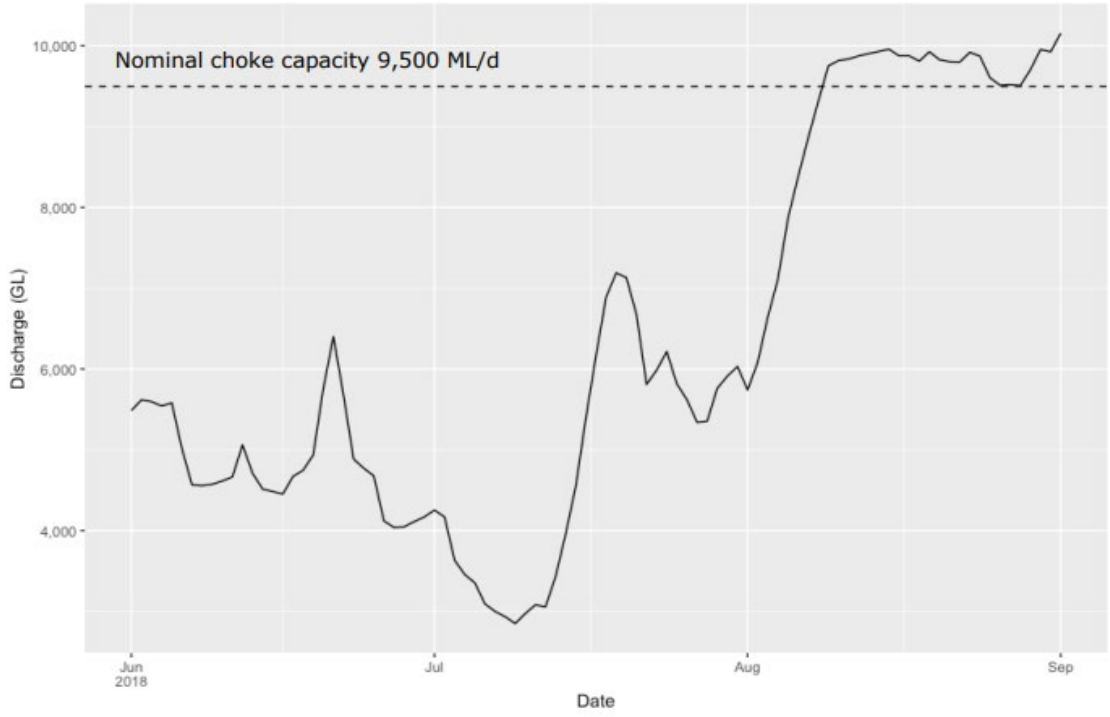

Figure 130: Murray River d/s Yarrawonga (June 2018 to September 2018)[1162]

40 His evidence is that the Defendant could have used flows up to 9,500 ML/day at Yarrawonga Weir up until 11 August 2018. Neither in section 6.6.1 nor anywhere else in Part 6.6 does Dr Ladson refer to using flows above 9,500 ML/day up to 9,800 ML/day whilst the forest regulators were open for environmental watering from 16 July 2018 to 31 August 2018 or at any other time. This is despite the fact that in section 6.5.3 of his First Report Dr Ladson addresses the impact of open forest regulators on "assumed transfer rates and channel capacity". As I observed in my Judgment on 2 September 2025, the fact that section 6.5.3 is not cross-referenced in particular (d)(i) is significant. I will return to section 6.5.3 shortly but for current purposes, as I think the Plaintiffs ultimately accepted, there is no basis to contend that the new allegation is currently pleaded by virtue of particular (d)(i).

Particular (d)(iii)

41 At the hearing of the amendment application, the Plaintiffs submitted that they had a reasonable belief that the new allegation was already pleaded in

particular (d)(iii), the terms of which are set out above. No reliance was placed on particular (d)(iii) when the Plaintiffs submitted that section 3.4.5 of Dr Ladson's Second Report was relevant, and they were correct to take that approach. I reject the submission that the new allegation is contained in particular (d)(iii).

42 Particular (d)(iii) takes as a starting point that there were "actions and plans" which were "assumed" (or contemplated) in the AOP and alleges negligence by the Defendant for failing to “adhere" to them. As I understand the Plaintiffs' argument about this, the "action" or "plan" which is said to be relevant to the new allegation is the transfer of water from the Hume Dam to Lake Victoria in the quantity of gigalitres as contemplated in the successive iterations of the 2018 AOP. For the same reasons as stated above, this is ambiguous because the AOP also contemplated that the transfers would be at 9,500 ML/day.

43 The Plaintiffs then refer to the cross-references in Dr Ladson's First Report and emphasise that this time section 6.5.3 falls within the cross reference (“chapters 6.4.4 to 6.5.5”). The Plaintiffs submit that section 6.5.3 addresses inadequate planning for transfers when the forest regulators were open for environmental watering and it follows that the new case has already been pleaded. The reason why this argument must be rejected is that it does not address the terms of section 6.5.3 other than in isolated respects.

44 The topic discussed in section 6.5.3 is described in paragraphs 986 and 987 of Dr Ladson’s First Report as follows:

> “986. In this section, I discuss:
>
> a) whether MDBA planning may not have adequately considered lower transfers caused by in-channel forest watering; and
>
> b) potential deficiencies in the development of the AOPs if in-channel watering through the Barmah Choke was not adequately planned for by the MDBA.
>
> 987. The influence of in-channel watering on Hume Dam to Lake Victoria transfers may have been a factor leading to low volumes in Lake Victoria. I present a brief analysis of the issue in this section but do not have sufficient information to reach a firm conclusion. If in-channel

watering was not adequately planned for, then this would represent a deficiency in the development of the AOPs in terms of assumed transfer rates and channel capacity."

45 Dr Ladson then undertakes an analysis of the topic and reaches a conclusion which is fairly summarised by quoting paragraphs 993–996 as follows:

> "993. It is possible that some of the available capacity to transfer water though the Barmah Choke was unavailable because of the requirement to deliver water for the in-channel watering. So, for example, some or all of the capacity used to deliver 21.8 GL of water for in-channel forest watering in July and August 2018 could instead have been used to deliver water to Lake Victoria or could have substituted for water that was released from Lake Victoria. The net effect is that without the in-channel watering, there would have been more volume in Lake Victoria early in the 2018/19 water year.
>
> 994. In my opinion, in-channel watering could have contributed to low levels in Lake Victoria, if:
>
> a) the MDBA used flow rates for planning transfers to Lake Victoria that did not take account of the reduction in flow caused by the in-channel watering, or
>
> b) the actual reduction in flow was larger than planned for.
>
> 995. I have reviewed the AOP Spreadsheets that were prepared early in the 2018/19 water year. It is not clear from these documents, if or how, the effect of in-channel watering on transfer rates has been incorporated in model runs or post processing of model outputs.
>
> 996. In my opinion, if insufficient or inappropriate planning for in-channel watering did lead to low lake levels, for the reasons noted above, or other reasons, then they contributed to the circumstances that led to overbank transfers and also represent a deficiency in the AOP process."

46 The following points are pertinent. *First* in paragraph 993 Dr Ladson contemplates a counterfactual where the forest regulators are closed (i.e. "without the in-channel watering"). The Plaintiffs expressly disavow a case based on negligence by the Defendant for permitting the forest regulators to be open between 16 July 2018 and 31 August 2018 for environmental watering. As I currently understand it, the Defendant had little (if any) choice about opening the forest regulators when an environmental water holder ordered it.

47 *Secondly* the Plaintiffs submit that paragraph 994(a) ought to be read as referring to "planning" the bulk transfer as already contemplated by the AOP for

July and August 2018. That reasoning is not open on a reading of section 6.5.3 as a whole. Dr Ladson is not saying that the Defendant failed to adhere to the transfer contemplated by the AOP for want of operational care. Dr Ladson is instead saying that the AOP may itself have been defective. In light of that, the Plaintiffs' reliance on particular (d)(iii) is misplaced. The particular covers defective departures from an efficacious AOP but not an efficient adherence to a defective AOP which is the subject of section 6.5.3 of Dr Ladson's First Report.

48 The approach to the particularisation of the Plaintiffs' case in these proceedings needs to be undertaken with care and precision. There is a deal of complexity in the issues which are thrown up for decision, including in relation to the question of whether a duty of care was owed, if so, the nature, content and extent of that duty, whether any such duty was breached and if so, whether any loss was caused.

49 Precision is especially important in this case because the Defendant operated within the hierarchy of semi-government entities and its activities were undertaken in the context of an express hierarchy of documentation. It may be one thing to say that the Defendant acted without reasonable care in preparing a draft plan to be submitted to a higher authority for approval and another thing to say that the Defendant acted without reasonable care in subsequently failing to adhere to the approved plan. Both the Defendant and the Court is entitled to know exactly how the case is put. This is not a case where the Defendant can fairly be expected to box at shadows.

50 The analysis of the pleadings which I have just undertaken reflects the important requirement for precision. Without the assistance of the cross-references to section 6.5.3 of Dr Ladson's First Report, there is nothing in particular (d)(iii) which discloses an allegation of negligence by failing to achieve a transfer for the months of July and August 2018 which is specified in the line item of the spreadsheet when the text and pictures of the AOP contemplate a flow rate of no more than 9,500 ML/day at Yarrawonga Weir.

Amendment application

51 I certainly accept that the Plaintiffs and their legal representatives held a different opinion about the application of particulars (d)(i) and (d)(iii). Submissions were made about the reasonableness of that opinion. It is not necessary to address those submissions in the detail with which they were advanced and, to a limited extent, resisted. The nature of the application led to some evidence about how it was that leave to amend was not sought until Friday on the fourth week of the trial. A sufficient summary of that evidence is as follows.

52 Up until 16 May 2025 all preparation of the case on both sides had been undertaken on the basis that there was an allegation that the Defendant was negligent for not running the river at Yarrawonga Weir at 9,500 ML/day in July and August 2018, which preparation included modelling work by expert witnesses about the rate at which the river would have been run had the Defendant acted with reasonable care.

53 On 16 May 2025 Dr Ladson's Second Report was served which is a document fairly described as lengthy and dense. In paragraph 343 (of 726), it contained the evidence referred to at [27] above. This was the first suggestion that the river might have been run above 9,500 ML/day at Yarrawonga Weir and still be within channel capacity at Picnic Point.

54 On 20 May 2025 the solicitors acting for the Defendant wrote to the solicitors acting for the Plaintiffs and set out in non-exhaustive terms matters in Dr Ladson's Second Report that they contended were not in reply and were not pleaded. The matters did not directly refer to the evidence in paragraph 343. To some extent, the width of Dr Ladson's Second Report was canvassed at a subsequent directions hearing before Garling J.

55 On 21 July 2025 the Plaintiffs filed their opening Written Submissions which for the first time alluded to the new allegation. Paragraph 92 of the Written Submissions included the following:

> "…Furthermore, in planning its maximum in-channel releases from Yarrawonga Weir, the Authority apparently forgot that it needed to adopt a higher release rate than would normally apply in order to account for that in-channel watering. The Authority was well aware that around 10% of the total release downstream of Yarrawonga Weir would be flowing into the Forest instead of through the Choke because of the in-channel watering. Yet the Authority failed to adjust its release-rate to achieve the desired transfer volumes. Thus, in mid-August 2018, despite releases downstream of Yarrawonga Weir being at 9,500 ML/day, water levels at the Choke were materially lower than full capacity (they sat at 2.26m rather than its expected 2.6m capacity). Had the Authority compensated for that, in the way it foreshadowed to the WLWG on 25 June 2018, a significant volume of additional water (26 GL) would have been transferred to Lake Victoria in-channel. The Authority later admitted that "on reflection, the performance of the Lake Victoria water levels over this time was due to [reasons including]…lower within channel system transfers through the Choke due to the interplay with in-channel forest watering activities"."

Even then the submission is made in terms of the Defendant's failure in planning and for the reasons set out above is ambiguous.

56 When the hearing commenced on 11 August 2025, the Plaintiffs made an oral opening submission which included the new allegation. A couple of days later, the Defendant gave oral opening submissions which expressed objection to the new allegation because it is not pleaded. On the application for leave to amend, the Plaintiffs submitted that the Defendant's objection lacked clarity. I do not accept that submission.

57 In any event, on or about 1 September 2025 I heard a lengthy application about the admissibility of paragraph 343 of Dr Ladson's Second Report. On 2 September 2025 I rejected the evidence and gave ex tempore reasons which included a finding that the new allegation is not pleaded. By 4 September 2025 my reasons had been reduced to writing and provided to the parties. Having foreshadowed it a day or so before (in any event, before my written reasons had been distributed) on 5 September 2025 the Plaintiffs filed in Court a Notice of Motion seeking leave to amend.

58 The Defendant submits that its objection to the existing pleading was made with clarity during their oral opening submissions. They go on to submit that the Plaintiffs made a forensic decision not to apply for leave to amend, which decision was only changed when I rejected paragraph 343 of Dr Ladson's

Second Report. I think it likely that a decision was made but I do not think (and the Defendant does not suggest) that the Plaintiffs chose to put off an application which they and their legal advisors understood would ultimately be likely to be necessary. That fact is that the Plaintiffs did not make the application earlier because they thought it unnecessary. That is an explanation.

59 As for the adequacy of that explanation, the relevance of adequacy goes to the question whether the prejudice for not allowing the amendment is to be visited on the Plaintiffs personally in their endeavour to vindicate what they allege are their rights. Two aspects of the explanation warrant emphasis:

(1) *First* I have found that there was no delay in making the application as a result of a deliberate forensic decision as was the case in the *Aon Risk Services* case; and

(2) *Secondly* in no sense can the delay in making the application be attributed to Mr Doyle or Mr Dunn, the named Plaintiffs. The reasons for the delay are located within the Plaintiffs' legal team.

60 Each case turns on its own facts but as it relates to the adequacy of the explanation there is little to distinguish the present case from that considered by the President in *Dymocks Book Arcade Pty Ltd v Capral Ltd (formerly Alcan Australia Ltd) & anor* [2011] NSWSC 1423 where her Honour found at [43] that there was an adequate explanation for the delay. It is not a matter for authority, but I make the same finding in this case.

Defendant's submissions

61 The Defendant submits that leave to amend ought not to be granted. It puts forward five reasons why not.

Prejudice

62 The *first* and primary reason is that the Defendant will suffer prejudice if the Plaintiffs are permitted to raise the new allegation now. The Defendant does

not merely assert prejudice, it explains it. It is right to give an explanation when the nature and extent of any such prejudice must be weighed against the public interest in having the real issues in the case ventilated and decided: the *Dymocks* case at [58]:

63 The prejudice is said to be that the Defendant has not had an opportunity to address the issue raised by the new allegation in its evidence-in-chief. With more particularity, the Defendant says it has not been able to investigate the issue about the terms on which environmental watering of the forest could have continued if the Defendant sought to increase the flow at Yarrawonga Weir up to 9,800 ML/day (or 10,000 ML/day) in July and August 2018. That issue not having yet been investigated, the Defendant has not been able to marshal evidence on the issue and adduce that evidence at the hearing.

The affected issue in the case

64 An examination of the question of prejudice requires a more detailed understanding of the factual circumstances out of which the new allegation arises.

65 Assuming, without deciding, that there was a relevant deficiency in the Defendant's understanding of the implications of having the forest regulators open as the water flowed past, the question whether bulk transfers above 9,500 ML/day at Yarrawonga Weir would have occurred will have to be determined by the Court. The objective circumstances which pertained at the relevant time are likely to be the best guide for deciding that hypothetical issue. A potentially important objective circumstance seems to be the way in which "lost" water in the Forest was accounted for in the 2018/2019 year. The statutory and contractual regime which established the Defendant and created the legal and operational landscape in which it operates has bestowed upon the Defendant functions of which the operation of the Murray Darling Basin is only one. Closely connected with the releasing of water is an agreed system of accounting for the water as between the relevant States and as between irrigators and environmental water holders, amongst others. What I have just

said about the accounting system is a gross oversimplification. The key point is that the Defendant also plays a central role in administering the accounting system, but it does not actually have entitlements to any of the water within the system. To some extent, actions by the Defendant which affect the allocation of water may need to be agreed by third parties such as the State or Commonwealth water authorities or environmental water entitlement holders.

66 As revealed by the evidence on the amendment application, in the water year which immediately preceded the 2018/2019 water year there was an agreed regime for the accounting of water which applied when water was "lost" through the forest regulators as it flowed past. I use the term "lost" lightly, without meaning any disparagement of devoting water to nourishing important red gum wetlands. In some documents it appears that the same concept is sometimes described as "use", but in most of the documents relevant to the current issue the term used is "lost".

67 The parties appear commonly to accept that the agreed accounting regime for lost water in the 2017/2018 water year is set out in an unsigned and updated set of minutes for a meeting of the Water Liaison Working Group (**WLWG**) which occurred on 28 June 2017. The minutes attach Annexure A which, when read together with the minutes, sets out the accounting regime which included the following features:

(a) the regime applied to water lost through the forest regulators as the water flowed past;

(b) the regime applied when water was flowing over Yarrawonga Weir within the range of 4,000 ML/day and 10,000 ML/day;

(c) when the regime applied, the lost water would be debited to the account of one or another of the environmental water holders (and therefore to the benefit of State water authorities to which the water would otherwise be allocated);

(d) the lost water would be measured by a formula;

(e) the formula had two components;

(f) the first component may be referred to in these reasons as "the initial loss";

(g) the second component may be referred to in these reasons as the "continuing loss";

(h) the continuing loss was calculated by another formula;

(i) the continuing loss formula provided that the continuing loss was a function of the rate at which water was flowing over Yarrawonga Weir measured in ML/day;

(j) the continuing loss formula was specified for water flowing over Yarrawonga Weir within the range of 4,000 ML/day to 10,000 ML/day and not beyond;

(k) the regime was expressly based on the premise that the flows would remain under the channel capacity which was described as 10,000 ML/day at Yarrawonga Weir; and

(l) the regime made no provision for the allocation of lost water to environmental water holders if the flows at Yarrawonga Weir exceeded 10,000 ML/day.

68 Coming then to the 2018/2019 water year, at some stage a proposal was put forward to change the accounting regime described above. On 22 June 2018 Mr Johnson from the Office of the Commonwealth Environmental Water Holder (**CEWH**) sent an email to Mr Zouch about a proposed change. It is unclear exactly what change Mr Johnson was addressing in his email. This may be the subject of further evidence. However, it appears that Mr Johnson's email was directed to a change in the way the component for the initial loss was calculated,

not the component for the continuing loss. Mr Johnson stated that the change was "not supported". The Plaintiffs rely on the email as evidence that Mr Johnson did not support a change to the accounting regime to change the channel capacity of 10,000 ML/day at Yarrawonga Weir but I do not presently think that is correct.

69 There is also a lack of clarity about the circumstances in which the email was sent and what happened next. There is also lack of clarity about who Mr Johnson was representing when he sent the email. Mr Johnson was an officer of the CEWH but he was also a member of a committee which included other environmental water holders and to whom the Defendant may have sent the original proposed change. The Plaintiffs point out that the email was written in the first person plural, but that would be consistent with both possibilities because the CEWH was an entity of which Mr Johnson was not the only officer.

70 It may be that further factual enquiry would illuminate these issues if it is still thought to be relevant later in the case. In any event, on 25 and 26 June 2018 there was a meeting of the WLWG at which the accounting regime for the new water year was considered. The minutes from the meeting on 28 June 2017 are attached to the minutes of the meeting of 26 June 2018, including Annexure A to those minutes.

71 At the hearing of the amendment application there was some debate about the meeting and effect of the minutes. The Plaintiffs submit that the effect of the minutes was that the accounting regime for the 2018/2019 water year (as described above) would continue to apply, including the provision for accounting for water lost through the forest regulators all the way up to 10,000 ML/day at Yarrawonga Weir. The Defendant submits that a change was agreed at the meeting, namely to reduce the channel capacity from 10,000 ML/day to 9,500 ML/day at Yarrawonga Weir for the purpose of accounting for water lost through the forest regulators and that thereafter there was no agreed regime above 9,500 ML/day.

72 The only purpose of considering this issue at this stage is that it is relevant to a question of the prejudice to the Defendant if the Plaintiffs are now permitted to argue that a river operator acting with reasonable care would have run the river at, say, 9,800 ML/day at Yarrawonga Weir. The existence (as the Plaintiffs wish to contend) or absence (as the Defendant wishes to contend) of an accounting regime above 9,500 ML/day may inform how a river operator acting with reasonable care would have approached that situation. It may also inform the causation issues about:

(1) What third parties would have done; and

(2) Whether running the river above 9,500 ML/day at Yarrawonga Weir would have made a difference to the Plaintiffs given the way in which water would have been accounted.

73 Having regard to the relevance of the issue, the question may not so much be (for the issue of causation and perhaps also for the issue of breach) what was the legal effect of the minutes (or more precisely the meeting which they record). If all relevant parties including the environmental water holders and State water authorities subsequently proceeded on a particular legal basis in 2018, it may not matter that in 2025 the Court finds that they were wrong as a matter of law. In any event, for current purposes I need to do no more than assess the merit of the respective contentions. The Plaintiffs' position lacks merit.

74 The minutes demonstrate that the meeting occurred for a particular purpose. The title of the minutes is "Barmah-Millewa in-channel application for the initial loss". Neither the title nor the text of the minutes identify any topic discussed at the meeting other than accounting for loss of water through the forest regulators. It is in that context that the "outcome" of the meeting recorded in paragraph 3(c) is to be understood: "WLWG, at the teleconference: notes that channel capacity is now 9,500 ML/day". The channel capacity is relevant to the accounting regime because the regime sets out in the minutes for the meeting

on 28 June 2017 stated: “flows for the watering event will remain below channel capacity (10,000 ML/day downstream at Yarrawonga Weir)”.

75 Paragraph 4 of the 2018 minute is to be read in the same context. It states:

> “4. The preferred method advised by WLWG was as follows:
>
> a. the initial incremental loss is to be debited when there has been no overbank flows in the 30 days preceding or following the opening of the regulators.
>
> b. the volume of initial incremental loss, if it is to be debited, will be based on the maximum flow for watering activity.
>
> c. the continuing use accounting arrangements from 2017-18 will apply for 2018-19.”

76 The statement in paragraph 4(c) upon which the Plaintiffs place reliance does not appear to mean that the accounting regime in the 2017 minutes was to continue to apply, despite the inconsistent matters specifically discussed and agreed at the meeting on 25 and 26 June 2018. The qualification to the calculation of the initial loss component under the accounting regime which is referred to in paragraph 4(a) was clearly intended to apply in 2018/2019 even though it was not part of the previous accounting regime. The change to the channel capacity and hence the maximum flow at Yarrawonga Weir was also intended to apply in 2018/2019.

77 The evidence on the amendment application makes clear that after 26 June 2018 there was no agreed accounting regime for water lost through forest regulators when flows at Yarrawonga Weir exceeded 9,500 ML/day. Although not relevant on a question of construction of the minutes (but relevant to the issue of causation and perhaps breach), the email from Mr McLean on 15 August 2018 and the three responses to it appear to show that at least Mr McLean, Mr Childs, Mr Sluggett and Mr Kelly all understood that there was no agreed accounting regime for losses when the flow at Yarrawonga Weir exceeded 9,500 ML/day. On the Plaintiffs’ position, the fact that the email was sent is inexplicable. Mr McLean's statement in his email that:

> "the loss relationship (flow downstream Yarrawonga versus Barmah-Millewa forest loss) from the original modelling developed for last year and continuing to apply this year was undertaken for flows downstream at Yarrawonga up to 10,000 ML/day"

is best explained as a reference to the formula for calculation of the continuing component of the loss. Mr McLean was observing in his email that the formula was capable of calculating the loss to be allocated for flows between 9,500 ML/day and 9,800 ML/day because of the parameters by which the formula was originally adopted when the channel capacity was 10,000 ML/day.

78 There are other documents which seem to demonstrate that after 26 June 2018 the environmental water holders were acting on the basis that there was no agreed accounting regime for losses from flows at Yarrawonga Weir above 9,500 ML/day when the forest regulators were open. In any event, such documents may be relevant to causation if the new allegation is brought into the case.

79 It is in this context that the prejudice to the Defendant is to be considered if leave to amend is granted.

Prejudice

80 Investigation by the Defendant of the new allegation would require an enquiry into the attitude of its own officers and officers of third parties, at least in relation to what would have happened if a proposal had been made to run the river at a steady rate of 9,800 ML/day or 10,000 ML/day at Yarrawonga Weir in July and August 2018. The Plaintiffs submit some insight to that issue is already apparent from Mr McLean's email on 15 August 2018, he being an officer of the Defendant. That may or may not be right given the proposal in the email was different to that which will become relevant if the amendment is made. In any event, the fact that the email exists makes it more important that the Defendant has the opportunity to enquire.

81 Mr McLean is not a witness in this case. The Defendant's witnesses have not addressed the new allegation in their evidence-in-chief. The Plaintiffs have

handed up a schedule of places in the Defendant's affidavits where the topics of forest regulators, in-channel watering, channel capacity and accounting are referred to. However the Defendant correctly submits that none of this evidence directly or even indirectly addresses the new allegation. In any event, it is one thing to give generalised evidence about a topic and another thing to address a specific allegation of negligence in relation to that topic. An officer of the CEWH, Mr Johnson, also gave some evidence-in-chief which did not address the new allegation.

82 The solicitor acting for the Defendant has given some evidence in which there is an estimate of two to three weeks to enquire into this matter. I accept that evidence, certainly in circumstances where it has not been challenged. Even then, an enquiry at this stage would be unsatisfactory given the progress of the hearing to date.

83 The Defendant nonetheless submits that it will not seek an adjournment to cure the prejudice that it will suffer if leave to amend is granted in order to avoid the alternative prejudice from a significant disruption to the hearing dates and delay. The Defendant submits that even having to make that choice is prejudice in itself and that seems to me to be a reasonable submission.

84 I accept that there is prejudice to the Defendant which will arise if leave to amend is granted. I do not accept the Plaintiffs' submissions that the new allegation merely raises questions about objective facts which pertained in June, July and August 2018. The nature of the objective facts in this case is such that they may usefully be explained by a witness.

85 On the other hand, a steady and measured assessment of the prejudice to the Defendant is appropriate. I make a number of observations.

86 *First* some difference to the Defendant's preparation for the case might have occurred had the amendment been sought on or shortly after 16 May 2025 when Dr Ladson's Second Report was served. At that point there was still approximately three months until the trial. However, when consideration is

given to the time period since the Defendant objected to the new allegation in opening, there has probably been very little change to the Defendant's position as it relates to prejudice from the amendment not being sought earlier. Either way the Defendant would have had to grapple with a new allegation on the run and against the spectre of a disruption to and/or loss of the hearing dates. Given that the Defendant is determined to press on, it may be that it would have reacted in the same way during the first week of trial.

87 *Secondly* while the Defendant has been deprived of an opportunity to ask its witnesses about the events in 2018, those events occurred seven years ago and it may be that the witnesses would not be able to add much to the documents in any event, in the sense they may not have an independent recollection.

88 *Thirdly* the onus of proving breach of duty and causation of some loss is on the Plaintiffs. The Defendant is not being deprived of the fullest opportunity to prove a matter upon which it bears the onus.

89 *Fourthly* the evidence given by the Defendant's witnesses in cross-examination on the new allegation, to the extent that they were asked, will have to be assessed in light of the fact that they were asked questions about a detailed topic which they may not have considered for seven years.

90 *Fifthly* to the extent that a witness has not been called (such as an officer of the State water authority or an environmental water holder (other than Mr Johnson)) there is a ready explanation as to why that witness was not called by the Defendant. Any adverse inference would seem to run against the Plaintiffs who have always believed that the new allegation was an issue in the case (since 16 May 2025).

91 All up, I accept that the Defendant will be exposed to some prejudice if leave to amend is granted but it must be kept in context and I consider that it is likely to be limited.

92 That prejudice must be weighed against the position of the Plaintiffs and as the President described it in the *Dymocks* case, the public interest in having the real issues in the proceedings ventilated. If leave to amend is not granted, there seems to be the prospect of serious prejudice to the Plaintiffs by having one of their claims not considered.

Disruption to the hearing dates

93 The second reason given by the Defendant as to why leave to amend should not be granted is that there will be a prejudice to the hearing dates. As stated above, the Defendant's determination to press on limits that prejudice. There has already been some disruption to the hearing dates by reason of a need to get further evidence from some of the experts. All delay is regrettable, but so far it has been managed reasonably well. This is a matter to take into account in line with the principles set out above, as given form under the *Civil Procedure Act*. Consideration must be given not just to the parties to the current proceedings but to all litigants in the Court.

94 After the lay evidence in this case, there are five sequential areas of expertise to be a subject of evidence from experts. They are sequential in the sense that each area of expertise draws on opinions expressed by the preceding experts as a basis for the next expert's opinions. It is a chain of five areas of expertise and it is to the parties' credit that the trial has got to this point without more disruption than has already occurred.

95 Further, the Plaintiffs submit that this may be a case where further evidence of some of the experts may be required in the future having regard to findings of the Court which inform the detail of the counterfactuals relevant to the determination of the issues in the case. The Defendant resists that position and it is not appropriate nor possible for any decision to be made about it on an application for leave to amend. I certainly do not yet have sufficient understanding of the detail of the issues to be able to express any view about it. However, what can be said now is that if leave to amend is granted further work may need to be done by the modelling experts, Mr Podger and Mr Barma,

in any event. As I say, it is a matter to take into account and, to some extent, tempers the prejudice to the Defendant from leave to amend being granted.

Form of the amendment

96 The third reason given by the Defendant as to why leave to amend ought not be granted is the form of the amendment. I agree that the form would be improved by specification of precise dates about which something was said in submissions. The grant of leave to amend should be understood as wide enough for the amendment to conform to any improvement in specificity. The Defendant also complains about the concluding clause and, whilst not an example of perfect drafting, I do not consider that it is a significant barrier to a grant of leave to amend.

Delay in making the application

97 The fourth reason given by the Defendant as to why leave ought not be granted is the delay in making the application, which I have addressed above.

Significance of the amendment

98 The last reason is that it is submitted by the Defendant that the amendment is "insignificant" when, as best I can tell, it relates to a relatively small quantity of gigalitres in the context of a case based on a very large quantity of gigalitres. What I would say about that is that I think the submission cuts both ways. It is relevant to the prejudice on either side.

Summary

99 It is a difficult decision but, having regard to the balance between the limited prejudice to which the Defendant will be exposed, the adequacy of the explanation and the interests of justice, I have decided to exercise my discretion by granting leave to amend as reflected in the orders.

Orders

100 I make the following orders:

(1) The Plaintiffs have leave to amend Annexure B to the Fourth Further Amended Statement of Claim in the form annexed to the Notice of Motion filed on 5 September 2025.

(2) The Plaintiffs pay the costs thrown away by the amendment.

(3) The parties are to confer and give such further instructions to Podger and Barma as contemplated by page 210 of Exhibit MAM-3

(4) Grant liberty to apply by email to Faulkner J's Chambers in relation to Order 3.

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I certify that the preceding 100 paragraphs
are a true copy of the reasons for judgment
of Justice Faulkner:

Associate.....

Date: 18 September 2025