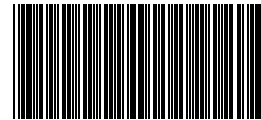




Filed: 29 April 2022 2:33 PM



D0001K2UHQ

## Defence to Amended Statement of Claim

### COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2019/00150651

### TITLE OF PROCEEDINGS

First Plaintiff	Doyle's Farm Produce Pty Ltd atf Claredale Family Trust ACN 119734539
Second Plaintiff	John Gerard Doyle
Number of Plaintiffs	5
First Defendant	Murray Darling Basin Authority ABN 13679821382

### FILING DETAILS

Filed for	Murray Darling Basin Authority, Defendant 1
Legal representative	John Pavlakis
Legal representative reference	
Telephone	9258 6000
Your reference	1000 045 233

### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Defence to Amended Statement of Claim (Defence to 2FASOC (Final).pdf)

[attach.]

Form 7A (version 5)  
UCPR 14.3

## DEFENCE TO SECOND FURTHER AMENDED STATEMENT OF CLAIM

### COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Sydney
Case number	2019/00150651

### TITLE OF PROCEEDINGS

First plaintiff	<b>Doyle's Farm Produce Pty Ltd (ACN 119 734 539) as trustee for Claredale Family Trust</b>
Number of plaintiffs	5
First Defendant	<b>Murray-Darling Basin Authority</b>
Second Defendant	<b>The Commonwealth of Australia</b>

### FILING DETAILS

Filed for	Defendants
Filed in relation to	Plaintiffs' Further Amended Statement of Claim
Legal representative	John Pavlakis, Ashurst Australia
Legal representative reference	1000 045 233
Contact name and telephone	John Pavlakis (02) 9258 6062 / Tess Grieve (02) 9258 5781
Contact email	john.pavlakis@ashurst.com / tess.grieve@ashurst.com

### PLEADINGS AND PARTICULARS

#### A PARTIES

##### (1) The Plaintiffs

- 1 In response to paragraph 1, the First Defendant and Second Defendant **(Defendants)**:
  - a. admit sub-paragraph 1(a); and
  - b. do not admit sub-paragraph 1(b).
- 2 In response to paragraph 2, the Defendants:
  - a. admit sub-paragraphs 2(a), 2(b) and 2(d);

- b. do not admit sub-paragraph 2(c); and
- c. say that as at 7 March 2018, the Second Plaintiff was the registered holder of 686 Class C Water Supply Entitlements issued by Murray Irrigation Limited (**MIL**) and otherwise do not admit sub-paragraph 2(e).

3 In response to paragraph 3, the Defendants:

- a. admit sub-paragraphs 3(a) and 3(b); and
- b. do not admit sub-paragraph 3(c).

4 In response to paragraph 4, the Defendants:

- a. admit sub-paragraphs 4(a), 4(b), 4(e), 4(f), and 4(g); and
- b. do not admit sub-paragraphs 4(c) and 4(d).

5 In response to paragraph 5, the Defendants:

- a. admit sub-paragraphs 5(a), 5(b), 5(e), and 5(f); and
- b. do not admit sub-paragraphs 5(c) and 5(d).

**(2) The Defendants**

6 The Defendants admit paragraph 6.

6A In response to paragraph 6A, the Defendants:

- a. say that Alan David Dreverman was the Executive Director (River Management Division) of the MDBA from 15 August 2014 to 31 August 2017;
- b. say that at all material times Mr Dreverman was acting as a delegate of the First Defendant;

**Particulars**

- 1 Instrument of Delegation No. 2 (2015)
- 2 Instrument of Delegation No. 1 (2017)
- 3 Instrument of Delegation – Water Act and Murray-Darling Basin Agreement (2019)

~~c. say that by reason of those matters, Mr Dreverman was at all material times a person having public official functions or acting in a public official capacity, and therefore was a public or other authority within the meaning of section 41 of the *Civil Liability Act 2002* (NSW); and~~

d. otherwise admit paragraph 6A.

6B In response to paragraph 6B, the Defendants:

- a. say that at all material times after August 2017, Andrew Reynolds was the Executive Director (River Management Division) of the MDBA;
- b. say that at all material times Mr Reynolds was acting as a delegate of the First Defendant;

**Particulars**

- 1 Instrument of Delegation No. 2 (2015)
- 2 Instrument of Delegation No. 1 (2017)
- 3 Instrument of Delegation – Water Act and Murray-Darling Basin Agreement (2019)

~~c. say that by reason of those matters, Mr Reynolds was at all material times a person having public official functions or acting in a public official capacity, and therefore was a public or other authority within the meaning of section 41 of the *Civil Liability Act 2002* (NSW); and~~

d. otherwise admit paragraph 6B.

6C In response to paragraph 6C, the Defendants:

- a. admit that at all material times Joseph Davis was the Senior Director, River Operations of the MDBA;
- b. say that at all material times Joseph Davis was acting as a delegate of the First Defendant; and

**Particulars**

- 1 Instrument of Delegation No. 2 (2015)
- 2 Instrument of Delegation No. 1 (2017)
- 3 Instrument of Delegation – Water Act and Murray-Darling Basin Agreement (2019)

~~c. say that by reason of those matters, Mr Davis was at all material times a person having public official functions or acting in a public official capacity, and therefore was a public or other authority within the meaning of section 41 of the *Civil Liability Act 2002* (NSW); and~~

d. otherwise admit paragraph 6C.

6D In response to paragraph 6D, the Defendants note the definition of the term "Delegates" used in the Second Further Amended Statement of Claim (**FASOC**), adopt that definition below, and otherwise do not admit any allegation contained in paragraph 6D.

6E The Defendants admit paragraph 6E.

**B GROUP MEMBERS AND COMMON QUESTIONS**

7 The Defendants admit paragraph 7.

7A The Defendants admit paragraph 7A.

8 In response to paragraph 8, the Defendants deny sub-paragraphs 8(d) and 8(e), and otherwise do not admit any allegation contained in paragraph 8.

9 The Defendants do not plead to paragraph 9 as that paragraph contains no allegations against the Defendants.

10 The Defendants do not admit paragraph 10.

11 The Defendants do not plead to paragraph 11 as that paragraph contains no allegations against the Defendants.

**C LEGISLATIVE FRAMEWORK**

12 In response to paragraph 12, the Defendants note the definition of the term "Murray-Darling Basin" used in the FASOC, and otherwise do not admit any allegation contained in paragraph 12.

13 In response to paragraph 13, the Defendants:

a. admit that the First Defendant operates the River Murray System (as defined in the *Water Act 2007* (Cth) (**Act**)) pursuant to the Murray-Darling Basin Agreement at Schedule 1 of the Act (**Agreement**);

b. say further that the First Defendant also operates the River Murray System pursuant to:

i. the Act; and

ii. the Basin Plan 2012; and

c. otherwise do not admit paragraph 13.

14 In response to paragraph 14, the Defendants:

- a. note the definition of the term "upper River Murray Storages" used in the FASOC;
- b. say that clause 2 of the Agreement defines "upper River Murray Storages" as Lake Victoria, the Menindee Lakes Storage, the storages formed by Dartmouth Dam and Hume Dam and by those weirs, and weirs and locks, described in Schedule A which are upstream of the eastern boundary of South Australia; and
- c. otherwise do not admit any allegation contained in paragraph 14.

**(1) Powers and Functions of the MDBA**

15 In response to paragraph 15, the Defendants:

- a. note the definition of the term "River Operations Functions" used in the FASOC;
- b. say further that clause 2 of the Agreement defines "river operations" as activities under the Agreement relating to:
  - i. the construction, operation, maintenance and renewal of works on, adjacent to, or connected to, the upper River Murray or the River Murray in South Australia;
  - ii. the execution of the provisions of the Agreement concerning sharing water between State Contracting Governments; and
  - iii. the provision of other services relating to water, to State Contracting Governments and other persons; and
- c. otherwise do not admit any allegation contained in paragraph 15.

16 In response to paragraph 16, the Defendants:

- a. admit that the First Defendant has the Release Power;
  - b. repeat paragraph 15 of the Defence;
  - c. say that at all material times:
    - i. the Release Power was exercised either by:
      - A. the Executive Director (River Management Division); or
      - B. the Senior Director, River Operations;
- as delegates of the First Defendant;

**Particulars**

The Release Power was delegated to the delegates pursuant to the following instruments of delegation:

- 1 Instrument of Delegation No. 2 (2015)
- 2 Instrument of Delegation No. 1 (2017)
- 3 Instrument of Delegation – Water Act and Murray-Darling Basin Agreement (2019)

- ii. for the purpose of the Act, the exercise by the delegates of the Release Power is deemed to be an exercise by the First Defendant of the Release Power; and

### **Particulars**

Section 34AB(1)(c) of the *Acts Interpretation Act 1901* (Cth)

- iii. otherwise, the exercise by the delegates of the Release Power was not an exercise by the First Defendant of the Release Power; and

- d. otherwise do not admit paragraph 16.

16A The Defendants deny paragraph 16A and repeat paragraphs 16 and 87 to 185 of the Defence.

16B In response to paragraph 16B, the Defendants:

- a. repeat paragraph 16 of the Defence;
- b. admit that the Delegates were employees of the Second Defendant;
- c. admit, for the purposes of this proceeding only, that the acts of the Delegates in any exercise of the Release Power were done in the course of their employment with the Commonwealth and that if (which is denied) the Delegates or any of them are liable to the Plaintiffs for such acts the Second Defendant would be vicariously liable to the Plaintiffs; and
- d. otherwise deny paragraph 16B.

17 In response to paragraph 17, the Defendants:

- a. refer to and rely on the terms of section 18E(2) of the Act, clauses 29 and 30 of the Agreement, and the Objectives and Outcomes for River Operations in the

River Murray System, including Annexure A (**O&O Document**) (as in force from time to time) for their full force and effect; and

b. otherwise deny paragraph 17.

18 In response to paragraph 18, the Defendants:

a. say that clause 30(2) of the Agreement provides that, subject to clause 30(3), the First Defendant must carry out its functions in relation to river operations (as defined in clause 2 of the Agreement) in accordance with the objectives and outcomes specified in the O&O Document (as in force from time to time);

b. say that each of the matters set out in sub-paragraphs 18(a) and 18(b) of the FASOC are specified in clause 4(2)(a) of the O&O Document (as in force from time to time) as general objectives in respect of water storage and delivery and accounting;

c. say that each of the matters set out in sub-paragraphs 18(c) and 18(d) of the FASOC are specified in clause 4(2)(b) of the O&O Document (as in force from time to time) as general outcomes in respect of water storage and delivery and accounting;

d. say that each of those general objectives and outcomes specified in clause 4(2) of the O&O Document (as in force from time to time) include a provision in the terms set out in clause 6 of the O&O Document (as in force from time to time);

e. refer to and rely on the whole of the O&O Document (as in force from time to time) for its full force and effect; and

f. otherwise deny paragraph 18.

19 In response to paragraph 19, the Defendants:

a. refer to and rely on the terms of clause 6 of the O&O Document (as in force from time to time) for their full force and effect; and

b. otherwise deny paragraph 19.

20 In response to paragraph 20, the Defendants:

a. say that clause 10 of the O&O Document (as in force from time to time) states that the First Defendant will do certain things, including prepare and adopt an



Annual Operating Plan for the River Murray System (**AOP**) for the following twelve months;

- b. repeat sub-paragraph 18(a) of the Defence, and say that none of the matters in clause 10 of the O&O Document are specified as a general or specific objective or outcome to be achieved in carrying out functions in relation to river operations within the meaning of clause 31 of the Agreement; and
- c. otherwise deny paragraph 20.

**(2) State Water Entitlements**

21 In response to paragraph 21, the Defendants:

- a. note the definition of the terms "State water entitlement" and "South Australia's monthly entitlement" used in the FASOC;
- b. say further, in respect of sub-paragraph 21(b)(iv), that the monthly entitlement of South Australia to the quantities of River Murray water stipulated in clause 88 of the Agreement in the month of October is 170,500 ML;
- c. refer to and rely on the whole of Part XII of the Agreement for its full force and effect; and
- d. otherwise do not admit any allegation contained in paragraph 21.

22 The Defendants admit paragraph 22, and refer to and rely on the terms of clauses 88 and 90 of the Agreement for their full force and effect.

23 The Defendants admit paragraph 23, and refer to and rely on the terms of clause 94 of the Agreement for their full force and effect.

24 In response to paragraph 24, the Defendants:

- a. repeat paragraph 23 of the Defence; and
- b. otherwise deny paragraph 24.

25 The Defendants admit paragraph 25.

26 The Defendants admit paragraph 26.

27 The Defendants admit paragraph 27.

28 In response to paragraph 28, the Defendants:

- a. refer to and rely on the terms of section 18E(2) of the Act and clauses 30(3) and 33 of the Agreement for their full force and effect;
- b. refer to and rely on the terms of clauses 13(1) and 16 of the O&O Document (as in force from time to time) for their full force and effect;
- c. say that the effect of clause 16 is that, if the First Defendant proposes to exercise a function relating to river operations which the First Defendant considers that a Southern Basin State might regard as being of particular significance, that matter need not be referred to the Basin Officials Committee (**BOC**) if the First Defendant seeks the advice of the Water Liaison Working Group (**WLWG**); and
- d. otherwise deny paragraph 28.

29 In response to paragraph 29, the Defendants:

- a. refer to and rely on the terms of clauses 15 and 16 of the O&O Document (as in force from time to time) for their full force and effect;
- b. repeat sub-paragraph 28(c) of the Defence; and
- c. otherwise deny paragraph 29.

30 In response to paragraph 30, the Defendants:

- a. refer to and rely on the whole of Part XII of the Agreement for its full force and effect; and
- b. otherwise do not admit paragraph 30.

### **(3) Operational Requirements for Upper River Murray Storages**

31 The Defendants admit paragraph 31.

32 In response to paragraph 32, the Defendants:

- a. say that the First Defendant's river operators have access to a draft MDBA River Murray System Operations Reference Manual dated 2 November 2010 (**draft Reference Manual**);
- b. say that the draft Reference Manual is amended from time to time; and
- c. otherwise deny paragraph 32.

#### **(i) Yarrawonga Weir and the Barmah Choke**

33 The Defendants admit paragraph 33.

34 In response to paragraph 34, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. admit that the Release Power can be exercised in respect of Yarrawonga Weir;
- c. say that Yarrawonga Weir is operated by Goulburn-Murray Water;

**Particulars**

At all material times, the operation of Yarrawonga Weir was the subject of a memorandum of understanding between MDBA and Goulburn-Murray Water.

- d. say that the Release Power may, from time to time, be exercised in respect of Yarrawonga Weir to achieve:
  - i. water level for gravity diversion to the Mulwala Canal and Yarrawonga Main Channel, which are used, in part, to deliver some water to NSW Murray Regulated River general security water entitlement holders;
  - ii. releases for meeting demands in the River Murray downstream of Yarrawonga Weir; and
  - iii. directed releases from the Hume Reservoir that pass through the Yarrawonga Weir prior to entering the Barmah-Millewa Forest; and
- e. otherwise deny paragraph 34.

35 The Defendants admit paragraph 35.

36 In response to paragraph 36, the Defendants:

- a. admit sub-paragraphs 36(a) and 36(b);
- b. admit that the Barmah Choke has a channel capacity that has been progressively decreasing;
- c. admit the First Defendant knew of the matter pleaded in sub-paragraph 36(b) of the Defence above; and
- d. otherwise deny paragraph 36.

37 In response to paragraph 37, the Defendants:

- a. say that there was no arrangement in place between MIL and WaterNSW for the use of the MIL infrastructure during the water years:
  - i. 2016/2017;

- ii. 2017/2018; and
- iii. 2018/2019, until an interim access agreement was reached on or about 10 September 2018 (**Interim Access Arrangement**); and

b. otherwise deny paragraph 37.

38 In response to paragraph 38, the Defendants:

- a. say that there are a number of regulating structures in the Barmah-Millewa Forest which manage flow in the River Murray (**Forest Regulators**);
- b. say that Forest Regulators can prevent the River Murray from flowing into numerous creeks and channels in the Barmah-Millewa Forest;
- c. say that the Forest Regulators are in the most part, "RMO assets" within the meaning of the Agreement;
- d. refer to and rely on the terms of specific objective and outcome (**Specific O&O**) 4.2 and clause 6 of the O&O Document (as in force from time to time) for their full force and effect; and
- e. otherwise deny paragraph 38.

39 In response to paragraph 39, the Defendants:

- a. repeat paragraphs 17 and 38 of the Defence; and
- b. otherwise deny paragraph 39.

40 In response to paragraph 40, the Defendants:

- a. repeat paragraphs 17 and 38 of the Defence;
- b. refer to and rely on the terms of Specific O&O 3.1.a and 3.1.b and clause 6 of the O&O Document (as in force from time to time) for their full force and effect;
- c. say that around 17 May 2018, amendments were made to version 7 of the O&O Document, including Specific O&O 3.1.b; and
- d. otherwise deny paragraph 40.

41 In response to paragraph 41, the Defendants:

- a. repeat paragraphs 17 and 38 of the Defence;
- b. refer to and rely on the terms of Specific O&O 12.9 and clause 6 of the O&O Document (as in force from time to time) for their full force and effect; and
- c. otherwise deny paragraph 41.

42 In response to paragraph 42, the Defendants:

- a. say that the Barmah Choke is a natural constriction of the River Murray through the Barmah and Millewa Forests;
- b. say that the Barmah Choke limits the channel capacity of the River Murray through the Barmah-Millewa Forest;
- c. refer to and rely on Specific O&O 3.1.a and 3.1.b and clause 6 of the O&O Document (as in force from time to time) for their full force and effect;
- d. say that rate of release at Yarrawonga Weir is used as a proxy for the capacity of the river through the Barmah Choke, including the component that flows via the Edward-Wakool system;

#### **Particulars**

The Edward River and Gulpa Creek offtakes pass a proportion of the flow via the Edward-Wakool system

- e. say that the rate of release at Yarrawonga Weir that delivers 3.0 m and 3.3 m at Tocumwal is dependent on:
  - i. private diversions in the Yarrawonga to Tocumwal reach of the Murray; and
  - ii. outfalls from the Yarrawonga Main Channel escape back into the River Murray (managed by Goulburn-Murray Water);

#### **Particulars**

The rate of release at Yarrawonga Weir that delivered 3.0 m at Tocumwal is approximately 15,000 ML/day; and

The rate of release at Yarrawonga Weir that delivered 3.3 m at Tocumwal is approximately 18,000 ML/day.

- f. say that the rate of release at Yarrawonga Weir that delivers 2.6 m at Picnic Point varies during the year and between years and is dependent on:

- i. flow rates through Edward River and Gulpa Creek offtakes;
- ii. settings of the Forest Regulators;
- iii. private diversions in the Yarrawonga to Barmah reach of the Murray;  
and
- iv. outfalls from the Yarrawonga Main Channel escape back into the River Murray (managed by Goulburn-Murray Water);

### **Particulars**

The rate of release at Yarrawonga Weir that delivered 2.6 m at Picnic Point was assumed to be approximately:

A. 10,000 ML/day in 2017/18 (2017/18 AOP at 4); and

B. 9,500 ML/day in 2018/19 (2018/19 AOP at 6).

- g. say that a rate of release at Yarrawonga Weir that would result in a flow of above 2.6 m at Picnic Point, may not reach this level at Picnic Point if:
  - i. irrigation escapes are utilised that bypass the Barmah Choke; and/or
  - ii. Forest Regulators upstream of Picnic Point are opened to accommodate the additional flow; and
- h. otherwise deny paragraph 42.

43 In response to paragraph 43, the Defendants:

- a. in respect of sub-paragraph 43(a):
  - i. repeat paragraph 42 of the Defence;
  - ii. say that water is delivered from Dartmouth to the Hume Reservoir, and then the Hume Reservoir to Lake Victoria; and
  - iii. otherwise admit sub-paragraph 43(a);
- b. in respect of sub-paragraph 43(b):
  - i. admit that the First Defendant knew that there was a risk of a decline in the health of forest ecosystems arising from the undesirable flooding of the Barmah-Millewa Forest;
  - ii. say further that:

- A. the risk of decline in the health of forest ecosystems arising from undesirable flooding of the Barmah-Millewa Forest is balanced against the need (from time to time) for transfers to deliver water to Lake Victoria; and
  - B. flooding of the Barmah-Millewa Forest can achieve ecological outcomes including supporting bird breeding events; and
- iii. otherwise deny sub-paragraph 43(b);
- c. in respect of sub-paragraph 43(c):
    - i. say that the First Defendant knew that there were risks associated with long periods of high sustained flows through the Barmah Choke at or above channel capacity;
    - ii. say further that the First Defendant knew that these risks could include notch erosion and bank instability, rainfall rejections, hypoxic blackwater events and adverse environmental outcomes caused by undesirable flooding of the Barmah-Millewa Forest;
    - iii. repeat sub-paragraph 43(b)(ii)(B) of the Defence above; and
    - iv. otherwise deny sub-paragraph 43(c);
- d. in respect of sub-paragraph 43(d):
    - i. say that the First Defendant knew that, by reason of the Barmah Choke's location downstream of the Hume Reservoir and the Dartmouth Reservoir, it was important to avoid excessive demands on the channel capacity of the Barmah Choke including by reason of water trades;
    - ii. refer to and rely on the whole of the *Murray-Darling Basin Agreement (Schedule D – Permissible Transfers between Trading Zones) Protocol 2010* for its full force and effect, and the Barmah Choke Trade Balance; and
    - iii. otherwise deny sub-paragraph 43(d);
- e. in respect of sub-paragraph 43(e):
    - i. repeat paragraph 42 of the Defence and admit that the First Defendant knew that transfers above 10,000 ML/day in 2017/2018 and 9,500 ML/day in 2018/2019 at Yarrowonga Weir could generally increase conveyance losses relative to transfers below those rates;

- ii. further say that:
    - A. system losses are largely driven by prevailing temperatures; and
    - B. the magnitude of system losses will depend on whether transfers are made through a wet forest or following a large unregulated flow event;
  - iii. repeat paragraph 37 of the Defence; and
  - iv. otherwise deny sub-paragraph 43(e);
- f. in respect of sub-paragraph 43(f):
- i. repeat paragraph 37 of the Defence;
  - ii. say that the First Defendant knew that:
    - A. it was a general outcome set out in clause 4(2)(b)(i) of the O&O Document (as in force from time to time) to conserve water and minimise losses subject to the matters set out in clause 6 of the O&O Document;
    - B. undesirable flows in the Barmah-Millewa Forest should be minimised;
    - C. in the water year 2017/2018, unnecessary transfers from Hume to Lake Victoria above 10,000 ML/day at Yarrawonga Weir should be minimised, where possible;
    - D. in the water year 2018/2019, unnecessary transfers from Hume Reservoir to Lake Victoria above 9,500 ML/day should be minimised, where possible; and
    - E. tributary inflows to fill Lake Victoria should be used where possible; and
  - iii. otherwise deny sub-paragraph 43(f).

**(ii) Lake Victoria**

44 In response to paragraph 44, the Defendants:

- a. admit sub-paragraph 44(a) and say further that Lake Victoria:
  - i. is a naturally-occurring shallow lake; and



- ii. a culturally and spiritually significant place to the Barkindji and Maraura people; and
- iii. contains large numbers of Aboriginal objects including burials, middens, fireplaces, scarred trees and stone artefacts;

b. in respect of sub-paragraph 44(b):

- i. repeat paragraphs 16 to 18 of the Defence; and
- ii. otherwise admit sub-paragraph 44(b).

45 In response to paragraph 45, the Defendants:

- a. repeat paragraph 17 of the Defence;
- b. say that the river regulation of Lake Victoria is subject to an Aboriginal Heritage Impact Permit under the *National Parks and Wildlife Act 1974 (NSW)* (**AHIP**);
- c. say that the AHIP requires that Lake Victoria be operated in accordance with the Lake Victoria Operating Strategy (**LVOS**);
- d. say that the purpose of the LVOS is to achieve the objectives of the AHIP and the Lake Victoria Cultural Landscape Plan of Management, dated May 2002, to minimise, to the greatest extent possible, the disturbance of Aboriginal objects through operation of the Lake and management of the landscape;
- e. say that the LVOS balances the competing objectives of water supply versus the drying cycle required for the survival of native vegetation that assists in protecting cultural heritage;
- f. say that the LVOS aims to enhance opportunities for drying the lake bed, and limit the time that the water levels in Lake Victoria are high, whilst meeting existing water supply and environmental flow obligations;
- g. refer to and rely on the terms of Specific O&O 9.1 and clause 6 of the O&O Document (as in force from time to time) for their full force and effect; and
- h. otherwise deny paragraph 45.

46 In response to paragraph 46, the Defendants:

- a. repeat paragraph 17 of the Defence;

- b. say that the Harmony Operation involves transferring water from Menindee Lakes to Lake Victoria if flow in the River Murray is insufficient to maintain suitable storage volumes in Lake Victoria (**Harmony Transfers**);
- c. say that Harmony Transfers are governed by storage in Lake Victoria relative to Harmony Transfer trigger levels;
- d. say that transfers from Menindee Lakes to Lake Victoria can be made for purposes other than Harmony Transfers;
- e. repeat paragraph 45 of the Defence;
- f. refer to and rely on the terms of Specific O&O 12.2 and clause 6 of the O&O Document (as in force from time to time) for their full force and effect; and
- g. otherwise deny paragraph 46.

47 In response to paragraph 47, the Defendants:

- a. repeat paragraph 45 of the Defence;
- b. refer to and rely on the terms of the LVOS for their full force and effect; and
- c. otherwise deny paragraph 47.

48 In response to paragraph 48, the Defendants:

- a. repeat paragraphs 45 and 47 of the Defence; and
- b. otherwise deny paragraph 48.

49 In response to paragraph 49, the Defendants:

- a. repeat paragraph 45 of the Defence;
- b. admit that the LVOS states that one of the "conditional rules" is that if the forecast NSW Reserve (all storages) at the end of May < 1000 GL, or Menindee Lakes is in NSW control, do not drawdown Lake Victoria surplus to regulated requirement in the period February-May. That is, do not dump water from Lake Victoria in late summer-autumn;
- c. say that the reference to "regulated requirement" in the period February-May in the LVOS includes system demand;
- d. refer to and rely on the terms of the LVOS for their full force and effect; and
- e. otherwise deny paragraph 49.

50 In response to paragraph 50, the Defendants:

- a. repeat paragraph 45 of the Defence;
- b. say that a fundamental principle underlying the LVOS is that the implementation of the strategy reflects the water availability status of the whole of the River Murray System;
- c. refer to and rely on the terms of the LVOS for their full force and effect; and
- d. otherwise deny paragraph 50.

51 In response to paragraph 51, the Defendants:

- a. admit that the First Defendant knew that without sufficient water in Lake Victoria prior to summer and autumn, there was a high risk that water demands during summer and autumn would not be able to be met;
- b. say that:
  - i. the First Defendant knew that it was important to ensure that Lake Victoria fills to a relatively high level as late as possible in the calendar year dependent upon tributary inflows; and
  - ii. in doing so, the First Defendant attempts to mitigate the risk of losses arising from a spill of Lake Victoria and losses associated with making transfers too early; and
- c. otherwise deny paragraph 51.

52 In response to paragraph 52, the Defendants:

- a. repeat paragraph 17 of the Defence;
- b. refer to and rely on the terms of Specific O&O 9.2 and clause 6 of the O&O Document (as in force from time to time) for their full force and effect;
- c. say that the minimum release rate from Lake Victoria (into the Rufus River) is not required where water levels are high in the River Murray or the lower end of Frenchman's Creek; and
- d. otherwise deny paragraph 52.

**(iii) Menindee Lakes**

53 The Defendants admit paragraph 53 and say further that the Menindee Lakes:

- a. are comprised of four main lakes being Lake Wetherell, Lake Pamamaroo, Lake Menindee and Lake Cawndilla;
- b. are very shallow with a large surface area;
- c. are located on the Darling River about 200 kilometres upstream of its junction with the River Murray at Wentworth, next to the town of Menindee, 100 kilometres north-west of Broken Hill;
- d. are located in a semi-arid area; and
- e. suffer from a high risk of evaporation in that:
  - i. they are estimated on average to lose 426 GL a year to evaporation, and to lose up to 700 GL a year to evaporation when the lakes are full; and
  - ii. between October 2016 and January 2019:
    - A. around 900 GL is estimated to have been lost from the Menindee Lakes through evaporation; and
    - B. total system losses from the lakes, including seepage, is estimated to be over 1,200 GL.

54 The Defendants admit paragraph 54.

55 The Defendants admit paragraph 55.

56 In response to paragraph 56, the Defendants:

- a. repeat paragraph 17 of the Defence;
- b. refer to and rely on the terms of Specific O&O 10.3 and clause 6 of the O&O Document (as in force from time to time) for their full force and effect;
- c. admit sub-paragraphs 56(a), 56(b) and 56(d); and
- d. deny sub-paragraph 56(c), and say that the minimum planned regulated release from Menindee Lakes, in accordance with Specific O&O 10.3, from May to October is 200 ML/day.

57 In response to paragraph 57, the Defendants:

- a. repeat paragraphs 42, 53 and 54 of the Defence;
- b. admit that the First Defendant knew that:

- i. where reserves in Menindee Lakes were low, added strain may be placed on the Barmah Choke if Lake Victoria is drawn down and there are low tributary inflows; and
  - ii. where there were limited tributary inflows, it would be difficult to meet large demands downstream of the Barmah Choke without access to water for release from the Menindee Lakes; and
- c. otherwise deny paragraph 57.

**(4) Environmental Water**

58 In response to paragraph 58, the Defendants:

- a. note the definition of the term "Environmental Water Functions" used in the FASOC; and
- b. otherwise do not admit any allegations contained in paragraph 58.

59 In response to paragraph 59, the Defendants:

- a. in respect of sub-paragraph 59(a):
  - i. admit that the First Defendant has the functions set out in sub-paragraph 59(a);
  - ii. say that, at all material times, the functions conferred on the First Defendant by subsections 172(1)(e) and 172(1)(f) of the Act were performed by the First Defendant or either by:
    - A. an Executive Director;
    - B. a General Manager; or
    - C. the Chief Operating Officer;as delegates of the First Defendant;

**Particulars**

The functions were delegated to the delegates pursuant to the following instruments of delegation:

- 1 In respect of an Executive Director and General Manager, Instrument of Delegation No. 2 (2015) and Instrument of Delegation No. 1 (2017).

- 2 In respect of an Executive Director, General Manager and the Chief Operating Officer, Instrument of Delegation – Water Act and Murray-Darling Basin Agreement (2019).
- iii. for the purpose of the Act, any performance by the delegates of these functions is deemed to be a performance by the First Defendant of the these functions;

### **Particulars**

Section 34AB(1)(c) of the *Acts Interpretation Act 1901* (Cth)

- iv. otherwise, any performance by the delegates of these functions was not a performance by the First Defendant of these functions; and
- v. otherwise do not admit sub-paragraph 59(a);
- b. in respect of sub-paragraph 59(b):
  - i. say that:
    - A. the First Defendant was required by section 41 of the Act to prepare and give to the Minister for adoption, a Basin Plan;
    - B. pursuant to section 34(1) of the Act, the First Defendant was required to perform its functions, and exercise its powers, consistently with, and in a manner that gives effect to, the Basin Plan; and
    - C. clause 8.13 of the Basin Plan required the First Defendant to prepare a Basin-wide environmental watering strategy;
  - ii. refer to and rely on the terms of clause 8.13 of the Basin Plan for their full force and effect; and
  - iii. otherwise deny sub-paragraph 59(b);
- c. in respect of sub-paragraph 59(c):
  - i. repeat sub-paragraphs 59(b)(i)(A) and (B) of the Defence above;
  - ii. say that clause 7.08(1) of the Basin Plan required the First Defendant to prepare a constraints management strategy;
  - iii. refer to and rely on the terms of clause 7.08 of the Basin Plan for their full force and effect; and

- iv. otherwise deny sub-paragraph 59(c);
- d. deny sub-paragraph 59(d);
- e. admit that the First Defendant has the functions set out in sub-paragraph 59(e); and
- f. deny sub-paragraph 59(f).

59A The Defendants deny paragraph 59A and repeat paragraphs 59 and 87 to 185 of the Defence.

59B In response to paragraph 59B, the Defendants:

- a. repeat paragraph 59 of the Defence;
- b. admit that the Delegates were employees of the Second Defendant;
- c. admit, for the purposes of this proceeding only, that the acts of the Delegates in any exercise of the Environmental Water Release Discretion (which power and exercise is denied) were done in the course of their employment with the Commonwealth and that if (which is denied) the Delegates or any of them are liable to the Plaintiffs for such acts the Second Defendant would be vicariously liable to the Plaintiffs; and
- d. otherwise deny paragraph 59B.

60 The Defendants deny paragraph 60.

61 The Defendants deny paragraph 61.

62 The Defendants deny paragraph 62.

63 The Defendants deny paragraph 63.

**(5) Water Trading and Transmission Losses**

64 The Defendants deny paragraph 64 and refer to and rely on the terms of sections 22 and 26 of the Act for their full force and effect.

65 The Defendants deny paragraph 65, repeat paragraph 64 of the Defence, and refer to and rely on the terms of Schedule D of the Agreement for their full force and effect.

66 In response to paragraph 66, the Defendants:

- a. repeat paragraphs 64 and 65 of the Defence;

- b. say that protocols made pursuant to clause 13(1) of Schedule D of the Agreement must not hinder the ability of the First Defendant to regulate and manage the flow of water within the upper River Murray and the River Murray in South Australia; and
- c. otherwise deny paragraph 66.

67 In response to paragraph 67, the Defendants:

- a. repeat paragraphs 43(d)(ii), 122(a), 123, 167(a) and 168 of the Defence;
- b. say that the First Defendant knew that if the restrictions in place regarding trade above and below the Barmah Choke were eased, increased strain may be placed on the Barmah Choke; and
- c. otherwise deny paragraph 67.

## **D WATER ENTITLEMENTS**

### **(1) The Doyle Water Entitlements**

68 In response to paragraph 68, the Defendants:

- a. say that as at 7 March 2018, the Second Plaintiff was the registered holder of 686 Class C Water Supply Entitlements issued by MIL;
- b. say that on 6 March 2016, the Second Plaintiff signed a MIL Entitlement Contract for unspecified water entitlements;
- c. say that on 17 April 2018, the Second Plaintiff signed a MIL Entitlement Contract for unspecified water entitlements; and
- d. otherwise do not admit paragraph 68.

69 The Defendants admit paragraph 69.

70 In response to paragraph 70, the Defendants:

- a. refer to and rely upon the terms of the MIL Entitlement Contract between the Second Plaintiff and MIL dated 6 March 2016 and the MIL Entitlement Contract between the Second Plaintiff and MIL dated 17 April 2018 for their full force and effect (together, the **Doyle Entitlement Contracts**);
- b. say that nothing in the Doyle Entitlement Contracts gives the Second Plaintiff any interest either in MIL's water access licences held pursuant to the *Water*



*Management Act 2000* (NSW) (**NSW Act**) or in the water that MIL is entitled to receive under them;

**Particulars**

Clause 5.2 of the Doyle Entitlement Contracts.

- c. say that nothing in the Doyle Entitlement Contracts obliges MIL to deliver, or entitles the Second Plaintiff to delivery of, or to take, any water;

**Particulars**

Clauses 7.7 and 10.5 of the Doyle Entitlement Contracts.

- d. say that any entitlement of Second Plaintiff to the volume of water recorded from time to time in water allocation account number E176 maintained by MIL is subject to the terms of the Doyle Entitlement Contracts ; and

**Particulars**

Clauses 7.7 and 10.5 of the Doyle Entitlement Contracts.

- e. otherwise do not admit paragraph 70.

**(2) The Coobool Water Entitlements**

71 In response to paragraph 71, the Defendants:

- a. in respect of sub-paragraphs 71(a) and 71(b):
  - i. refer to and rely on the terms of sections 56 and 59 of the NSW Act for their full force and effect; and
  - ii. otherwise admit sub-paragraphs 71(a) and 71(b);
- b. in respect of sub-paragraph 71(c):
  - i. say that, in accordance with section 85(2) of the NSW Act, water allocations are to be credited to the water allocation account of an access licence in accordance with any relevant available water determination; and
  - ii. otherwise deny sub-paragraph 71(c).

72 In response to paragraph 72, the Defendants:

- a. admit sub-paragraph 72(a);
- b. in respect of sub-paragraph 72(b):

- i. repeat paragraph 70 of the Defence; and
- ii. otherwise deny sub-paragraph 72(b).

73 In response to paragraph 73, the Defendants:

- a. refer to and rely on the terms of sections 58, 59 and 60 of the NSW Act and the Water Sharing Plan for the New South Wales Murray and the Lower Darling Regulated Rivers Water Sources 2016 (**NSW Murray-Lower Darling Water Sharing Plan**) for their full force and effect;
- b. say that, in accordance with section 60(1)(a) of the NSW Act, available water determinations are required to be made in accordance with the rules of priority established by section 58 and the NSW Murray-Lower Darling Water Sharing Plan; and
- c. otherwise do not admit paragraph 73.

74 In response to paragraph 74, the Defendants:

- a. repeat paragraph 73 of the Defence;
- b. refer to and rely on the terms of clause 102 of the Agreement for their full force and effect;
- c. say that determinations must be made in accordance with the terms of clause 102 of the Agreement (**Available Water Determination Function**);
- d. say that an assessment of water availability in the River Murray System for each of New South Wales, Victoria and South Australia is made on a 'worst case' inflow condition although an assessment on a 99%, 95% and 90% inflow scenario are also provided;
- e. say that the making of any available water determination pursuant to section 59 of the NSW Act is at the discretion of the Minister administering the NSW Act;
- f. say that in exercising that discretion and making any available water determination pursuant to section 59 of the NSW Act, the Minister considers a range of factors including:
  - i. the State's assessment of supply based upon existing water in storage and a near 'worst case' inflow condition, which has 1 per cent probability of occurring (excluding the Millennium Drought);

- ii. the State's assessment of existing commitments at the beginning of the water year including operational reserves (conveyance and transmission and evaporative losses), storage reserves, environmental allowances and carryover (including undelivered inter-state trades where applicable);
- iii. current weather and seasonable climate conditions;
- iv. Bureau of Meteorology's (**BOM**) seasonal and climatic outlooks; and
- v. the timing of releases from Snowy Hydro Limited;

### **Particulars**

NSW Government, Department of Planning, Industry and Environment  
"Resource assessment process",

<https://www.industry.nsw.gov.au/water/allocations-availability/allocations/how-water-is-allocated/resource-assessment-process>

NSW Government, Department of Planning, Industry and Environment, "How water is shared in the regulated NSW Murray Valley", October 2015

[https://www.industry.nsw.gov.au/data/assets/pdf\\_file/0008/166283/How-water-is-shared-in-the-regulated-nsw-murray-valley.pdf](https://www.industry.nsw.gov.au/data/assets/pdf_file/0008/166283/How-water-is-shared-in-the-regulated-nsw-murray-valley.pdf)

- g. say that the volume of water available for allocation varies from year to year based on:
  - i. the licence category; and
  - ii. the size of the total entitlement and individual entitlement under that licence category pursuant to the NSW Act and the NSW Murray-Lower Darling Water Sharing Plan; and
- h. say that pursuant to section 56 of the NSW Act, the NSW Murray Regulated River (General Security) Access Licence (**General Security Licence**) entitles its holder to:
  - i. specified shares in the available water within a specified water management area or from a specified water source;
  - ii. take water:
    - A. at specified times, at specified rates or in specified circumstances, or in any combination of these; and

- B. in specified areas or from specified locations;
- i. say that the General Security Licence is the penultimate licence category to receive water allocations under the NSW Act and the NSW Murray-Lower Darling Water Sharing Plan;
- j. say further that the General Security Licence is:
  - i. one of the least secure (and least reliable) licence categories; and
  - ii. one of the most susceptible to seasonable climatic variations;

**Particulars**

NSW Government, Department of Planning, Industry and Environment, "How water is allocated", <https://www.industry.nsw.gov.au/water/allocations-availability/allocations/how-water-is-allocated>

- k. say that at all material times:
    - i. the Available Water Determination Function was exercised either by:
      - A. the Executive Director (River Management Division); or
      - B. the Senior Direction, River Operations;
- as delegates of the First Defendant.

**Particulars**

The Available Determination Function was delegated to the delegates pursuant to the following instruments of delegation:

- A. Instrument of Delegation No 2 (2015)
  - B. Instrument of Delegation No 1 (2017)
  - C. Instrument of Delegation – Water Act and Murray-Darling Basin Agreement (2019).
- ii. for the purpose of the Act, the exercise by the delegates of the Available Water Determination Function is deemed to be an exercise by the First Defendant of the Available Water Determination Function; and

**Particulars**

Section 34AB(1)(c) of the *Acts Interpretation Act 1901* (Cth)

iii. otherwise, the exercise by the delegates of the Available Water Determination Function was not an exercise by the First Defendant of the Available Water Determination Function; and

I. otherwise deny paragraph 74.

74A The Defendants deny paragraph 74A and repeat paragraphs 74 and 87 to 185 of the Defence.

74B In response to paragraph 74B, the Defendants:

- a. repeat paragraph 74 of the Defence;
- b. admit that the Delegates were employees of the Second Defendant;
- c. admit, for the purposes of this proceeding only, that the acts of the Delegates in any exercise of the Available Water Determination Function were done in the course of their employment with the Commonwealth and that if (which is denied) the Delegates or any of them are liable to the Plaintiffs for such acts the Second Defendant would be vicariously liable to the Plaintiffs; and
- d. otherwise deny paragraph 74B.

75 In response to paragraph 75, the Defendants:

- a. repeat paragraphs 73 and 74 of the Defence; and
- b. otherwise admit paragraph 75.

### **(3) Reliability of the Water Access Entitlements**

76 In response to paragraph 76, the Defendants say that the NSW Murray Valley general security entitlement holders received:

- a. in water year 2004/2005, as at 15 April 2005, an allocation of 49%;
- b. in water year 2005/2006, as at 15 February 2006, an allocation of 63%;
- c. in water year 2006/2007, as at 10 November 2006, an allocation of 0%;
- d. in water year 2007/2008, as at 15 February 2008, an allocation of 0%;
- e. in water year 2008/2009, as at 14 May 2009, an allocation of 9.6%;
- f. in water year 2009/2010, as at 18 May 2010, an allocation of 28.3%;
- g. in water year 2010/2011, as at 15 December 2010, an allocation of 71.5%;
- h. in water year 2011/2012, as at 1 November 2011, an allocation of 41.9%

- i. in water year 2012/2013, as at 16 July 2012, an allocation of 64.6%;
- j. in water year 2013/2014, as at 1 October 2013, an allocation of 95.7%;
- k. in water year 2014/2015, as at 16 March 2015, an allocation of 60.9%;
- l. in water year 2015/2016, as at 15 February 2016, an allocation of 23.3%;
- m. in water year 2016/2017, as at 15 November 2016, an allocation of 83.6% but say further that as at 31 May 2017, an allocation of 100%;
- n. in water year 2017/2018, as at 15 March 2018, an allocation of 51% but say further that as at 31 May 2018, an allocation of 51%;
- o. in water year 2018/2019, as at 1 July 2018, an allocation of 0% but say further that as at 31 May 2019, an allocation of 0%;
- p. in water year 2019/2020, as at 8 April 2020, an allocation of 0% but say further that as at 31 May 2020, an allocation of 3%; and
- q. otherwise deny paragraph 76.

## **E THE MDBA'S DUTY OF CARE**

77 In response to paragraph 77, the Defendants:

- a. repeat paragraphs 13, 15-16, 21-24, 58-59, 70 and 74 of the Defence;
- b. say that functions and powers conferred on the First Defendant under the Act are exercised in the context of, inter alia:
  - i. the need for each of New South Wales, Victoria and South Australia to provide timely and accurate hydrometric and other data required;
  - ii. the high variability and uncertainty of the River Murray System relating to:
    - A. weather conditions and associated factors (such as precipitation and evaporation rates);
    - B. inflows to rivers;
    - C. use of water pursuant to water allocations and by other users;
    - D. carry-over of water allocations between water years;
    - E. the interaction of, and movement of water between, ground water and surface water sources;

- F. the quality of water;
  - G. the difficulty of accurately predicting inflows to rivers;
  - H. the time that water takes to travel and other physical constraints of the River Murray System;
  - I. rainfall and system flow forecasts by the BOM for the River Murray System; and
  - J. social and/or economic consequences of particular activities;
- iii. limits to the accuracy of hydrological models (such as models for water accounting and water resource assessment) and of rainfall and stream flow forecasts;
  - iv. uncertainty about changes to the geomorphology of river channels near flow gauging stations;
  - v. the need to implement particular river operations activities such as maintaining or refurbishing RMO assets;
  - vi. uncertainty about the environmental consequences of particular activities (for example, because of uncertainty about ecosystem, natural biological or biophysical processes);
  - vii. variability and uncertainty of transmission losses (for example, direct evaporation loss, transpiration losses including seepage loss and river bank transpiration loss);
  - viii. drought being a natural part of Australia's climate;
  - ix. increasing drought frequency and severity in the River Murray System;
  - x. changes in rainfall patterns and warming temperatures, and wind leading to higher rates of evaporation; and
  - xi. the nature and patterns (including changing patterns) of system demands including water orders made by the States and traded water;
- ca. say that, at all material times, WaterNSW was responsible for delivering water orders placed by General Security Licence holders;

### **Particulars**

*Water NSW Act 2014 (NSW), section 7(1)(a)*

Water NSW Operating Licence, clause 3.3.1

cb. say that, at all material times, MIL was responsible for delivering water orders placed by its customers being all persons or entities that held NSW water supply entitlements under a contractual entitlement with MIL;

**Particulars**

Murray Irrigation Limited Entitlement Contract, clauses 10.1, 10.2

cc. say that, at all material times, Goulburn Murray Water was responsible for delivering water orders placed by Victorian high reliability share-holders;

**Particulars**

Bulk Entitlement (River Murray – Goulburn-Murray Water) Conversion Order 1999, clause 15.1 (**Conversion Order**).

- c. say that where tributary inflows were limited, there were risks that:
- i. the exercise of the functions and powers conferred on the First Defendant under the Act, in the context of the matters referred to in sub-paragraph 77(b) of the Defence above, may impact the volume of water available for allocation to New South Wales, Victoria and South Australia in that year; and
  - ii. a reduction in the volume of water available for allocation to New South Wales, Victoria and South Australia may lead to a reduction in the volume of water allocated to particular retail entitlement holders in that year;
- d. say that, in addition to the matters outlined above, the supply of water available to General Security Licence holders may also be dependent upon:
- i. water that is available for allocation to General Security Licence holders;
  - ii. the share component and extraction component of held General Security Licences;
  - iii. amount of private carry over;
  - iv. impact and availability of water trading in New South Wales; and
  - v. private water storage; and



e. say that, in addition to the matters outlined above, the supply of water available to Victorian high reliability water share-holders may also be dependent upon:

i. a seasonal determination being made;

**Particulars**

*Water Act 1989 (Vic) (Vic Act)*, section 33AC.

ii. any condition that applies to the allocation of water determined at the discretion of the Victorian Minister administering the Vic Act;

**Particulars**

Vic Act, section 64GB(6).

iii. the state of the Murray declared water system in the part of the season to which the determination relates and the expected state of the Murray declared water system;

iv. rules set out in the Conversion Order;

v. any matter taken into account by Goulburn Murray Water that is relevant at the time in making seasonal determinations in the Murray declared water system, including but not limited to:

A. Goulburn-Murray Water's assessment of supply based upon volume of water in storage plus useful inflows to storage over 3 months and any resources available from other water systems, including inter-valley trade commitments and supplements;

B. Goulburn-Murray Water's assessment of existing commitments including water required to operate the system over the year, inter-valley trade commitments to other systems, carryover commitments from the previous water season and remaining volume of water required to be delivered for the current water season;

C. Goulburn-Murray Water's assessment of the volume of water required to be set aside as an 'early reserve' for the following water season in accordance with the method detailed in the Conversion Order;

- D. current operational data such as actual deliveries, losses and inflows;
- E. revised forecast operational data as the water season progresses.

### **Particulars**

Northern Victoria Resource Manager, "How Seasonal Determinations are Made",  
[https://nvrn.net.au/downloads/nvrn/NVRM\\_seasonal\\_determination.pdf](https://nvrn.net.au/downloads/nvrn/NVRM_seasonal_determination.pdf)

Victorian Government, "Victoria's North and Murray Water Resource Plan", p. 177,  
[https://www.mdba.gov.au/sites/default/files/pubs/vic-victoria-s-north-and-murray-comprehensive-report-part-1-30-april-2019\\_2.pdf](https://www.mdba.gov.au/sites/default/files/pubs/vic-victoria-s-north-and-murray-comprehensive-report-part-1-30-april-2019_2.pdf)

### Conversion Order, Schedule 3

- vi. the size of the total share of water and individual share of water in respect of the Murray declared system pursuant to the Vic Act;
  - vii. the amount of any private carry over;
  - viii. the impact and availability of water trading in Victoria; and
  - ix. any private water storage; and
- f. otherwise deny paragraph 77.

78 In response to paragraph 78, the Defendants:

- a. note the definition of the term "Risks of Harm" used in the FASOC;
- b. repeat paragraph 77 of the Defence; and
- c. otherwise do not admit any allegation contained in paragraph 78.

79 In response to paragraph 79, the Defendants:

- a. repeat paragraphs 77 of the Defence;
- b. say that the risks referred to in paragraph 77(c) of the Defence were not remote or insignificant; and
- c. otherwise deny paragraph 79.

80 The Defendants deny paragraph 80.

81 In response to paragraph 81, the Defendants:

- a. repeat paragraphs 15, 16, 58 and 59 of the Defence;
- b. say that the First Defendant has, pursuant to section 199 of the Act, delegated certain functions and powers to its Chief Executive and staff;

**Particulars**

Act, sections 199 and 206

*Water Amendment Act 2008 (Cth)*, clause 7 and Schedule 3

Instrument of Delegation No. 1 (2017)

Instrument of Delegation No. 2 (2015)

Instrument of Delegation – Water Act and Murray-Darling Basin Agreement  
(2019)

Instrument of Delegation – Basin Plan (2019)

- c. say that:
  - i. the Act and Agreement establish the BOC and confer on the BOC power to make determinations or directions concerning the performance of functions and powers conferred on the First Defendant;

**Particulars**

This includes the powers conferred by clauses 30(3) and 99(2) of the Agreement.

- ii. the Act and Agreement establish the Ministerial Council (**MinCo**) and confer power on the MinCo to give directions concerning the performance of functions and powers conferred on the First Defendant;

**Particulars**

This includes the power conferred by clause 29(3) of the Agreement;

- iii. pursuant to section 203 of the Act, the First Defendant has established, inter alia, the WLWG, which:

A. comprises representatives of the States; and

- B. advises on the distribution of water and river operations for the River Murray System; and

**Particulars**

Terms of Reference, Appointments and Operating Procedures - Water Liaison Working Group dated 3 May 2010

- d. otherwise deny paragraph 81.

82 In response to paragraph 82, the Defendants:

- a. repeat paragraph 77 of the Defence;
- b. say that the First Defendant was aware of the risks referred to in sub-paragraph 77(c) of the Defence; and
- c. otherwise deny paragraph 82.

83 The Defendants deny paragraph 83.

84 In response to paragraph 84, the Defendants:

- a. admit that the Plaintiffs and Group Members could not direct or control the First Defendant's exercise of its functions and powers; and
- b. otherwise do not admit paragraph 84.

85 In response to paragraph 85, the Defendants:

- a. repeat paragraph 77 of the Defence;
- b. in respect of sub-paragraph 85(a):
  - i. admit that irrigated agriculture is the major economic driver within the NSW Central Murray and Goulburn-Murray irrigation region;
  - ii. admit that the First Defendant was aware of the matters referred to in sub-paragraph 85(b)(i) of the Defence above; and
  - iii. otherwise do not admit the matters pleaded in sub-paragraph 85(a) and deny that the First Defendant was aware of those matters;
- c. in respect of sub-paragraph 85(b):
  - i. admit that the farming communities of the NSW Central Murray region and the Goulburn-Murray irrigation region are highly dependent on irrigated agriculture;

- ii. admit that the First Defendant was aware of the matters referred to in paragraph in sub-paragraph 85(c)(i) of the Defence above;
  - iii. otherwise do not admit the matters pleaded in sub-paragraph 85(b) and deny that the First Defendant was aware of those matters;
- d. in respect of sub-paragraph 85(c):
  - i. admit that a reduction or absence of water availability and/or water allocation may have consequential economic and social impacts on the farming communities of the NSW Central Murray region and Goulburn-Murray irrigation region;
  - ii. admit that the First Defendant was aware of the matters referred to in sub-paragraph in 85(d)(i) of the Defence above; and
  - iii. otherwise do not admit the matters pleaded in sub-paragraph 85(c) and deny that the First Defendant was aware of those matters;
- e. in respect of sub-paragraph 85(d):
  - i. admit that communities throughout the River Murray System are reliant on water from the River Murray;
  - ii. admit that the First Defendant was aware of the matters referred to in paragraph in 85(e)(i) of the Defence above; and
  - iii. otherwise do not admit the matters pleaded in sub-paragraph 85(d) and deny that the First Defendant was aware of those matters;
- f. in respect of sub-paragraph 85(e):
  - i. admit that inefficient and/or inappropriate use of the Basin water resources could have a significant detrimental economic and social impact on the wellbeing of the communities in the Murray-Darling Basin;
  - ii. admit that the First Defendant was aware of the matters referred to in sub-paragraph 85(f)(i) of the Defence above; and
  - iii. otherwise do not admit the matters pleaded in sub-paragraph 85(e) and deny that the First Defendant was aware of those matters;
- g. deny sub-paragraph 85(f); and
- h. otherwise deny paragraph 85.

86 The Defendants deny paragraph 86, and say further that:

- a. the imposition of a duty of care on the First Defendant (which is denied) would be inconsistent with:
  - i. the common law;
  - ii. Division 2 of the *Civil Liability Act 2002* (NSW); and
  - iii. the Act.
- ~~b. at all material times, the First Defendant was a public or other authority within the meaning of section 41 of the *Civil Liability Act 2002* (NSW);~~
- ~~c. by reason of the matters in sub-paragraph 86(b) of the Defence above, and pursuant to section 42 of the *Civil Liability Act 2002* (NSW) the principles which apply in determining whether the First Defendant owed the alleged duty of care to the Plaintiffs and Group Members include the functions required to be exercised by the First Defendant being determined by reference to the broad range of its activities (and not merely by reference to the matter to which these proceedings relate); and~~
- ~~d. having regard to the principle referred to in sub-paragraph 86(c) of the Defence above, the First Defendant did not owe the alleged duty of care to the Plaintiffs or the Group Members;~~
- ~~e. further or alternatively, the claim against the First Defendant is based on alleged acts or omissions involving an exercise of, or failure to exercise, the powers conferred to the First Defendant pursuant to the Act;~~

#### **Particulars**

~~The First Defendant operates the River Murray System pursuant to the Act and the Agreement (see, in particular, section 18E of the Act; clauses 98 and 102 of the Agreement).~~

- ~~f. the powers which the First Defendant had under the Act and the Agreement were powers of a kind that persons generally are not authorised to exercise without specific statutory authority and were therefore special statutory powers within the meaning of section 43A(2) of the *Civil Liability Act 2002* (NSW);~~
- ~~g. the alleged acts or omissions of the First Defendant pleaded in paragraphs 186 to 197 (inclusive) of the FASOC (which are denied) were not so~~

~~unreasonable that no authority having the powers of the First Defendant under the Act could properly consider the acts or omissions to be a reasonable exercise of, or failure to exercise, those powers;~~

~~h. by reason of the matters in sub-paragraphs 86(b), and 86(d)-(f) of the Defence above, and pursuant to section 43A(3) of the *Civil Liability Act 2002* (NSW), the acts or omissions alleged against the First Defendant do not give rise to civil liability;~~

~~i. further or alternatively, the claim against the First Defendant, in so far as it is based on the alleged omissions of the First Defendant pleaded in paragraphs 186 to 197 (inclusive) of the FASOC (which are denied) is based on the First Defendant's alleged failure to exercise or to consider exercising its powers under the Act and the Agreement in respect of the River Murray System;~~

~~j. the First Defendant could not have been required to exercise its powers to operate the River Murray System in proceedings instituted by the Plaintiffs or Group Members;~~

~~k. by reason of the matters in sub-paragraphs 86(b) and 86(i)-(j) of the Defence above, and pursuant to section 44 of the *Civil Liability Act 2002* (NSW), the claim against the First Defendant cannot give rise to civil liability; and~~

~~l. further or alternatively, by reason of the matters in sub-paragraph 86(b) of the Defence above, and pursuant to section 46 of the *Civil Liability Act 2002* (NSW), the fact that the First Defendant exercised a function, or decided to exercise a function, does not of itself indicate that the First Defendant owed a duty of care to the Plaintiffs or Group Members to exercise the function, or that the function should be exercised in the particular circumstances, or in the particular way, pleaded in the FASOC.~~

## **F EVENTS OF THE 2016-17 WATER YEAR**

### **(1) Rainfall, Inflows, Storage Levels and System Demand 2016-2017**

87 In response to paragraph 87, the Defendants:

- a. admit sub-paragraph 87(a);
- b. admit sub-paragraph 87(b);
- c. in respect of sub-paragraph 87(c):
  - i. rely of the terms of the BOM outlooks;

- ii. say that the accuracy of a particular weather outlook will vary significantly depending on how long before the start of a time period an outlook is issued and the period of time the subject of the outlook; and
- iii. otherwise admit sub-paragraph 87(c).

88 The Defendants admit paragraph 88.

89 The Defendants admit paragraph 89.

90 In response to paragraph 90, the Defendants:

- a. admit sub-paragraph 90(a);
- b. in respect of sub-paragraph 90(b), say that, by around 21 October 2016, the water in Menindee Lakes, after allowing for New South Wales' prior entitlements, became available to the First Defendant and otherwise do not admit sub-paragraph 90(b).

91 In response to paragraph 91, the Defendants:

- a. in respect of sub-paragraph 91(a):
  - i. say that in October 2016, approximately 1,366.3 GL flowed to South Australia including 1,189.2 GL of unregulated flows;
  - ii. say that in November 2016, approximately 2,170 GL flowed to South Australia including 1,959 GL of unregulated flows;
  - iii. say that in December 2016, approximately 1,919.1 GL flowed to South Australia including 1,409.8 GL of unregulated flows; and
  - iv. otherwise deny sub-paragraph 91(a);
- b. in respect of sub-paragraph 91(b):
  - i. say that in around mid-November 2016, the South Australian State Emergency Services were distributing sandbags to South Australian residents, businesses and shack owners because of risk of the flooding; and
  - ii. otherwise deny sub-paragraph 91(b); and
- c. do not admit sub-paragraph 91(c).

92 In response to paragraph 92, the Defendants:



- a. refer to and rely on the terms of the BOM climate outlooks dated 24 November 2016, 15 December 2016, 25 January 2017, 23 February 2017, 30 March 2017, 27 April 2017 and 25 May 2017 ;
- b. say that the First Defendant was aware of the BOM climate outlooks referred to in sub-paragraph 92(a) of the Defence above;
- c. repeat sub-paragraph 87(c)(ii) of the Defence;
- d. say that the First Defendant was aware of the matters referred to in sub-paragraph 87(c)(ii) of the Defence; and
- e. otherwise deny paragraph 92.

93 In response to paragraph 93, the Defendants:

- a. admit sub-paragraph 93(a);
- b. say further that in the month of December 2016:
  - i. above average rainfall was recorded for western New South Wales; and
  - ii. above average rainfall was also reported for parts of north-eastern New South Wales;
- c. in respect of sub-paragraph 93(b), say that total River Murray System inflows for December 2016 was approximately 570 GL (excluding Snowy, Darling, and environmental inflows and inter-valley trade (**IVT**));
- d. repeat sub-paragraph 91(a)(iii) of the Defence; and
- e. otherwise deny paragraph 93.

94 The Defendants admit paragraph 94.

## **(2) River Operations 2016-2017**

95 In response to paragraph 95, the Defendants:

- a. repeat paragraph 20 of the Defence;
- b. admit that the First Defendant published the 2016-2017 AOP in July 2016;
- c. say that:
  - i. the 2016-2017 AOP provided the context for, and descriptions of the breadth of, potential river operations for the River Murray System in

the 2016/2017 water year under a range of six system scenarios labelled according to the assumed River Murray System inflows;

- ii. the 2016-2017 AOP was regularly reviewed by the First Defendant and the WLWG throughout the water year and was formally reviewed by the First Defendant and the WLWG in October 2016; and
- iii. an update to the 2016-2017 AOP was published in November 2016 (**2016-2017 AOP Update**);

- d. refer to and rely on the terms of the 2016-2017 AOP and the 2016-2017 AOP Update for their full force and effect; and
- e. otherwise deny paragraph 95.

96 In response to paragraph 96, the Defendants:

- a. say that, on around 30 June 2016, MIL sought to renegotiate the charges applied for use of MIL infrastructure;
- b. repeat paragraph 37 of the Defence; and
- c. otherwise deny paragraph 96.

97 In response to paragraph 97, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. say that flood operations were commenced at Hume Reservoir with releases increased to 45,000 ML/day in response to high inflows in the week ending 7 September 2016; and
- c. otherwise deny paragraph 97.

98 In response to paragraph 98, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. say that the average rate of release from Weir 32 was 2,452 ML/day from 26 October 2016 to 19 April 2017;
- c. say that releases from Weir 32 gradually increased from around 1,000 ML/day to around 2,100 ML/day in the week ending 7 December 2016;
- d. say that around 1,800 ML/day was released from Weir 32 from around 15 December 2016 until the week ending 8 January 2017;

- e. say that around 6,000 ML/day was released from Weir 32 in the week ending 18 January 2017;
- f. say that around 5,100 ML/day was released from Weir 32 from around 21 January 2017 to around 1 February 2017;
- g. say that the releases from Weir 32 gradually reduced from around 5,000 ML/day to around 4,000 ML/day from around 1 February 2017 to around 22 February 2017;
- h. say that the releases from Weir 32 gradually reduced from around 4,000 ML/day to around 2,000 ML/day from 23 February 2017 to 15 March 2017;
- i. say that releases from Weir 32 were:
  - i. gradually reduced from around 2,000 ML/day to around 1,000 ML/day from 16 March 2017 to around 6 April 2017;
  - ii. around 1,000 ML/day from around 6 April 2017 to around 20 April 2017; and
  - iii. gradually reduced from around 1,000 ML/day to 400 ML/day from 20 April 2017 to 25 April 2017; and
- j. otherwise deny paragraph 98.

99 In response to paragraph 99, the Defendants:

- a. repeat paragraph 98 of the Defence;
- b. say that from around 21 October 2016 to around 8 January 2017, the releases directed from Menindee Lakes primarily comprised environmental water;
- c. say that from around 9 January 2017 to around 26 April 2017, the releases from the Menindee Lakes primarily comprised operational releases to meet downstream Murray demands; and
- d. otherwise deny paragraph 99.

100 In response to paragraph 100, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. say that approximately 134.2 GL of water was released from Weir 32 in January 2017;

- c. say that South Australian Department of Environment, Water and Natural Resources had forecast environmental water flow of 50 GL for January 2017;
- d. say that in January 2017:
  - i. approximately 459.1 GL flowed to South Australia including approximately 164 GL of environmental water; and
  - ii. South Australia deferred 26.8 GL of their entitlements; and
- e. otherwise deny paragraph 100.

101 In response to paragraph 101, the Defendants:

- a. say that from 1 January 2017, the flow rate from Yarrowonga reduced to 9,000 ML/day;
- b. say that by around 4 January 2017, the flow rate from Yarrowonga reduced to 8,000 ML/day;
- c. admit sub-paragraph 101(b); and
- d. otherwise deny paragraph 101.

102 In response to paragraph 102, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. say that approximately 118.9 GL was released from Weir 32 in February 2017;
- c. say that South Australian Department of Environment, Water and Natural Resources had (successively) forecast environmental water flows of 40 GL, 80 GL, and 75 GL for February 2017;
- d. say that in February 2017:
  - i. approximately 257.8 GL flowed to South Australia including approximately 75 GL of environmental water; and
  - ii. South Australia deferred 22.4 GL of their entitlements; and
- e. otherwise deny paragraph 102.

103 In response to paragraph 103, the Defendants:

- a. note the definition of the term “2016/2017 Menindee Releases” used in the FASOC;

- b. repeat sub-paragraph 16(c) of the Defence; and
- c. otherwise deny any allegation contained in paragraph 103.

104 In response to paragraph 104, the Defendants:

- a. say that approximately 119 GL of environmental water was released from Weir 32 in the 2016/2017 water year;
- b. say that approximately 100 GL of environmental water was released from Lake Cawndilla in the 2016/2017 water year; and
- c. otherwise deny paragraph 104.

105 The Defendants deny paragraph 105.

106 In response to paragraph 106, the Defendants:

- a. repeat paragraph 95 of the Defence;
- b. say that total River Murray System inflows during 2017/2018 was approximately 16,580 GL;
- c. say that this amount:
  - i. includes inflows to the Menindee Lakes; and
  - ii. excludes releases from the Snowy Mountain Scheme, IVT and managed environmental water flows; and
- d. otherwise deny paragraph 106.

## **G EVENTS OF 2017-2018 WATER YEAR**

### **(1) Rainfall, Tributary Inflows, Storage Levels and System Demand 2017-2018**

107 In response to paragraph 107, the Defendants:

- a. say that at all material times:
  - i. Dartmouth Reservoir had a total capacity of 3,856 GL and an active capacity of 3,785 GL;
  - ii. Hume Reservoir had a total capacity of 3,005 GL and an active capacity of 2,982 GL;
  - iii. Lake Victoria had a total capacity of 677 GL and an active capacity of 577 GL; and

- iv. Menindee Lakes had a total capacity of 1,731 GL and an active capacity of 1,251 GL;
    - b. admit that by around 1 June 2017, total active storage in the upper River Murray Storages was 5,477 GL;
    - c. say further that the 5,477 GL comprised approximately:
      - i. 2,940 GL in Dartmouth Reservoir (being 78% of active capacity);
      - ii. 1,942 GL in Hume Reservoir (being 65% of active capacity);
      - iii. 296 GL in Lake Victoria (being 51% of active capacity); and
      - iv. 299 GL in Menindee Lakes (being 24% of active capacity);
    - d. in respect of the water in the Menindee Lakes, refer to paragraphs 54 and 55 of the FASOC; and
    - e. otherwise deny paragraph 107.
- 108 In response to paragraph 108, the Defendants:
  - a. repeat sub-paragraph 87(c)(ii) of the Defence; and
  - b. otherwise admit paragraph 108.
- 109 In response to paragraph 109, the Defendants:
  - a. admit that the 2017-2018 AOP was published in August 2017;
  - b. say that the 2017-2018 AOP sets out six system scenarios labelled according to the assumed River Murray System inflows; and
  - c. admit that the moderate scenario assumed River Murray System inflows of about 4,400 GL and say that this was comparable to actual inflows in 2014/2015; and
  - d. otherwise do not admit paragraph 109.
- 110 In response to paragraph 110, the Defendants:
  - a. repeat paragraph 109 of the Defence;
  - b. admit that total River Murray System inflows during 2017/2018 was approximately 4,100 GL;
  - c. say that this amount:

- i. includes inflows to the Menindee Lakes; and
  - ii. excludes Snowy and environmental inflows and IVT; and ,
- d. otherwise deny paragraph 110.

111 In response to paragraph 111, the Defendants:

- a. repeat sub-paragraph 87(c)(ii) of the Defence;
- b. admit that in the week ending 21 June 2017:
  - i. models were steadily easing back the likelihood of El Nino; and
  - ii. most models still indicated an increased chance of warmer and drier than average conditions for Australia over winter, which was reflected in the BOM's three month outlook from June to August;
- c. admit that the First Defendant was aware of the matters referred to in sub-paragraph 111(b) of the Defence;
- d. say that the First Defendant was aware of the matters referred to in sub-paragraph 87(c)(ii) of the Defence; and
- e. otherwise deny paragraph 111.

112 In response to paragraph 112, the Defendants:

- a. say that total River Murray System inflows during June 2017 were approximately 161 GL (excluding Snowy, Darling, and environmental inflows); and
- b. otherwise admit paragraph 112.

113 In response to paragraph 113, the Defendants:

- a. admit sub-paragraphs 113(a), 113(b), 113(c) and 113(d);
- b. in respect of sub-paragraph 113(e):
  - i. say that the total River Murray System inflows during July 2017 was approximately 270 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT);
  - ii. admit that the total inflow during July 2017 referred to in sub-paragraph 113(b)(i) of the Defence above was significantly lower than the long-term average of 1,203 GL;

- c. in respect of sub-paragraph 113(f):
  - i. admit that in the month of July 2017, approximately 268.2 GL flowed to South Australia, including approximately 173 GL of environmental water; and
  - ii. say that South Australia deferred 13.4 GL of its entitlement; and
- d. otherwise deny paragraph 113.

114 In response to paragraph 114, the Defendants:

- a. admit that releases at Yarrowonga Weir peaked at approximately 33,500 ML/day in August 2017, during the week ending 23 August 2017;
- b. say that the Kiewa River at Bandiana exceeded the Minor Flood Level of 2.80 m during the week ending 23 August 2017;
- c. say that the Ovens River at Wangaratta peaked at around 29,000 ML/day in August, during the week ending 23 August 2017;
- d. say that the storage volume at Lake Victoria was approximately 428 GL around 1 August 2017 and approximately 530 GL around 31 August 2017, representing approximately a 102 GL increase by the end of August 2017;
- e. admit that rainfall improved over southern parts of the Basin in August 2017, following the relatively dry conditions of June and July;
- f. admit that across the Basin as a whole, BOM reported area-averaged rain totalling 26.4 mm which is 30% below the long-term average;
- g. in respect of sub-paragraph 114(f):
  - i. say that the total River Murray System inflows during August 2017 was approximately 1,025 GL (excluding Snowy inflows, inflows to the Menindee Lakes, managed environmental flows and inter-valley transfers); and
  - ii. say that this was below the long-term August average of 1,575 GL
- h. in respect of sub-paragraph 114(g), say that in the month of August 2017:
  - i. approximately 190 GL flowed to South Australia, including approximately 83 GL of environmental water; and
  - ii. South Australia deferred 17.9 GL of its entitlement; and



- i. otherwise deny paragraph 114.

115 In response to paragraph 115, the Defendants:

- a. say that by around 30 August 2017 total active storage in the upper River Murray Storages was 6,393 GL comprising:
  - i. 3,083 GL at Dartmouth Reservoir (being 81% of active capacity);
  - ii. 2,638 GL at Hume Reservoir (being 88% of active capacity);
  - iii. 423 GL at Lake Victoria (being 73% of active capacity); and
  - iv. 249 GL at Menindee Lakes (being 20% of active capacity);

#### **Particulars**

First Defendant's Weekly Report for the week ending 30 August 2017

- b. in respect of the water in the Menindee Lakes, refer to paragraphs 54 and 55 of the FASOC; and
- c. otherwise deny paragraph 115.

116 In response to paragraph 116, the Defendants:

- a. repeat sub-paragraph 87(c)(ii) of the Defence;
- b. admit that the BOM climate outlook for spring (September to November) issued 17 August 2017 stated that:
  - i. rainfall was likely to be below average for western parts of Australia, but elsewhere there was no strong signal towards a wetter or drier three months; and
  - ii. daytime temperatures were likely to be warmer than average for most of Australia during spring, and spring nights were likely to be warmer than average over northern and eastern Australia;
- c. refer to and rely on the terms of the BOM climate outlook for spring (September to November) issued 17 August 2017; and
- d. otherwise do not admit paragraph 116.

117 In response to paragraph 117, the Defendants:

- a. in respect of sub-paragraph 117(a), say that on or around 29 September 2017 the storage volume at Lake Victoria was 670.7 GL representing 99% of total storage;
- b. admit sub-paragraph 117(b);
- c. in respect of sub-paragraph 117(c), say that BOM reported that:
  - i. for the Basin as a whole, September 2017 was the driest September on record (in 118 years of records);
  - ii. rainfall for September 2017 was below average or very much below average across most of the Basin;
- d. in respect of sub-paragraph 117(d), say that the total River Murray System inflows during September 2017 were approximately 640 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT);
- e. in respect of sub-paragraph 117(e), say that in the month of September 2017:
  - i. approximately 192.6 GL flowed to South Australia, including approximately 64 GL of environmental water; and
  - ii. South Australia deferred 3 GL of its entitlement; and
- f. otherwise deny paragraph 117.

118 In response to paragraph 118, the Defendants:

- a. admit that in October 2017 approximately 236.5 GL flowed to South Australia including approximately 82 GL of environmental water; and
- b. otherwise deny paragraph 118.

119 The Defendants admit paragraph 119.

## **(2) River Operations 2017-2018**

120 In response to paragraph 120, the Defendants:

- a. repeat paragraph 20 of the Defence;
- b. admit that the First Defendant published the 2017-2018 AOP in August 2017;
- c. say that:
  - i. the 2017-2018 AOP provided the context for, and descriptions of the breadth of, potential river operations for the River Murray System in the

2017-2018 water year under a range of six system scenarios labelled according to the assumed River Murray System inflows;

- ii. the 2017-2018 AOP was regularly reviewed by the First Defendant and the WLWG throughout the water year and was formally reviewed by the First Defendant and the WLWG in October 2017; and
- iii. an update to the 2017-2018 AOP was published in November 2017 (**2017-2018 AOP Update**);

d. refer to and rely on the terms of the 2017-2018 AOP and the 2017-2018 AOP Update for their full force and effect; and

e. otherwise deny paragraph 120.

121 In response to paragraph 121, the Defendants:

- a. repeat paragraph 110 of the Defence; and
- b. otherwise deny paragraph 121.

122 In response to paragraph 122, the Defendants:

- a. in respect of sub-paragraph 122(a), say that:
  - i. the Sunraysia region is located in north-western Victoria and south-western New South Wales;
  - ii. there has been expansion in permanent horticulture in the Sunraysia region, largely due to the growth in the area of nut trees;
  - iii. annual consumptive use in the reaches between:
    - A. Barmah and Wakool Junction has decreased in both Victoria and New South Wales; and
    - B. Wakool Junction and the South Australia border has increased slightly in both Victoria and New South Wales;
  - iv. when the two reaches identified in sub-paragraph 122(a)(iii) of the Defence above are combined, historic data shows that the overall trend in consumptive use is relatively static both annually and over the peak consumptive use period between January and April;

- v. changes in consumptive use in the reach between Barmah and the South Australia border over time need to be considered in conjunction with increases in regulated supply as a result of IVT; and
- vi. total consumptive use in the reach between Barmah and the South Australia border has not increased, but:
  - A. a growing proportion of demand is being supplied by IVT; and
  - B. some demand has moved from the upstream end (Torrumbarry system) to the downstream end (Sunraysia region);

### **Particulars**

Hydrology and Risk Consulting Pty Ltd (**HARC**) *Review of historical use of water: Barmah to SA border* dated 20 January 2020.

- b. in respect of sub-paragraph 122(b), say that:
  - i. water for consumptive use can be traded into, and out of, South Australia;
  - ii. Victorian environmental water entitlements are traded to South Australia through a process of "trade for immediate delivery";
  - iii. New South Wales environmental water entitlements move from New South Wales to South Australia through a "bulk entitlement delivery" process;
  - iv. the majority of water that is traded to South Australia is environmental water; and
  - v. environmental flows to South Australia can be supplied from environmental water entitlements held in the NSW Murray, Victorian Murray, Murrumbidgee or Goulburn systems;
- c. in respect of sub-paragraph 122(c), admit that in the 2017/2018 water year there were lower return flows relative to historical levels; and
- d. otherwise deny paragraph 122.

123 In response to paragraph 123, the Defendants:

- a. admit that the First Defendant was aware of the matters pleaded in sub-paragraphs 122(a)(i), (ii) and (iv), 122(b) and 122(c) of the Defence; and

- b. otherwise deny paragraph 123.

124 In response to paragraph 124, the Defendants:

- a. repeat paragraph 38 of the Defence;
- b. admit that from on or around 10 July 2017, gates and bays of several Forest Regulators were opened to provide a low level inundation of the Barmah-Millewa Forest while releases downstream of Yarrawonga Weir were within channel (**Barmah-Millewa In-Channel Watering Action**);
- c. admit that, historically, gates and bays of several Forest Regulators were generally opened when river flows downstream of Yarrawonga Weir would result in the Barmah Choke channel capacity being exceeded;
- d. admit that the Barmah-Millewa In-Channel Watering Action was undertaken to provide connectivity between the river and the floodplain in winter and into spring when river flows are below 10,000 ML/day;
- e. further say that:
  - i. the Barmah-Millewa In-Channel Watering Action was at the request of environmental water holders; and
  - ii. an incremental daily use based on flow downstream of Yarrawonga Weir was applied during the Barmah-Millewa In-Channel Watering Action;
- f. admit that the First Defendant stated that "the small additional water loss associated with undertaking this action is being debited from water accounts held by the environmental water holders"; and
- g. otherwise deny paragraph 124.

125 In response to paragraph 125, the Defendants:

- a. admit that gates and bays of several Forest Regulators were opened until on or around January 2018;
- b. further say that:
  - i. the Barmah-Millewa In-Channel Watering Action continued until on or around 18 August 2017;
  - ii. between on or around 18 August 2017 to on or around 7 September 2017, additional gates and bays of several Forest Regulators were

opened to accommodate flows exceeding 10,000 ML/day downstream of Yarrawonga Weir;

- iii. from on or around 7 September 2017, the Barmah-Millewa In-Channel Watering Action recommenced and continued to around early October 2017;
  - iv. from around early October 2017, additional gates and bays of several Forest Regulators were opened to accommodate flows exceeding 10,000 ML/day downstream of Yarrawonga Weir;
  - v. around late November 2017 or around early December 2017 the majority of gates and bays of several Forest Regulators were in the process of being closed;
  - vi. from around early December 2017, additional gates and bays of several Forest Regulators were opened to accommodate flows exceeding 10,000 ML/day downstream of Yarrawonga Weir; and
  - vii. the majority of gates and bays of several Forest Regulators were progressively closed from around late December 2017 to January 2018;
  - viii. between on or around 14 January 2018 to on or around 17 January 2018, gates and bays of several Forest Regulators were opened to manage the level at Picnic Point; and
  - ix. the majority of gates and bays of several Forest Regulators were progressively closed by the end of January 2018; and
- c. otherwise deny paragraph 125.

126 In response to paragraph 126, the Defendants:

- a. say that during the week ending 16 August 2017 releases at Yarrawonga Weir reached a peak of approximately 10,500 ML/day as higher inflows from the Kiewa and Ovens Rivers travelled downstream; and
- b. otherwise deny paragraph 126.

127 In response to paragraph 127, the Defendants:

- a. say that during the week ending 23 August 2017 releases at Yarrawonga Weir reached a peak of approximately 33,500 ML/day as higher inflows from the Kiewa and Ovens Rivers travelled downstream; and

b. otherwise deny paragraph 127.

128 In response to paragraph 128, the Defendants:

- a. say that during the week ending 30 August 2017 releases at Yarrowonga Weir reduced from approximately 25,000 ML/day to approximately 12,000 ML/day;
- b. otherwise deny paragraph 128.

129 In response to paragraph 129, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. say that bulk transfers from Hume Reservoir to Lake Victoria commenced between late July 2017 and early August 2017 but ceased due to forecast rainfall along the Murray;
- c. admit that around 2 September 2017 releases from Yarrowonga Weir reduced below 10,000 ML/day;
- d. admit that between around 3 September 2017 and 15 September 2017, releases from Hume Reservoir were made to meet increasing downstream demands;
- e. say that between around 29 August 2017 and 17 September 2017, releases from Yarrowonga Weir were, in part, made to meet environmental water demands;
- f. admit that from around 15 September 2017 bulk transfers from Hume Reservoir to Lake Victoria commenced at rates below 10,000 ML/day downstream of Yarrowonga to ensure Lake Victoria had sufficient volume to meet downstream demand during summer and autumn;
- g. say that until on or around 3 October 2017 releases from Yarrowonga Weir were targeted below 10,000 ML/day; and
- h. otherwise deny paragraph 129.

130 In response to paragraph 130, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. say that a total of approximately 40 GL was transferred from Hume Reservoir to Lake Victoria in the month of September 2017; and
- c. otherwise deny paragraph 130.

- 131 In response to paragraph 131, the Defendants:
- a. repeat paragraphs 129 and 141 of the Defence;
  - b. in respect of sub-paragraph 131(a), say that in 2017/2018, 266 GL of water was transferred by way of bulk transfers from Hume Reservoir to Lake Victoria and that such transfers occurred in:
    - i. July 2017;
    - ii. September 2017;
    - iii. October 2017;
    - iv. November 2017;
    - v. April 2018; and
    - vi. May 2018;
  - c. in respect of sub-paragraph 131(b), say that between 2 August 2017 and the end of May 2018:
    - i. releases from Hume Reservoir were approximately 3,009 GL; and
    - ii. flow into Lake Victoria (measured at Frenchman Creek Inlet Regulator) was approximately 1,016 GL;
  - d. in respect of sub-paragraph 131(c) say that there were conveyance losses associated with transfers of water from Hume Reservoir to Lake Victoria above 10,000 ML/day at Yarrawonga Weir; and
  - e. otherwise deny paragraph 131.
- 132 In response to paragraph 132, the Defendants:
- a. admit that during the week ending 13 September 2017, the storage volume at Lake Victoria increased by approximately 41 GL to 605 GL (89% total capacity);
  - b. say that in the week ending 13 September 2017, the storage volume at Lake Victoria was increasing as a result of higher tributary inflows from the Kiewa, Ovens, Goulburn and Murrumbidgee catchments that occurred in August 2017; and
  - c. otherwise deny paragraph 132.
- 133 In response to paragraph 133, the Defendants:



- a. admit that during the week ending 27 September 2017, the storage volume at Lake Victoria increased by approximately 25 GL to 670 GL (99% total capacity);
- b. say that in the week ending 27 September 2017, the storage volume at Lake Victoria was increasing primarily as a result of higher tributary inflows from the from Kiewa, Ovens, Goulburn and Murrumbidgee catchments that occurred in August 2017; and
- c. otherwise deny paragraph 133.

134 In response to paragraph 134, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. say that the level at Lake Victoria decreased from the beginning of October 2017 until around 22 October 2017 and increased thereafter;

#### **Particulars**

As at 1 October 2017, the volume at Lake Victoria was 669 GL.

As at 22 October 2017, the volume at Lake Victoria was 623 GL.

As at 31 October 2017, the volume at Lake Victoria was 630 GL.

- c. say that, water stored in Lake Victoria can be used to meet:
  - i. South Australia's monthly entitlement;
  - ii. water traded into South Australia; and
  - iii. environmental water orders;
- d. admit that around early October 2017 transfers of water from Hume Reservoir to Lake Victoria were commenced targeting rates above 10,000 ML/day but below 15,000 ML/day downstream of Yarrawonga; and
- e. otherwise deny paragraph 134.

135 In response to paragraph 135, the Defendants:

- a. say that the possibility of transfers of water from Hume Reservoir to Lake Victoria above 10,000 ML/day but below 15,000 ML/day downstream of Yarrawonga Weir were foreshadowed with BOC prior to the commencement of those transfers;

#### **Particulars**

BOC Meeting 48 (18 May 2017) Agenda Item 5 'Water Resource Availability'  
at [16]

BOC Meeting 51 (29 August 2017) Confirmed Minutes at [53], Agenda Item 5  
'Water resource availability' at page 3, and Agenda Item 11 'River Murray  
System Capacity Risks and Options' at page 3

- b. say that BOC was otherwise informed of the transfers of water from Hume Reservoir to Lake Victoria above 10,000 ML/day but below 15,000 ML/day downstream of Yarrawonga Weir;

**Particulars**

BOC Meeting 54 (12 October 2017) Confirmed Minutes at [14] and Agenda  
Item 5 'Water Resource Availability' at [16]

BOC Meeting 56 (24 November 2017) Agenda Item 5 'Water Resource  
Availability' at [10]

BOC Meeting 59 (8 February 2018) Agenda Item 5 'Water Resource  
Availability' at [8]

- c. say that BOC did not express any objection to the transfer of water from Hume Reservoir to Lake Victoria above 10,000 ML/day but below 15,000 ML/day;
- d. say that the possibility of transfers of water from Hume Reservoir to Lake Victoria above 10,000 ML/day but below 15,000 ML/day was considered and discussed with the WLWG;

**Particulars**

WLWG Meeting 217 (13 June 2017) Draft Meeting summary at page 3

WLWG Meeting 220 (26 July 2017) Draft Meeting Summary at page 4

WLWG Meeting 221 (10 August 2017) Draft Meeting Summary at page 6

WLWG Meeting 226 (26 September 2017) Draft Meeting Summary at pages  
1-2, 4, 5-6

- e. say that the WLWG otherwise remained informed of and discussed the transfers of water from Hume Reservoir to Lake Victoria above 10,000 ML/day but below 15,000 ML/day; and

**Particulars**

WLWG Meeting 227 (10 October 2017) Draft Meeting Summary at pages 1, 5

WLWG Meeting 228 (27 October 2017) Draft Meeting Summary at pages 1, 5

WLWG Meeting 229 (9 November 2017) Draft Meeting Summary at pages 1,  
5

WLWG Meeting 230 (24 November 2017) Draft Meeting Summary at page 1

WLWG Meeting 231 (12 December 2017) Draft Meeting Summary at page 1

WLWG Meeting on Accounting for Environmental Water Releases at Hume  
Dam (15 December 2017) Draft Meeting Summary at page 3

f. otherwise do not admit paragraph 135.

136 In response to paragraph 136, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. admit that, in the week ending 4 October 2017, storage in Lake Victoria decreased by 8 GL, and Lake Victoria was being drawn down;
- c. say that, from around 1 October 2017, releases from Menindee Lakes were around 400 ML/day to assist meeting system demands downstream of the Darling River confluence; and
- d. otherwise deny paragraph 136.

137 In response to paragraph 137, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. admit that in the week ending 11 October 2017, storage in Lake Victoria decreased by 26 GL and Lake Victoria was being drawn down;
- c. say that, from around 7 October 2017, releases from Menindee Lakes were gradually increased to approximately 1,800 ML/day to assist meeting system demands downstream of the Darling River confluence; and
- d. otherwise deny paragraph 137.

138 In response to paragraph 138, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;

- b. admit that, in the week ending 18 October 2017, the storage volume at Lake Victoria decreased by approximately 12 GL to 624 GL and Lake Victoria was being drawn down;
- c. say that releases from Menindee Lakes were around 1,800 ML/day to assist meeting system demands downstream of the Darling River confluence; and
- d. otherwise deny paragraph 138.

139 In response to paragraph 139, the Defendants:

- a. admit that, during the week ending 25 October 2017, the storage volume at Lake Victoria was increasing and was expected to continue to increase over the next fortnight as higher flows arrived from the Murray and the Murrumbidgee and from the Menindee Lakes; and
- b. otherwise deny paragraph 139.

140 In response to paragraph 140, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. admit that approximately 78 GL was released from Lake Victoria in the month of October 2017;
- c. admit that the storage at Lake Victoria decreased by approximately 40 GL in the month of October 2017; and
- d. otherwise deny paragraph 140.

141 In response to paragraph 141, the Defendants:

- a. repeat sub-paragraph 16(c) and paragraph 134 of the Defence;
- b. admit that between 4 October 2017 and 25 December 2017, releases at Yarrowonga Weir were above 10,000 ML/day;
- c. say that:
  - i. between on or around 4 October 2017 and on or around 20 October 2017 water was released from Yarrowonga Weir targeting rates above 10,000 ML/day but below 15,000 ML/day to ensure that Lake Victoria was at an appropriate level to supply anticipated high system demands over the coming summer and autumn;

- ii. between on or around 21 October 2017 and on or around 30 November 2017 water was released from Yarrawonga Weir targeting rates above 10,000 ML/day but below 15,000 ML/day to meet environmental water demands;
- iii. between on or around 1 December 2017 and on or around 3 December 2017 water was released from Yarrawonga Weir above 15,000 ML/day to create airspace in the Yarrawonga Weir Pool ahead of forecast intense local rainfall and high inflows from the local catchment ahead of larger inflows from the Ovens River;
- iv. between on or around 4 December 2017 and on or around 6 December 2017 water was released from Yarrawonga Weir targeting rates above 10,000 ML/day but below 15,000 ML/day to meet environmental water demands;
- v. between on or around 7 December 2017 and on or around 10 December 2017 water was released from Yarrawonga Weir above 10,000 ML/day as a result of increased inflows from the Ovens River;
- vi. between on or around 11 December 2017 and on or around 24 December 2017 water was released from Yarrawonga Weir above 10,000 ML/day but below 15,000 ML/day to meet environmental water demands; and
- vii. from on or around 25 December 2017, releases were targeted below 10,000 ML/day at Yarrawonga Weir; and

d. otherwise deny paragraph 141.

142 In response to paragraph 142, the Defendants:

- a. repeat paragraph 141 of the Defence;
- b. deny sub-paragraph 142(a);
- c. in respect of sub-paragraph 142(b), admit that there are conveyance losses associated with transfers of water from Hume to Lake Victoria above 10,000 ML/day at Yarrawonga Weir; and
- d. otherwise deny paragraph 142.

143 The Defendants admit paragraph 143.

144 In response to paragraph 144, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. in respect of paragraph 144(a), say that in December 2017 Lake Victoria was filled due to significant rainfall in early December 2017;
- c. in respect of paragraph 144(b):
  - i. repeat paragraph 52 of the Defence; and
  - ii. admit that in the period 1 February 2018 to 31 May 2018, releases from Lake Victoria into the Rufus River were above 700 ML/day; and
- d. otherwise deny paragraph 144.

145 In response to paragraph 145, the Defendants:

- a. repeat sub-paragraphs 16(c) and 59(f) of the Defence;
- b. admit that during the 2017/2018 water year:
  - i. directed releases from Hume Reservoir were approximately 434 GL; and
  - ii. directed releases from Menindee Lakes were approximately 23 GL; and
- c. otherwise deny paragraph 145.

146 The Defendants deny paragraph 146.

147 In response to paragraph 147, the Defendants:

- a. in respect of sub-paragraph 147(a), admit that in the 2017-2018 Summary of River Operations report, the First Defendant reported that 1,023 GL of environmental water was delivered over the South Australian border during the period 1 June 2017 to 31 May 2018;
- b. in respect of sub-paragraph 147(b) admit that in the Transition Period Water Take Report 2017-2018, the First Defendant reported that 934 GL was held environmental water lawfully accessible for use in South Australia during the period 1 July 2017 to 30 June 2018;
- c. in respect of sub-paragraph 147(c) say that in the Southern Connected Basin Environmental Watering Committee (**SCBEWC**) 2017-2018 Annual Report, the SCBEWC reported that there was a total of 853 GL "return flows" during period 1 July 2017 to 30 June 2018; and
- d. otherwise deny paragraph 147.

- 148 In response to paragraph 148, the Defendants:
- a. deny sub-paragraph 148(a); and
  - b. in respect of sub-paragraph 148(b):
    - i. repeat paragraph 120 of the Defence;
    - ii. say that during the 2017/2018 water year (1 June 2017 to 31 May 2018) a total of approximately 1,006 GL of environmental water was delivered to South Australia; and
    - iii. otherwise deny sub-paragraph 148(b).

## **H EVENTS OF 2018-19 WATER YEAR**

### **(1) Rainfall, Tributary Inflows, Storage Levels and System Demand 2018-2019**

- 149 In response to paragraph 149, the Defendants:
- a. admit that by around 1 June 2018, total active storage in the upper River Murray storages was 4,618 GL;
  - b. say further that the 4,618 GL comprised:
    - i. 3,341 GL in Dartmouth Reservoir (being 88% of active capacity);
    - ii. 1,078 GL in Hume Reservoir (being 36% of active capacity);
    - iii. 199 GL in Lake Victoria (being 34% of active capacity); and
    - iv. 0 GL in Menindee Lakes (being 0% of active capacity);
  - c. in respect of the water in the Menindee Lakes, refer to paragraphs 54 and 55 of the FASOC; and
  - d. otherwise deny paragraph 149.
- 150 In response to paragraph 150, the Defendants:
- a. in respect of sub-paragraph 150(a), admit that by around 28 June 2018, the First Defendant knew that BOM's three month climate outlook released on 28 June 2018 indicated a significantly higher chance of drier and warmer than average conditions in the Murray-Darling Basin for the next three months and otherwise do not admit sub-paragraph 150(a);

- b. in respect of sub-paragraph 150(b) admit that by around 1 June 2018, the First Defendant knew that a significant volume of active storage in the MDBA's reservoirs was available in the upper River Murray Storages upstream of the Barmah Choke in Dartmouth Reservoir (88% active capacity) and Hume Reservoir (36% active capacity) and otherwise do not admit sub-paragraph 150(b);
- c. admit sub-paragraphs 150(c) and 150(d);
- d. in respect of sub-paragraph 150(e), admit that by the time the 2018-2019 AOP was published, the First Defendant knew that in the three driest scenarios, there was a risk that Lake Victoria may not be filled to the effective full supply level; and
- e. otherwise deny paragraph 150.

151 In response to paragraph 151, the Defendants:

- a. in respect of sub-paragraph 151(a), say that in the month of June 2018, BOM reported for Australia as a whole, that day time temperatures for June were warmer than average and nights were cooler than average and otherwise do not admit sub-paragraph 151(a);
- b. in respect of sub-paragraph 151(b), say that BOM reported that in the month of June 2018, area-averaged rainfall for the Basin was 23.4 mm, which is 30% below the average, and otherwise do not admit sub-paragraph 151(b);
- c. in respect of sub-paragraph 151(c), say that the total inflow into the River Murray System during June 2018 was approximately 203 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT) and otherwise admit paragraph 151(c);
- d. in respect of sub-paragraph 151(d), say that by the end of June 2018, the storage volume at Hume Reservoir rose to approximately 1,291 GL;
- e. in respect of sub-paragraph 151(e), say that by the end of June 2018, storage level at Lake Victoria rose to approximately 364 GL; and
- f. otherwise deny paragraph 151.

152 In response to paragraph 152, the Defendants:

- a. in respect of sub-paragraph 152(a), admit that in the week ending 18 July 2018, the First Defendant noted that operational planning suggested that in the



coming weeks, if conditions remain dry, transfers from Hume Reservoir to Lake Victoria may need to begin in readiness for higher system demands later in the season and otherwise do not admit sub-paragraph 152(a); and

### **Particulars**

First Defendant's Weekly Report for the week ending 18 July 2018

b. admit sub-paragraph 152(b).

153 In response to paragraph 153, the Defendants:

a. in respect of sub-paragraph 153(a), say that BOM reported for Australia as a whole, that day-time temperatures for July were the second-warmest on record, and otherwise do not admit sub-paragraph 153(a);

b. in respect of sub-paragraph 153(b):

i. say that BOM reported that July 2018:

A. was the driest for Australia as a whole since 2002; and

B. was the fifth driest July on record for NSW, continuing a run of seven consecutive months of below average rainfall for NSW and NSW's driest January to July period since 1965; and

ii. otherwise do not admit sub-paragraph 153(b);

c. in respect of sub-paragraph 153(c), say that BOM reported that area-average rainfall for the Murray-Darling Basin in July 2018 was 12.6 mm, which was 68% below the average and ranked 12th driest out of 119 years of historical records and otherwise do not admit sub-paragraph 153(c); and

d. in respect of sub-paragraph 153(d), say that the total River Murray System inflows during July 2018 was approximately 254 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT) and otherwise admit sub-paragraph 153(d).

154 In response to paragraph 154, the Defendants:

a. in respect of sub-paragraph 154(a), say that BOM reported that area-average rainfall for the Basin in August 2018 was 21.6 mm, 43% below the long-term average making August 2018 the 28th driest August out of 119 years of records and otherwise do not admit sub-paragraph 154(a);

b. in respect of sub-paragraph 154(b):

- i. say that the total River Murray System inflows during August 2018 was approximately 564 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT);
  - ii. say that this was below the month's long-term median of 1,272 GL and in comparison with the historical record since 1891, only about 16% of previous monthly totals for August were lower than the inflows observed in August 2018; and
  - iii. otherwise admit sub-paragraph 154(b);
- c. admit sub-paragraph 154(c);
  - d. in respect of sub-paragraph 154(d), say that in the month of August 2018, approximately 174.7 GL flowed to South Australia, including approximately 51 GL of environmental water; and
  - e. otherwise deny paragraph 154.

155 In response to paragraph 155, the Defendants:

- a. in respect of sub-paragraph 155(a), say that BOM reported that in September 2018, Australia experienced its driest September on record, with area-average rainfall for the Basin at 10.2 mm, 70% below the long-term average and the 6th driest September out of 119 years of record and otherwise do not admit sub-paragraph 155(a);
- b. in respect of sub-paragraph 155(b):
  - i. say that the total River Murray System inflows during September 2018 were approximately 480 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT);
  - ii. say that this was below the month's long term median of 1,334 GL and in comparison with the historical record since 1891, only about 9% of previous monthly totals for September were lower than the inflows observed in September 2018; and
  - iii. otherwise admit sub-paragraph 155(b);
- c. in respect of sub-paragraph 155(c), say that by around 30 September 2018 the storage volume:

- i. at Dartmouth Reservoir was approximately 3,305 GL, representing a 178 GL decrease from the storage volume on 1 September 2018 (being approximately 3,483 GL); and
  - ii. at Lake Victoria was approximately 355 GL, representing a 21 GL increase from the storage volume on 1 September 2018 (being approximately 334 GL); and
- d. otherwise deny paragraph 155.

156 In response to paragraph 156, the Defendants:

- a. admit sub-paragraph 156(a);
- b. in respect of sub-paragraph 156(b), say that BOM reported that in the month of October 2018, area-averaged rainfall for the Basin was 36.6 mm, which was 9% below the long-term average for October, and otherwise do not admit sub-paragraph 156(b);
- c. in respect of sub-paragraph 156(c),:
  - i. say that the total River Murray System inflows during October 2018 was approximately 318 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT);
  - ii. say that this was below the month's long term median of 973 GL and in comparison with the historical record since 1891, only about 9% of previous monthly totals for October were lower than the inflows observed in October 2018; and
  - iii. otherwise admit sub-paragraph 156(c);
- d. in respect of sub-paragraph 156(d):
  - i. say that by around 31 October 2018 the storage volume:
    - A. at Dartmouth Reservoir was approximately 3,105 GL, representing a 193 GL decrease from the storage volume on 1 October 2018 (being approximately 3,298 GL); and
    - B. Lake Victoria was approximately 450 GL, representing a 94 GL increase from the storage volume on 1 October 2018 (being approximately 356 GL);
  - ii. further say that in the month of October 2018:

- A. 229 GL was transferred from Hume Reservoir to Lake Victoria;
  - B. releases from Yarrawonga Weir were above 9,500 ML/day but below 15,000 ML/day; and
  - C. there are conveyance losses associated with releases from Yarrawonga Weir above 9,500 ML/day; and
- iii. otherwise deny sub-paragraph 156(d);
- e. in respect of sub-paragraph 156(e), say that in the month of October 2018:
    - i. South Australia's monthly entitlement was 170,500 ML;
    - ii. South Australia deferred 10.9 GL of its monthly entitlement; and
    - iii. approximately 227.5 GL flowed to South Australia, including approximately 68 GL of environmental water; and
  - f. otherwise deny paragraph 156.

157 In response to paragraph 157, the Defendants:

- a. repeat sub-paragraph 87(c)(ii) of the Defence;
- b. refer to and rely on the terms of the BOM climate outlook for November 2018 to January 2019 issued 11 October 2018; and
- c. otherwise deny paragraph 157.

158 In response to paragraph 158, the Defendants:

- a. admit sub-paragraph 158(a);
- b. in respect of sub-paragraph 158(b), say that BOM reported that in the month of November 2018, area-averaged rainfall across the Basin was 42.4 mm, which was 5% above the long-term average for November and the first month since December 2017 where area averaged rainfall across the Basin was above the long-term average and otherwise do not admit sub-paragraph 158(b);
- c. in respect of sub-paragraph 158(c):
  - i. say that the total River Murray System inflows during November 2018 was approximately 230 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT);
  - ii. say that this was below the month's long term median of 594 GL and in comparison with the historical record since 1891, only about 12% of

previous monthly totals for November were lower than the inflows observed in November 2018; and

- iii. otherwise admit sub-paragraph 158(c);
- d. in respect of sub-paragraph 158(d):
  - i. admit that between 7 November 2018 and 5 December 2018 the storage volumes at Dartmouth Reservoir and Lake Victoria were as alleged in sub-paragraphs 158(d)(i) and (ii);
  - ii. further say that in the month of November 2018:
    - A. 197 GL was transferred from Hume Reservoir to Lake Victoria;
    - B. releases from Yarrawonga Weir targeted rates above 9,500 ML/day but below 15,000 ML/day; and
    - C. there were conveyance losses associated with releases from Yarrawonga Weir above 9,500 ML/day; and
  - iii. otherwise deny sub-paragraph 158(d);
- e. admit sub-paragraph 158(e);
- f. in respect of sub-paragraph 158(f), say that in the month of November 2018:
  - i. approximately 204.4 GL flowed to South Australia, including approximately 36 GL of environmental water; and
  - ii. South Australia deferred 12.9 GL of its entitlement; and
- g. otherwise deny paragraph 158.

159 In response to paragraph 159, the Defendants:

- a. in respect of sub-paragraph 159(a), say that BOM reported that in the month of December 2018, rainfall in the northern Basin was generally average or below and in the southern Basin much of the region experienced above average rainfall, and otherwise do not admit sub-paragraph 159(a);
- b. in respect of sub-paragraph 159(b), say that BOM reported that temperatures in the month of December 2018 were well above average across the Basin and otherwise do not admit sub-paragraph 159(b);
- c. in respect of sub-paragraph 159(c):

- i. admit that River-Murray System inflows for December totalled around 234 GL (excluding Snowy, Darling, and environmental inflows and IVT); and
    - ii. admit that the inflows referred to in sub-paragraph 159(c)(i) of the Defence above were below the long-term average of around 450 GL;
  - d. admit sub-paragraph 159(d);
  - e. in respect of sub-paragraph 159(e), admit that during December 2018 there was a rainfall rejection event following a significant rainfall event upstream of Yarrowonga Weir between on or around 13 December and 19 December 2018;
  - f. in respect of sub-paragraph 159(f):
    - i. say that by around 31 December 2018 the storage volume:
      - A. at Dartmouth Reservoir was approximately 2,729 GL, representing a 151 GL decrease from the storage volume on 1 December 2018 (being approximately 2,880 GL); and
      - B. at Lake Victoria was approximately 532 GL, representing a 22 GL decrease from the storage volume on 1 December 2018 (being approximately 554 GL);
    - ii. further say that in the month of December 2018:
      - A. 150 GL was transferred from Hume Reservoir to Lake Victoria;
      - B. releases from Yarrowonga Weir were above 9,500 ML/day and otherwise repeat sub-paragraph 178(d) of the Defence; and
      - C. there are conveyance losses associated with releases from Yarrowonga Weir above 9,500 ML/day; and
    - iii. otherwise deny sub-paragraph 159(f);
  - g. in respect of sub-paragraph 159(g):
    - i. repeat sub-paragraph 16(c) of the Defence;
    - ii. admit that in December 2018, environmental water holders were advised that the system could support the pattern of delivering 60 GL of environmental water as a pulse in December 2018 and January 2019; and

- iii. otherwise deny sub-paragraph 159(g);
- h. in respect of sub-paragraph 159(h), say that in the month of December 2018:
  - i. approximately 264.8 GL flowed to South Australia, including approximately 61 GL of environmental water;
  - ii. South Australia deferred 15.7 GL of its entitlement; and
- i. otherwise deny paragraph 159.

160 In response to paragraph 160, the Defendants:

- a. admit sub-paragraph 160(a);
- b. in respect of sub-paragraph 160(b):
  - i. say that BOM reported that in the month of January 2019:
    - A. Australian temperatures were the warmest on record in terms of mean, maximum and minimum temperatures;
    - B. persistent stable and sunny conditions brought sustained and unprecedented heatwaves throughout the Basin; and
  - ii. otherwise do not admit sub-paragraph 160(b);
- c. in respect of sub-paragraph 160(c):
  - i. say that the total River Murray System inflows during January 2019 was approximately 100 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT);;
  - ii. say that this was below the month's long term median of 193 GL and in comparison with the historical record since 1891, only about 8% of previous monthly totals for January were lower than the inflows observed in January 2019; and
  - iii. otherwise admit sub-paragraph 160(c);
- d. in respect of sub-paragraph 160(d), say that by 31 January 2019, the storage at Lake Victoria was approximately 401 GL, representing a 134 GL decrease from the storage volume on 1 January 2019 (being approximately 525 GL);
- e. in respect of sub-paragraph 160(e), say that in the month of January 2019:
  - i. approximately 267.7 GL flowed to South Australia, including approximately 65 GL of environmental water; and

- ii. South Australia deferred 14.9 GL of its entitlement; and
- f. otherwise deny paragraph 160.

161 In response to paragraph 161, the Defendants:

- a. admit sub-paragraph 161(a);
- b. in respect of sub-paragraph 161(b), say that BOM reported that in the month of February 2019, temperatures were the fourth warmest on record for Australia as a whole and otherwise do not admit sub-paragraph 161(b);
- c. in respect of sub-paragraph 161(c), say that the total River Murray System inflows during February 2019 was approximately 77 GL (excluding Snowy, Menindee Lakes, and environmental inflows and IVT) and otherwise admit sub-paragraph 161(c);
- d. in respect of sub-paragraph 161(d), say that in the month of February 2019:
  - i. approximately 226.9 GL flowed to South Australia, including approximately 44 GL of environmental water; and
  - ii. South Australia deferred 13.9 GL of its entitlement;
- e. in respect of sub-paragraph 161(e) admit that:
  - i. at the end of January 2019, conveyance losses in the 2018/2019 water year were estimated in the order of 620 GL; and
  - ii. by on or around March 2019, losses were projected to be between 850 GL and 1,000 GL by the end of May 2019; and

### **Particulars**

#### Losses in the River Murray System 2018-2019 Report – March 2019 **(MDBA Losses Report)**

- f. otherwise deny paragraph 161.

162 In response to paragraph 162, the Defendants:

- a. admit that total flows to South Australia in the 2018/2019 water year were approximately 2,457 GL (77% AEP);
- b. say that this included:
  - i. 1,850 GL of South Australia's entitlement flow although 83.7 GL was deferred; and



ii. approximately 666 GL of environmental water; and

c. otherwise deny paragraph 162.

163 The Defendants admit paragraph 163.

164 The Defendants admit paragraph 164, and further say that the estimated figure of around 2,650 GL for total water use referred to in that paragraph included use in the lower Darling River.

165 The Defendants admit paragraph 165.

**(2) River Operations 2018-19**

166 In response to paragraph 166, the Defendants:

a. repeat paragraph 20 of the Defence;

b. say that the First Defendant published the 2018-2019 AOP in July 2018;

c. say that:

i. the 2018-2019 AOP provided the context for, and descriptions of the breadth of, potential river operations for the River Murray System in the 2018-2019 water year under a range of six system scenarios labelled according to the assumed River Murray System inflows;

ii. the 2018-2019 AOP was regularly reviewed by the First Defendant and the WLWG throughout the 2018/2019 water year and was formally reviewed by the First Defendant and the WLWG in October 2018;

iii. an update to the 2018-2019 AOP was published in December 2018 (dated October 2017) (**2018-2019 AOP Update**);

d. refer to and rely on the terms of the 2018-2019 AOP and the 2018-2019 AOP Update for their full force and effect; and

e. otherwise deny paragraph 166.

167 In response to paragraph 167, the Defendants:

a. repeat paragraph 122 of the Defence; and

b. otherwise deny paragraph 167.

168 In response to paragraph 168, the Defendants:

- a. admit that the First Defendant was aware of the matters pleaded in sub-paragraph 123(a) of the Defence; and
- b. otherwise deny paragraph 168.

169 In response to paragraph 169, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. admit that in June 2018 there was 27.5 GL of environmental direct trade released from Lake Victoria;
- c. say that in June 2018 132.5 GL flowed to South Australia, including approximately 42 GL of environmental water; and
- d. otherwise deny paragraph 169.

170 In response to paragraph 170, the Defendants:

- a. repeat paragraph 38 of the Defence;
- b. admit that on or around 16 July 2018 a Barmah-Millewa In-Channel Watering Action commenced; and
- c. otherwise deny paragraph 170.

171 In response to paragraph 171, the Defendants:

- a. repeat paragraph 38 of the Defence;
- b. admit that gates and bays of several Forest Regulators were opened until on or around early January 2019;
- c. further say that:
  - i. Forest Regulators remained in the Barmah-Millewa In-Channel Watering Action configuration until on or around 15 September 2018;
  - ii. from on or around 15 September 2018 gates and bays of several Forest Regulators were changed to an "efficient" configuration;
  - iii. from on or around mid-December 2018, additional gates and bays of several Forest Regulators were opened to maintain a level at Picnic Point below 2.6 m during higher tributary inflows; and
  - iv. the majority of gates and bays of the Forest Regulators were progressively closed between the end of December 2018 and early January 2019; and

d. otherwise deny paragraph 171.

172 In response to paragraph 172, the Defendants:

- a. say that in July 2018, approximately 239.7 GL flowed to South Australia, including approximately 131 GL of environmental water; and
- b. otherwise deny paragraph 172.

173 In response to paragraph 173, the Defendants:

- a. repeat paragraph 171 of the Defence;
- b. otherwise admit paragraph 173; and
- c. further say that the statement by the First Defendant referred to in sub-paragraph 173(b) was made in the First Defendant's Weekly Report for the week ending 1 August 2018 and refer to and rely on the terms of that document.

174 In response to paragraph 174, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. admit that during the period from on or around 31 July or 1 August 2018 to on or around 31 August 2018:
  - i. water was transferred from Hume Reservoir to provide for demands downstream of Yarrawonga Weir and to Lake Victoria in preparation for peak season demands; and
  - ii. releases from Yarrawonga Weir were targeted at or below 9,500 ML/day;
- c. say that during the period 1 August 2018 to 31 August 2018 there were some increased tributary inflows from the Kiewa and Ovens Rivers which reduced the need to release water from storage to meet downstream demands; and
- d. otherwise deny paragraph 174.

175 In response to paragraph 175, the Defendants:

- a. repeat sub-paragraph 16(c) and paragraph 171 of the Defence;
- b. admit that in August 2018, approximately 51 GL of environmental water was delivered to South Australia;

- c. say that by 31 August 2018, the storage volume in Lake Victoria was approximately 333 GL, representing a 39 GL decrease from the storage volume on 31 July 2018 (being approximately 372 GL); and
- d. otherwise deny paragraph 175.

176 In response to paragraph 176, the Defendants:

- a. repeat sub-paragraph 16(c) of the Defence;
- b. admit that in late August 2018, the 2018-2019 AOP was reviewed against observed and outlook conditions and the review indicated that the storage level of Lake Victoria was tracking below the extreme dry scenario of the AOP;
- c. admit that in late August 2018:
  - i. the Hume Reservoir to Lake Victoria bulk transfer strategy was adjusted; and
  - ii. the commencement of bulk transfers at rates above 9,500 ML/day downstream of Yarrawonga Weir (up to 15,000 ML/day) earlier than previously planned, were considered;
- d. admit that in late August 2018 the flows from Hume Reservoir to Lake Victoria were increased above 9,500 ML/day but below 15,000 ML/day at Yarrawonga Weir to ensure that Lake Victoria could reach a high enough level to meet all summer and autumn demands under any potential ongoing dry scenario; and
- e. otherwise deny paragraph 176.

177 In response to paragraph 177, the Defendants:

- a. say that the possibility of transfers of water from Hume Reservoir to Lake Victoria above 9,500 ML/day but below 15,000 ML/day was foreshadowed with BOC prior to the commencement of those transfers;

#### **Particulars**

BOC Noted the 2018-19 Annual Operating Plan on 1 August 2018: BOC Meeting 61 (1 August 2018) Confirmed Minutes at [15] and Agenda Item 5 'Water Resource Outlook' at [15]

- b. say that BOC was otherwise informed of the transfers of water from Hume Reservoir to Lake Victoria above 9,500 ML/day but below 15,000 ML/day;

### Particulars

BOC Special Teleconference (21 September 2018) Agenda Item 'Delivery Issues' at [4]-[5], [9], [14], [20] and [27]-[29]

BOC Meeting 62 (4 October 2018) Agenda Item 5 'Water Resource Outlook' at [11]-[12]

BOC Meeting 63 (23 November 2018) Agenda Item 7 'Water Resource Outlook' at [14]-[15], [20]

- c. say that the BOC did not express any objection to the transfer of water from Hume Reservoir to Lake Victoria above 9,500 ML/day but below 15,000 ML/day;
- d. say that the possibility of transfers of water from Hume Reservoir to Lake Victoria above 9,500 ML/day but below 15,000 ML/day was considered and discussed with the WLWG;

### Particulars

WLWG Meeting 239 (2 May 2018) Draft Meeting Summary at page 2

WLWG Meeting 243 (13 August 2018) Draft Meeting Summary at page 4

WLWG Meeting 244 (28/29 August 2018) Draft Meeting Summary at pages 4, 5

- e. say that the WLWG otherwise remained informed of, and discussed, transfers of water from Hume Reservoir to Lake Victoria above 9,500 ML/day but below 15,000 ML/day; and

### Particulars

WLWG Special Teleconference (7 September 2018) Draft Meeting Summary at pages 1-3

WLWG Meeting 245 (12 September 2018) Draft Meeting Summary at page 2

WLWG Meeting 246 (24 September 2018) Draft Meeting Summary at pages 1, 5

WLWG Meeting 247 (9 October 2018) Draft Meeting Summary at page 2

WLWG Meeting 248 (26 October 2018) Draft Meeting Summary at pages 2, 4-5

WLWG Meeting 249 (9 November 2018) Draft Meeting Summary at pages 1-2, 6-7

WLWG Meeting 250 (26 November 2018) Draft Meeting Summary at pages 2, 5

WLWG Meeting 252 (10 December 2018) Draft Meeting Summary at page 1

WLWG Meeting 253 (10 January 2019) Draft Meeting Summary at page 1

f. otherwise do not admit paragraph 177.

178 In response to paragraph 178, the Defendants:

- a. repeat sub-paragraph 16(c) and paragraph 176 of the Defence;
- b. say that between on or around 30 August 2018 and on or around 6 January 2019 releases downstream of Yarrowonga Weir were above 9,500 ML/day;
- c. say that from on or around 15 September 2018, pursuant to the Interim Access Arrangement, MIL infrastructure was utilised;
- d. say that:
  - i. between on or around 30 August 2018 and on or around 13 December 2018, water was released from Yarrowonga Weir targeting rates above 9,500 ML/day but below 15,000 ML/day to ensure that Lake Victoria was at an appropriate level to supply high system demands over the coming summer and autumn;
  - ii. during this period:
    - A. from around 5 November 2018, releases from Yarrowonga Weir were made to meet environmental water orders commencing at 500 ML/day;
    - B. from around 15 November 2018, releases from Yarrowonga Weir were made to meet environmental water orders commencing at 1,000 ML/day;
    - C. from around 30 November 2018, releases from Yarrowonga Weir were made to meet environmental water orders commencing at 1,500 ML/day; and

- D. from around 8 December 2018, releases from Yarrowonga Weir were made to meet environmental water orders commencing at 4,000 ML/day;
- iii. between on or around 14 December 2018 and on or around 18 December, water was released from Yarrowonga Weir above 15,000 ML/day due to rainfall at the Ovens River;
- iv. between on or around 19 December and on or around 28 December, water was released from Yarrowonga Weir above 9,500 ML/day but below 15,000 ML/day to meet environmental water demands; and
- v. between on or around 29 December 2018 and on or around 6 January 2019 releases at Yarrowonga Weir were targeted below 9,500 ML/day; and
- e. otherwise deny paragraph 178.

179 In response to paragraph 179, the Defendants:

- a. deny sub-paragraph 179(a);
- b. in respect of sub-paragraph 179(b):
  - i. admit that there were conveyance losses associated with transfers of water from Hume to Lake Victoria above 9,500 ML/day at Yarrowonga Weir; and

### **Particulars**

#### MDBA Losses Report

- c. otherwise deny paragraph 179.

180 The Defendants admit paragraph 180.

181 The Defendants admit paragraph 181, and further say that the statements by the First Defendant pleaded in paragraph 181 appear in the First Defendant's Weekly Report for the week ending 5 September 2018, and the Defendants refer to and rely on the terms of that document.

182 In response to paragraph 182, the Defendants:

- a. repeat paragraph 171 of the Defence; and
- b. otherwise deny paragraph 182.

- 183 In response to paragraph 183, the Defendants:
- a. repeat paragraphs 16(c) and 52 of the Defence;
  - b. admit that in the period 1 February 2019 to 31 May 2019 (other than between 9-15 May 2019), releases from Lake Victoria into the Rufus River were above 700 ML/day; and
  - c. otherwise deny paragraph 183.
- 184 In response to paragraph 184, the Defendants:
- a. in respect of sub-paragraph 184(a):
    - i. repeat paragraphs 163 and 166 of the Defence;
    - ii. admit that total River Murray System inflows during 2018-2019 was approximately 2,803 GL; and
    - iii. say that this amount excludes inflows to the Menindee Lakes, Snowy Hydro, IVT and managed environmental water flows;
  - b. admit sub-paragraphs 184(b) and 184(c);
  - c. in respect of sub-paragraph 184(d), repeat paragraph 162 of the Defence; and
  - d. otherwise deny paragraph 184.
- 185 The Defendants deny paragraph 185.

## **I MDBA BREACHES OF DUTY**

### **(1) 2016-2017 Breaches**

- 186 The Defendants deny paragraph 186.
- 187 The Defendants deny paragraph 187.
- 188 In response to paragraph 188, the Defendants note the definition of the term “2016/2017 Breaches” used in the FASOC, and otherwise deny paragraph 188.

### **(2) 2017-2018 Breaches**

- 189 The Defendants deny paragraph 189.
- 190 The Defendants deny paragraph 190.
- 191 The Defendants deny paragraph 191.
- 192 The Defendants deny paragraph 192.



193 In response to paragraph 193, the Defendants note the definition of the term "2017/2018 Breaches" used in the FASOC, and otherwise deny paragraph 193.

**(3) 2018-2019 Breaches**

194 The Defendants deny paragraph 194.

195 The Defendants deny paragraph 195.

196 The Defendants deny paragraph 196.

197 The Defendants deny paragraph 197.

198 In response to paragraph 198, the Defendants note the definition of the term "2018/2019 Breaches" used in the FASOC, and otherwise deny paragraph 198.

**J DELEGATES' BREACHES**

198A In response to paragraph 198A, the Defendants:

- a. note the definitions of the terms "Delegates' Duty of Care" and "Delegates Breaches" used in the FASOC;
- b. deny that the Delegates or any of them owed the Delegates' Duty of Care;
- c. deny that the Delegates breached the Delegates' Duty of Care;
- d. deny that the First Defendant is vicariously liable for the Delegates' Breaches, or otherwise their acts or omissions;
- e. admit, for the purposes of this proceeding only, that if (which is denied) the Delegates or any of them are liable to the Plaintiffs for the conduct alleged, that the Second Defendant would be vicariously liable to the Plaintiffs;
- f. otherwise deny paragraph 198A; and
- g. ~~in further answer to the allegations in section J of the FASOC say that:~~
  - i. ~~by reason of the matters in sub-paragraphs 6A(c), 6B(c) and 6C(c) of the Defence, and pursuant to section 42 of the *Civil Liability Act 2002* (NSW) the principles which apply in determining whether the Delegates owed the alleged duty of care to the Plaintiffs and Group Members include the functions required to be exercised by the Delegates being determined by reference to the broad range of their activities (and not merely by reference to the matter to which these proceedings relate); and~~

- ~~ii. having regard to the principle referred to in the preceding sub-paragraph, the Delegates did not owe the alleged duty of care to the Plaintiffs or the Group Members;~~
- ~~iii. further or alternatively, the claim against the Delegates is based on alleged acts or omissions involving an exercise of, or failure to exercise, the powers conferred to the Delegates;~~
- ~~iv. the powers (if any) which the Delegates exercised or failed to exercise were powers of a kind that persons generally are not authorised to exercise without specific statutory authority and were therefore special statutory powers within the meaning of section 43A(2) of the *Civil Liability Act 2002* (NSW);~~
- ~~v. the alleged acts or omissions of the Delegates pleaded in paragraph 198A of the FASOC (which are denied) were not so unreasonable that no delegate having the powers of the Delegates could properly consider the acts or omissions to be a reasonable exercise of, or failure to exercise, those powers;~~
- ~~vi. by reason of the matters in sub-paragraphs 6A(c), 6B(c), 6C(c), and 198A(f)(iii)-(iv) of the Defence above, and pursuant to section 43A(3) of the *Civil Liability Act 2002* (NSW), the acts or omissions alleged against the Delegates do not give rise to civil liability in the Delegates, and accordingly no civil liability on the part of the Second Defendant;~~
- ~~vii. further or alternatively, the claim against the Delegates, in so far as it is based on the alleged omissions of the Delegates pleaded in paragraph 198A of the FASOC (which are denied) is based on the Delegates' alleged failure to exercise or to consider exercising their powers;~~
- ~~viii. the Delegates could not have been required to exercise those powers in proceedings instituted by the Plaintiffs or Group Members;~~
- ~~ix. by reason of the matters in sub-paragraphs 6A(c), 6B(c), 6C(c) and 198A(f)(vii)-(viii) of the Defence above, and pursuant to section 44 of the *Civil Liability Act 2002* (NSW), the claim against the Delegates cannot give rise to civil liability, and accordingly cannot give rise to civil liability on the part of the Second Defendant; and~~
- ~~x. further or alternatively, by reason of the matters in sub-paragraphs 6A(c), 6B(c), 6C(c) of the Defence above, and pursuant to section 46~~

~~of the *Civil Liability Act 2002* (NSW), the fact that the Delegates exercised a function, or decided to exercise a function, does not of itself indicate that the Delegates owed a duty of care to the Plaintiffs or Group Members to exercise the function, or that the function should be exercised in the particular circumstances, or in the particular way, pleaded in the FASOC.~~

## **K CAUSATION**

199 In response to paragraph 199, the Defendants:

- a. repeat sub-paragraph 76(n) of the Defence; and
- b. otherwise deny paragraph 199

200 In response to paragraph 200, the Defendants:

- a. repeat sub-paragraph 76(o) of the Defence; and
- b. otherwise deny paragraph 200.

201 In response to paragraph 201, the Defendants:

- a. repeat sub-paragraph 76(p) of the Defence; and
- b. otherwise deny paragraph 201.

202 The Defendants deny paragraph 202 and say further that:

- a. in the 2016/17 year, high reliability share-holders in the Murray declared water system received an allocation of 100% on 3 October 2016 and for the remainder of the year;

### **Particulars**

Northern Victoria Resource Manager, "Seasonal Determination in Murray system at 100 per cent high-reliability water shares",  
<https://nvrn.net.au/seasonal-determinations/history/2016-17-season/seasonal-determination-3-october-2016.html>

Northern Victoria Resource Manager, "Final seasonal determination update for 2016/17", <https://nvrn.net.au/seasonal-determinations/history/2016-17-season/final-seasonal-determination-update-for-2016-17.html>

203 The Defendants:

- a. deny paragraph 203;

- b. say further that in the 2017/18 year, high reliability shareholders in the Murray declared water system received an allocation of 100% on 2 October 2017 and for the remainder of the year.

**Particulars**

Northern Victoria Resource Manager, "Seasonal determination update for 2017/18", <https://nvrn.net.au/seasonal-determinations/history/2017-18-season/seasonal-determination-2-october-2017.html>

Northern Victoria Resource Manager, "Final seasonal determination update for 2017/18", <https://nvrn.net.au/seasonal-determinations/history/2017-18-season/seasonal-determination-3-april-2018.html>

204 The Defendants:

- a. deny paragraph 204;
- b. say further that in the 2018/19 year, high reliability shareholders in the Murray declared water system received an allocation of 100% on 17 December 2018 and for the remainder of the year.

**Particulars**

Northern Victoria Resource Manager, "2018/19 seasonal determination update", <https://nvrn.net.au/seasonal-determinations/history/2018-19-season/seasonal-determination-monday-17-december-2018.html>

Northern Victoria Resource Manager, "Final 2018/19 seasonal determinations and updated 2019/20 outlook", <https://nvrn.net.au/seasonal-determinations/history/2018-19-season/seasonal-determination-1-april-2019.html>

**L LOSS AND DAMAGE**

205 The Defendants:

- a. deny paragraph 205; and
- b. repeat paragraphs 202, 203 and 204.

206 The Defendants deny paragraph 206.

**M SECTION 5D OF THE CIVIL LIABILITY ACT 2002**

207 In further answer to the whole of the FASOC, the Defendants:

- a. deny that any alleged breach of duty (which is denied) by the First Defendant as pleaded in paragraphs 186 to 197 (inclusive) of the FASOC, was a necessary condition of the occurrence of the harm alleged by the Plaintiffs and Group Members, within the meaning of section 5D(1)(a) of the *Civil Liability Act 2002* (NSW) ("factual causation"); and
- b. further or alternatively, deny that it is appropriate, within the meaning of section 5D(1)(b) of the *Civil Liability Act 2002* (NSW) ("scope of liability"), for any liability of the First Defendant for the breaches alleged in paragraphs 186 to 197 (inclusive) of the FASOC (which is denied) to extend to the harm or damage alleged caused by their conduct.

**N SECTION 5I OF THE CIVIL LIABILITY ACT 2002**

208 In further answer to the whole of the FASOC, the Defendants repeat paragraph 77 of the Defence, and say that:

- a. by virtue of the matters set out in paragraph 77 above, in any water year, the exercise of the First Defendant's functions and powers under the Act carried with it a risk that:
  - i. the volume of water available to New South Wales, Victoria and South Australia may be reduced; and
  - ii. a reduction in the volume of water available for allocation to New South Wales, Victoria or South Australia may lead to a reduction in the volume of water allocated to particular retail entitlement holders in any water year;
- b. the risk described in sub-paragraph 208(a) of the Defence above was an inherent risk, within the meaning of section 5I of the *Civil Liability Act 2002* (NSW), in the exercise of the First Defendant's powers under the Act and the Agreement to operate the River Murray System, in that the risk in sub-paragraph 208(a) of the Defence above could not be avoided by the exercise of reasonable care and skill;
- c. if (which is denied) any of the Plaintiffs or Group Members have suffered harm as a result of the volume of water available to New South Wales being reduced following the circumstances and events in each of the 2016/2017, 2017/2018 and 2018/2019 water years, then:

- i. any such Plaintiff or Group Member has suffered harm as the result of the materialisation of a risk (namely, the risk set out at sub-paragraph 208(a) of the Defence above) which was an inherent risk in the exercise of the Defendant's powers under the Act and the Agreement to operate the River Murray System; and
- ii. pursuant to section 51 of the *Civil Liability Act 2002* (NSW), the First Defendant is not liable to any such Plaintiff or Group Member for that harm.

**SIGNATURE OF LEGAL REPRESENTATIVE**

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

Capacity

Date of signature



Solicitor on record

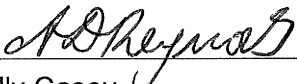
29/4/22

**AFFIDAVIT VERIFYING**

Name Mr Andrew Reynolds  
 Address 33 Allara St, ACT 2601  
 Occupation Acting Chief Executive, Murray-Darling Basin Authority  
 Date 28 April 2022

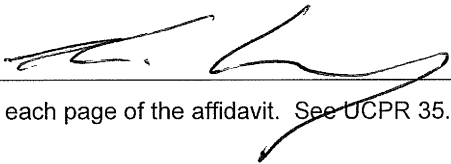
I affirm:

- 1 I am the Acting Chief Executive of the Murray-Darling Basin Authority, the Second Defendant in these proceedings.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at Canberra  
 Signature of deponent   
 Name of witness Kelly Casey  
 Address of witness 33 ALLARA ST, CANBERRA, ACT 2601  
 Capacity of witness Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent
- 2 I have known the deponent for at least 12 months.

Signature of witness 

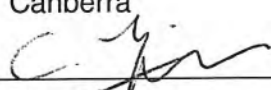
Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

**AFFIDAVIT VERIFYING**

Name Mr Christopher Flinders  
 Address One Canberra Avenue, Forrest ACT 2603  
 Occupation Acting Assistant Secretary, Department of Finance  
 Date 28 April 2022

I affirm:

1. I am the Acting Assistant Secretary, Risk and Insurance Branch, Commercial & Government Services of the Department of Finance acting on behalf of the Commonwealth, the First Defendant in these proceedings.
2. I believe that the allegations of fact contained in the defence are true.
3. I believe that the allegations of fact that are denied in the defence are untrue.
4. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at Canberra  
 Signature of deponent   
 Name of witness Tina Hall  
 Address of witness One Canberra Avenue, Forrest ACT  
 Capacity of witness Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

Drivers Licence (ACT)  
 Identification document relied on (may be original or certified copy) †

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[\* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]