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**TRANSCRIPT OF PROCEEDINGS**

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O/N H-907572

**MR B. WALKER SC, Royal Commissioner**

**IN THE MATTER OF THE MURRAY-DARLING BASIN ROYAL COMMISSION**

**ADELAIDE**

**10.00 AM, MONDAY, 18 JUNE 2018**

**DAY 1**

**MR R. BEASLEY SC, Senior Counsel Assisting, appears with MR S. O'FLAHERTY,  
Junior Counsel Assisting**

**MR J. ELFERINK appears for the South Australian Dairyfarmers' Association Inc**

THE COMMISSIONER: Good morning. This is the first hearing of the Murray-Darling Basin Royal Commission. I am the Royal Commissioner. At the outset, may I acknowledge that this land that we meet on today is the traditional lands of the Kurna people, and we respect their spiritual relationship with their country. We  
5 also acknowledge the Kurna people as the custodians of the Adelaide region and that their cultural and heritage beliefs are still as important to the living Kurna people today. We also pay our respects to the cultural authority of other Aboriginal people visiting or attending from other areas of South Australia, or, indeed, of  
10 Australia who are present today.

I would also like to thank the staff of the Commission, not merely for the organisation of today and following hearings, but in particular for the progress that has been made since this Commission was constituted. This is the first hearing, I repeat, but it is by no means the first serious piece of work that the Commission has  
15 undertaken. We have now assembled a great deal of material, both by our own efforts and researchers, and also through the good offices and cooperation of a large range of people, both in some governments and privately, who have supplied submissions and other material.

We have also undertaken a number of journeys near and, in particular, far throughout Queensland, New South Wales, Victoria and, of course, South Australia. At the outset – and I will not labour this point today – it has to be observed that the Basin Plan, which is at the heart of the concerns of this Royal Commission and its terms of  
20 reference, is a plan for the administration of the water resources and their use throughout a very large catchment area. It is a very large catchment area, but the  
25 rivers are not, except in terms of length, large rivers.

At the heart of the Commonwealth statute with which we are concerned, there lie two provisions that I'm sure Mr Beasley will focus on in more detail in his opening,  
30 which is about to occur. But for all purposes of this Royal Commission, from beginning to end, I want to emphasise that the provisions in particular of sections 23 and 21, and in that order, of the Water Act are at the heart of my present concerns.

Section 23 you will hear about more from Mr Beasley. Suffice to say, it is a  
35 provision which requires not merely permits, but positively requires the quantification of critical measures of water for the purposes of the administration of the resource, must be undertaken. Section 21 is a remarkable provision in a regard which may have constitutional implications that are not to the forefront of my concerns. That is, section 21 is an example of the Commonwealth Parliament  
40 legislating a fact by which I do not mean that they have ignored the lessons of the Communist Party case and considered that Parliament can make a fact true by saying so.

Rather, I mean that under section 21 the Basin Plan must be prepared having regard  
45 to the fact that the use of the Basin water resources has had and is likely to have significant adverse impacts on the conservation and sustainable use of biodiversity.

That last mouthful of a phrase is a verbatim quote from the Commonwealth legislation. The significance of that for the interest I have in a possible interim report on questions of legality, I hope is obvious, and Mr Beasley, I think, will likely explain in much more detail.

5

The Water Act and the Basin Plan, which it requires and which it regulates, is a statute said to be founded on a number of different heads of Commonwealth legislative power. For present purposes, and in particular bearing in mind the matters upon which Mr Beasley is about to open, I wish to emphasise just two of them. The first is the external affairs power under which, for example, treaties to which Australia is party can provide a target for Australian Commonwealth legislation. In this case, there are treaties about which Mr Beasley will no doubt make some mention. I want to stress that this is not a matter of any doubts as to the validity of the Water Act insofar as it is based on the external affairs power, but rather that the external affairs power of its nature characterises the kind of legislation which it may empower.

In short, it must implement the relevant treaty obligations. The second head of Commonwealth power is one which has a particular relevance in light of the recently commenced proceedings in the High Court of Australia concerning the powers of this Royal Commission. That other head of power arises by a referral, in this case, on the part of South Australia, but it happens also by the other states involved, under paragraph 51(37) of the Constitution, that is, a referral of the undoubted power of the state or states acting severally to the Commonwealth to enact the laws authorised by those referrals.

In that sense the Basin Plan is a creature of the Water Act which is a creature of federal cooperation of the most formal kind mandated by and expressly contemplated by our federal constitution. The referrals by the states, as is most common in such cases, were made pursuant to, and as part of the carrying out of, a set of intergovernmental agreements. There is a long history of attempts by governments to agree in this country concerning what we now call the Murray-Darling Basin. They extend back in time before federation to a series of, generally speaking, dispiriting and disappointing failures to reach anything like an agreement from the 1880s onwards.

Some might think that that dispiriting and disappointing story continues until today. I don't belong to that school of thought, but I can readily sympathise with the attitude that it shows. It suffices to say that the significance of the merits and operation of the Water Act, created as it was, and the Basin Plan, created as it in turn was, for the people and government of South Australia is undeniable. Both as to the executive government of South Australia and as to the exercise of the legislative power of South Australia to refer powers for the purposes of the Commonwealth having enacted the Water Act, there is, therefore, an issue of responsible government in South Australia, that is, the duty and capacity from time to time for the government of South Australia, both in its legislative and executive arms, to find out about, to examine and to consider any possible changes to the steps that have been taken

pursuant to the Constitution of South Australia. It is a matter, I stress, of South Australian responsible government to ascertain what South Australia's interests are in relation to the Basin Plan and the Water Act.

5 Another way of making that point is that the successful observance, that is, compliance with the Water Act and the Basin Plan is plainly a matter of particular and peculiar governmental interest to South Australia. It follows, and with exactly the same force, that it has that same character for New South Wales, for Victoria, for Queensland, for the ACT and for the Commonwealth. In relation to the powers of  
10 this Commission, it is incumbent on somebody in my position to consider in advance of their possible exercise not only whether the exercise is expedient or justified in a particular case, but also whether they are lawful. So much ordinarily goes without saying. The comments I'm about to make are, therefore, directed to some of the issues which are now for the High Court to determine. They are by way of an  
15 explanation of what this Commission has done, which has now produced the proceedings in the High Court.

My comments must not be taken to be and could not be any commentary upon what the High Court can or should do. That, I can assure you, is entirely a matter for that  
20 court. Although I am named as the first defendant in these proceedings, it should not either have been understood that my comments presage any arguments that may be put on behalf of any of the parties in those proceedings. They are not so intended, they are rather intended as matters of public comment concerning the public importance of some of the issues involved. I will not be taking any active role as a  
25 party in the High Court proceedings. It is, again, incumbent on somebody in my position not to do so when questions of his or her powers are raised in proceedings such as the present ones.

It is, I think, clear that a Royal Commission such as this one is one of the means by  
30 which governments in this country seek to inform themselves and their legislatures and, indeed, their people of matters considered from time to time by executive governments to be of public concern. It may well be that it is one of the means by which responsible government can be given substance beyond and as well as the Constitutional technique of answering to questions in the houses of Parliament.

35 The gaining of sufficient information by an appropriate organ of government in order that questions of compliance and efficacy and, consequentially, possible improvements can be made to laws is, I think, accepted as the essence of a parliamentary democracy with responsible government. But we live in a federation,  
40 and the issues before this Royal Commission, which is a South Australian Royal Commission, are issues which, I repeat, are to the same extent and for the same reasons of peculiarly and particularly governmental interest to Victoria, the ACT, New South Wales, Queensland and the Commonwealth. But the qualities that constitute the federation, all those I've just named with the special exception  
45 constitutionally for the ACT, are not foreign to each other. We are not foreign country, the states, to each other, let alone to the Commonwealth, and we are certainly not mutually hostile.

Section 118 of the constitution requires full faith and credit, as, in my paraphrase, the response of every state to the laws of every other state. And in an important part of the Constitution, it may well be that the true position is as follows: other than by the operation of section 109, which provides that state laws cease to operate to the extent  
5 of their inconsistency with Commonwealth laws, there is nothing in the Constitution permitting the Commonwealth to ignore the continuation or creation of powers at the level of the states, the former colonies, that you see, for example, in sections 106 and 107. I repeat it is a federation.

10 Cooperative schemes such as that which produced the Basin Plan, therefore pose a self-evidently important question about the distribution of the powers necessary to permit the effective operation of responsible government within the several qualities of the federation. Relevantly, in this case, as between South Australia and the Commonwealth. Now, it may be that the proceedings in the High Court will permit  
15 an answer to a number of questions which may not yet be regarded as plainly answered in the Commonwealth Law Reports. It may well be that the nature of our federation is in a sense in firm. And I don't mean by that to raise a straw man argument. It may well be that it is in firm in this regard.

20 One of the lessons of the history of the constitutional politics of the water in this country is the very dispiriting lesson as follows. The Murray-Darling and their tributaries were the most discussed topic in the conventions leading up to federation. No one could read our constitution and think that they were also the most  
25 occasionally dealt with in our Constitution. Indeed, although there are express references to water, including for irrigation and navigation, which arose out of the decades of discussion pre-federation concerning the Murray-Darling, there is nothing plain at all concerning the distribution of powers with respect to them.

It might be, therefore, that no one polity in the federation, and I include the  
30 Commonwealth in that, possesses the legislative competence to enact laws such as the South Australian Royal Commissions Act, which would compel production of governmental material from another polity. It may well be that the Federal system is such that crucial consideration of that material for the point of view of the policy with which that polity, in this case South Australia is interested, cannot be compelled  
35 because of the equal interest of another polity.

Alternatively, and oppositely, it may be that that which has been talked of, as the immunity of other polities, to the compulsion to produce such material, that is, to resist compelled production of its governmental material, ceases at the point where  
40 that resistance would itself prevent the exercise of the governmental functions of the other polity which seeks the material. It may be that this is an example, familiarly, of one person's rights, ceasing at the point where they unreasonably infringe on another person's rights.

45 But these are questions which are of such large import that, notwithstanding it, is my duty to form a view as to my power to issue the summonses I did. It is equally now my duty to refrain from any further steps in that regard and to await the outcome in

the High Court. It could be, as a matter of policy, and within my terms of reference, that the issue thrown up by the Commonwealth resisting my summonses provides an implication for the entry by Australian polities, the states and the Commonwealth and the territories, into any future intergovernmental agreements for cooperative  
5 schemes. Every one of the parties, states, territories and Commonwealth, to an intergovernmental agreement has a self-evident interest in the observance of the agreement. Indeed, in the efficacy of the agreement and obviously in the public interest sought to be served by the agreement.

10 If, as I do, one considers that information is necessary for those matters finally to be taken into account at the highest levels of government, such as in a Parliament, then it seems clear that if information cannot be obtained from the other polities, parties to the intergovernmental agreement, then there will be a very large gap, indeed, in the usual way a Parliament goes about considering the wisdom of a cause it has taken or  
15 has in mind to take. For all those reasons, I stress there are large issues which are not for me to say anything further about beyond this morning raised by the Commonwealth's position.

And quite apart from the position which is not cooperative, which has been created  
20 by the assertion of the immunities from compelled production, there remains of course the possibility of voluntary cooperation. I still invite that. It is, I think, plainly not beyond the power of the Commonwealth to provide it. May I briefly remark on matters that have been raised publicly? The litigation commenced by the Commonwealth has nothing, so far as I understand it, to do with extra territoriality.  
25 It may or may not, as a matter of argument, as the case proceeds, throw light on the validity and operation of a Commonwealth enactment, that is, the service and execution of Process Act 1992.

That is an Act which in its section 6 in terms applies to the Crown in all its  
30 capacities. That either may have nothing to do with the argument with which I will have nothing to do with in the High Court, or it may be a matter of interest to their Honours. It suffices to say that that is a statute, a federal statute, which empowers the service of a South Australian Royal Commissions process on a person outside the territory of South Australia and with compulsory effect. I am not aware of any  
35 aspect of the Commonwealth's position in the recently commenced proceedings in the High Court which challenges that element of the power of this Commission.

If, however, statements in what I regard as uninformed of public comment about the powers of this Commission being limited territorially were to be true, I cannot resist  
40 observing that what would be true of a Royal Commission would also be true of a court, and it will be a shocking revelation to those of us who litigate for a living in Australia that the process of state courts have no compulsory effect outside the territories of the states. Indeed, that was one of the earliest statutes enacted in the new Commonwealth of Australia to ensure that the new states – the former colonies  
45 – would not be foreign countries to each other in relation to the legal system.

Hitherto, it has probably been considered, in my experience, that, of course, both the Commonwealth Crown and all the state Crowns, that is, for practical purposes, their executive governments, have been obliged to produce material in response to subpoenas issued by state courts which subpoenas have been given extraterritorial effect by the service and Execution of Process Act, either in its current or former forms. I stress it's a question for the High Court and not for this Royal Commission as to whether what I think was the former understanding of that matter has any relevance to the contentions that have now been raised in proceedings concerning investigative tribunals such as this Royal Commission.

The alteration to the course which is to be taken by this Royal Commission with respect to the evidence before it and the hearings before me, which has been required by the High Court proceedings, will, nonetheless, not prevent me and my Commission staff from addressing all the terms of reference and all of them in a substantial manner. The question whether the Basin Plan, for example, has been lawfully made, in every respect, the question whether it has been lawfully amended, in every respect, remains, therefore, a candidate question for an interim report by this Royal Commission. And that is the principal focus of the hearing starting today.

Any failure by the Commonwealth, by the Basin Authority, to participate in the proceedings of this Royal Commission on that basal question does nothing to remove that question from public controversy. And from that discourse in relation to which there is an implied freedom of political communication throughout the Commonwealth, neither does it affect the power of this Royal Commission to report on its views of those questions. Any such failure would be regrettable, but it is by no means fatal to the exercise I am required by my Commission to carry out. It will, however, soon be too late for the Commonwealth and the Basin Authority to have any arguments they wish to advance on that question heard and taken into account by me in relation to those issues. Thank you. Mr Beasley.

MR R. BEASLEY SC: Thank you, Commissioner. At least a couple of your terms of reference could be described as broad. The Basin Plan is complex, as is the science and other issues surrounding it. Decisions have had to be made by you about what issues relevant to the terms of reference are more important than others. I will come to that in a moment. The Murray-Darling Basin is large. It consists of 23 river valleys and covers over a million square kilometres, or about twice the size of France. It covers three-quarters of New South Wales, about half of Victoria, substantial parts of Queensland, and South Australia, and part of the Australian Capital Territory. It's home to over 2 million people. You decided, as a part of your investigative processes, to consult with members of the community in the Basin. It was, of course, not possible to go everywhere. Decisions also had to be made about that. However, a lot of ground was covered. A lot of people were spoken to, and a lot of people spoke to the Commission. I will return to that later, too.

Much of the Basin as we've seen is semi-arid. The rivers, watercourses and streams have highly variable inflow. Things are likely to get worse because of climate change, another topic I will return to. The Basin does, however, contain many of

Australia's main rivers, wetlands and floodplains of national significance and 16 wetlands of international significance under the Ramsar Convention. From the Gwydir wetlands to the Basin to the Coorong and lower lakes of South Australia. Amongst other things of ecological and environmental significance, native fish,  
5 native wildlife, red gum and black box and other native plants – these wetlands are critical habitat for water birds. The rivers and wetlands of the Basin are also of fundamental cultural and spiritual significance to the people of a large number of Aboriginal nations. How the representatives of those nations have been consulted and how their views on the Basin Plan have been considered is a matter for you  
10 inquiry.

A large number of commodities are of course produced in the Basin. All of them need water: livestock, grapes, citrus, vegetables, nuts, cereal, and of course cotton and rice. About two-thirds of the irrigated area of Australia is in the Murray-Darling  
15 Basin. Before discussing briefly some of the issues of significance that members of the Basin community have discussed with you, it's important to outline details of the Basin Plan, and the subject matter of the hearing today and beyond that. The Basin Plan as you've mentioned, Commissioner, was Commonwealth legislation. The obligation of creating it prior to its enactment by a Federal Parliament was given to  
20 the Murray Darling Basin Authority, a Commonwealth statutory authority. The statutory command to the authority to create the Basin Plan is contained in the Water Act.

The Water Act and the Basin Plan share, not surprisingly, similar objects and  
25 purposes. Central to these – and what provides a constitutional basis for their validity (and what appears also to sometimes be forgotten) is the object of giving effect to relevant international agreements Australia is a party to, such as the Ramsar Convention on Wetlands and International Importance, the Biodiversity Convention, the Bonn Convention, the Climate Change Convention and other agreements  
30 concerning the protection of migratory birds and their environment. One issue you are considering is what it might mean for the validity of the Basin Plan if it has been enacted or adjusted or amended in such a way that it should not or no longer be seen as implementing the obligations Australia is under pursuant to those various international agreements.  
35

Before opening on the issue of lawfulness and process that is subject to the hearing today and for, at least, part of next week, I should mention why we have a Basin Plan at all. We have a Basin Plan because the waters of our main rivers such as in the Murray and the Darling, and many of the rivers and streams of the entire system of  
40 the northern and southern Basin and the floodplains, have for decades been the subject of over allocation and overuse. Too many people and organisations have been allocated irrigation licences, and they have been allowed to take too much water. This has led to significant adverse impacts on the biodiversity of the Basin.

45 Such has been the negative impact on the environment and ecology of the Basin, special measures were thought to be needed to attempt to stop the decline that's occurred, and to move towards a process of restoration. Those special measures

include many things, but taking less water for consumption and allocating it to the environment – while that is a very simple summary – is one of them. It will be easy enough to prove all those things to your satisfaction, but in one sense, it's not necessary. As you observed in your opening statement, almost every word I've just  
5 said is either a direct quote or an accurate enough paraphrase straight from the text of the Water Act. It's an object of the Water Act to move away from overuse and towards a sustainable level of take for watercourses.

10 The Basin Plan is to be prepared on the basis of the statutory fact you mentioned, that is, that overuse has significantly damaged the environment, and something has to be done about it. That's why we have the Basin Plan, and that's why it is of enormous importance. The public hearing today and the hearing days later this month is centred not so much on the science of the Basin Plan, which will be the subject of  
15 public hearings in July and perhaps beyond, but on its lawfulness. Related to that issue is the issue of the lawfulness of the recent adjustments made to the long term average sustainable diversion limit of the plan (I will explain that term later), and the lawfulness of the proposed amendment to the plan recommended through the northern Basin review.

20 Suggestions have been made that the Basin Plan is a compromise. Perhaps it is, but precisely by what amount or percentage is often not made clear. Suggestions have also been made that perhaps because of this compromise, close examination of the lawfulness of aspects of the plan, whether as originally made or as adjusted or amended, is unhelpful. It is at a minimum unhelpful to make such a suggestion.  
25 There is nothing unimportant in a country governed by the rule of law to inquire into and ensure that things done by government and its instrumentalities are done lawfully. That is vital. There is more to this issue, much more than money. Nevertheless, the Basin Plan is a \$13 billion plan. It's important that those funds are not just spent usefully, but also lawfully and in accordance with the objects of the  
30 Water Act and the Basin Plan as properly construed.

It's perfectly proper and important in circumstances where there is real doubt for a truly independent of government inquiry to thoroughly examine the lawfulness of the  
35 actions of the Basin Authority and the government in relation to the Water Act and the Basin Plan. Governments make policy all the time. So do statutory authorities like the Basin Authority. Actions even in strict observance of such policies are not because of that necessarily lawful. Actions in accordance with a policy position might be necessarily unlawful because of that.

40 Parliament can always repeal, replace or amend legislation it doesn't like it, subject to constitutional powers, of course. But there is no place in a country governed by the rule of law and the separation of powers to have the executive or a government statutory authority say, "Well, we don't like the law. So we are going to do our own  
45 thing". Decision-makers don't get to lawfully make decisions simply by deciding that words in a statute mean what they say they mean, and nothing more. Whatever else that is, it's not statutory construction, and it's not acting in accordance with the rule of law.

Further, leaving issues solely of legality to one side just for a moment, in circumstances where there's doubt and real debate amongst the scientific community – and there is serious and credible science-based debate and disagreement with the Basin Authority – it's also perfectly proper and important for an independent inquiry  
5 to examine the merits behind the decisions and determinations of the Basin Authority which is obliged under the statute to always exercise its functions using the “best available science”. Now, the Basin Authority might be able to justify all of its determinations and decisions on a scientific basis. You will hear evidence to the contrary to that position, but now is not the time to draw conclusions about that.

10 The Basin Authority is, of course, welcome to come before you, and all the lawyers acting for the Commission would assist in facilitating them calling whatever relevant or responsive evidence they wish to call or tender. Whatever the Basin Authority can establish, however, in relation to a serious scientific debate, they can't establish it  
15 through a press release. They can't establish it through anything less than for transparency. And they should not want to.

Can I turn to the factual context in which the issue of lawfulness arises? After the enactment of the Water Act in 2007, but prior to the enactment of the Basin Plan in  
20 2012, in October 2010, the Basin Authority published a report entitled the Guide to the Proposed Basin Plan. The Guide was not well received in some Basin communities. Whether this was because of an inadequacy of the consultation process prior to its publication or after its publication, or because of the volume of water it recommended was needed by the environment, is not important for today.  
25 Its content and the science that informs that content are important, as are the processes by which the Basin Authority went through in determining crucial aspects of the plan.

In the Guide, the Basin Authority noted the crucial definition of “environmentally-sustainable level of take” that's contained in the Water Act. That was a task it had to determine. The environmentally sustainable level of take, or amount of water that  
30 can be used for consumptive purposes like irrigation, must not compromise key environmental assets, key ecosystem functions, the productive base of water resources, or key environmental outcomes. I will mention in passing now that  
35 notions of optimising economic and social outcomes are not expressly mentioned in the text of the definition of environmentally-sustainable level of take. The Guide provides some explanation as to how the authority at that time determined how much water was needed to be recovered for the environment. Ultimately, its hydrologic modelling indicated that between 3000 and 7600 gigalitres – that's billion litres –  
40 was needed to be recovered for the environment on a long-term yearly average.

Modelling used was developed by the CSIRO, as part of the Murray-Darling Basin sustainable yield project and the guide, and in the guide, the authorities said that its approach had been “peer reviewed by both national and international peer reviews”  
45 and that its approach was “robust and represented the application of the best available science” as required by the Water Act. There will be evidence presented to you about that peer review process. More precision was given to the volume of the

water to meet environmental water requirements of the Basin in the technical guide to the Basin Plan.

5 There will be evidence called that the technical Guide had different authors which may explain the additional precision in the technical guide. The technical guide suggested that a range of water to be recovered for the environmental watering requirements of the Basin was between 3856 gegalitres and 6983 gegalitres. Importantly, the lower figure 3856 was expressed as having a “high uncertainty” of achieving the environmental watering requirements of the Basin. In other words –  
10 and bear in mind, at the moment, we have a 2100 gegalitre plan – 3856 gegalitres is highly likely to not be enough water to achieve environmental and ecological targets.

15 Despite this approximate range of 4000 to 7000 gegalitres being based on the best available science, nothing beyond an amount of 4000 gegalitres was modelled by the authority, for the purposes of setting a sustainable diversion limit. It is important to clarify what is meant by sustainable diversion limit. Pursuant to the Water Act, the Basin Plan is to contain a Basin wide long-term average sustainable diversion limit:

20 *While individual water resource plans made under plan will each reflect their own sustainable diversion limit, the long term Basin wide average sustainable diversion limit represents the amount of water which can be used for consumption, domestic use, irrigation –*

25 etcetera:

*...after –*

and I’m quoting that from the guide:

30 *...after environmental watering requirements had been met. Of course, that environmental watering requirements must meet our international obligations.*

35 The Water Act also states the long-term sustainable diversion limit must be based on the environmentally sustainable level of take, which I outlined before. That’s the core function of the Plan. Nevertheless, despite the range of 4000 to 7000 gegalitres, the Basin Authority examined scenarios involving 3000 gegalitres, 3500 gegalitres and 4000 gegalitres. At page 21 (xxi) of the Guide, the authority explained this decision was reached because it:

40 *...believed that reductions exceeding 4000 gegalitres would not meet the requirements for the Water Act because they would not represent an optimisation of economic social and environmental outcomes.*

45 Now, at that point the Basin Authority has probably already fallen into legal error. Modelling recovery that has a high risk of not achieving environmental watering requirements for key environmental assets or ecosystem functions does not sound consistent with a level of take that is not to compromise or endanger the

environmental criteria of the definition of the ESLT Act. In order to determine what the environmental watering requirements of the Basin Plan are, the Basin Authority had to determine the Basin's key environmental assets, its key ecosystem functions and its key environmental outcomes. Environmental assets and environmental  
5 outcomes are further defined in the Act but the word "key" is not used.

An element of judgment was required and no one would suggest that that exercise of judgment was not both complex and difficult. Clearly, it was. While the CSIRO in a peer review report expressed some criticism of the Basin Authority selection of key  
10 ecosystem functions, it described the choices it made in relation to key environmental assets as scientifically defensible. 20,000 were considered. 2442 key environmental assets across the Basin were then determined. That was, no doubt, a long and difficult process. The water required for these environmental assets is not just a question of volume. Issues of when water is delivered, for how long and the  
15 amount of flow at any one time are important.

Rivers and the life they support need baseflow, they need freshes and, periodically, they need overbank inundation. Ecosystems need these things at the right time and in the right amounts. For the purposes of hydrological modelling, 106 indicator sites  
20 were selected by the Basin Authority. 18 indicator sites for environmental assets and 88 hydrologic indicator sites for ecosystem functions. The results of the scenarios modelled in the Guide are instructive. For the 3000 gigalitre scenario modelled, the floodplain key environmental assets upstream of the Coorong Lower Lakes were given priority. That model showed that there would be insufficient water in drier  
25 years to meet the environmental watering requirements of the Coorong. Equally, if the Coorong and Lower Lakes were given priority, then even in median years there would be insufficient water available for iconic sites like the Barmah-Millewa Forest, the Chowilla Floodplain. So 3000 gigalitres as a recovery for an environment was short for what was required.

Before the Basin Plan was legislated in 2012, the Authority produced a report considering its determination of the environmentally sustainable level of take. That is, the sustainable level of take for consumption which has to be reflected in the long-term average SDL. That report was published in late 2011. It discussed hydrologic  
35 modelling based on recovery of water for the environment of 2400 gigalitres, 2800 gigalitres and 3200 gigalitres. Evidence will be called concerning the processes behind the modelling of those scenarios. Those processes did not involve the application of the best available science. They involve policy decisions. They involved irrelevant considerations that I will come to. Whether they involved worse  
40 than that will be a matter for you, based on the evidence.

Leaving that evidence aside, a number of observations can immediately be made concerning the ESLT report. First, in the 12 months between the publication of the Guide and the ESLT report, a massive change in the amount of water for the  
45 environment was said to be required. A massive reduction. Secondly, related to that, the maximum amount now being modelled was over 600 billion litres less than the minimum amount the Guide said was needed to have a high uncertainty of achieving

environmental watering requirements of key environmental assets and key ecosystem functions. Thirdly, there had been a change in the management and governance of the Basin Authority. It had a new chief executive. The chair of the board, Michael Taylor, resigned on 7 December 2010, after publication of the Guide, before  
5 publication of the ESLT report. He was replaced by Mr Craig Knowles. In the media release following his resignation, Mr Taylor said this:

10 *Balancing the requirements of the Act against the potential social and economic impact on communities will be a significant challenge. The guide was developed with full regard to the requirements of the Act and in close consultation with the Australian Government solicitor. However, the MDBA has sought and obtained further –*

15 I emphasise the word “further” –

*confirmation that it cannot compromise the minimum level of water required to restore the systems environment on social and economic grounds.*

20 Whether this suggests that the Basin Authority had decided to act against legal advice or whether that advice had changed, is perhaps not yet clear. But it is a matter I know you wish to explore. The processes, the administration and decision-making processes, rather than the science-based processes, will form part of the evidence called at the public hearings. You can already be comfortably satisfied, though,  
25 Commissioner, that Mr Taylor was not providing his own legal advice. You can be comfortably satisfied that what he said upon his resignation probably came straight from advice that the Authority had been given from time to time while he was the chair, and more than once. Why that advice appears to have changed is not presently clear, and I know that also interests you.

30 What is clear is that there was a change in emphasis in the language by the Basin Authority from the time of the guide to the ESLT report. Despite what was said about the modelling in the 2010 Guide, being based on a best available science and internationally peer reviewed, in the ESLT report 12 months later, the Authority said this at page v:

35 *The October 2010 guide proposed a reduction in diversions between 3000 and 4000 gigalitres per year. This proposal was on the basis of a relatively simple end of flow – end of system flow analysis to identify environmental watering requirements and consideration of socioeconomic impacts, which led the  
40 EMDA to select the low end of the identified environmental watering requirements range. The ESLT and SDLs in the proposed Basin Plan had been informed by detailed hydrologic modelling of the environmental watering requirements of indicator sites. The development and implementation of this method commenced in 2009 and it had been intended to use that work to inform  
45 the guide but the work could not be completed in the timeframe for the guide. The indicator site method is a much more robust method to determine an ESLT, as it takes into account the specific ecological targets and flow requirements*

*for indicator sites and opportunities and constraints for environmental water delivery.*

5 Now, to some extent, that does appear, a curious statement. As I said, the hydrologic modelling in the Guide had been developed by the CSIRO and was said to be the best available science 12 months before. It is also, with respect, an utterly inadequate statement as a means of describing the huge change of the volume of water said to be needed for the environment in the 12 months between the publication of the Guide and the ESLT report.

10 What precisely is a hydrologic indicator site method for modelling will be explored in the public hearings. It may be that it ignores the watering requirements of some key assets in the environmental watering requirements in between indicator sites. That's certainly the view of some hydrologists you will hear from. In the ESLT report the framework for determining an environmentally sustainable level of take now expressly stated in clearer terms from the Guide that the method had to take into account the need to optimise economic and social outcomes. At page 67 of that document the Authority said this:

20 *Following the significant analysis to quantify the lower bound of the ESLT set out in this report, the judgment to choose the bottom end of the band of environmental restoration needs is simultaneously to maximise the productive benefits from water use and to minimise social and economic impacts from reductions in water availability for the irrigation industry and other water users.*

25 In pointing these processes out, I'm not suggesting that in determining an environmentally sustainable level of take, social and economic outcomes either should be taken into account, or should not be. I am not suggesting that social and economic outcomes are not important. They are. The Water Act says the water resources of the Basin Plan have to be managed in a way that optimises economic and social outcomes. That's also only stating common sense. Managing the water resources of the Basin so as to cause the most economic and social damage would hardly be sensible. But contrary to the MDBA's approach, in our view, economic and social criteria have nothing to do with setting an environmentally sustainable level of take.

30 Sometimes it's said, contrary to that argument, that the international agreements that have to be implemented by Australia don't ignore social and economic outcomes. That's true. But one thing is absolutely sure, there is not a triple bottom line in any of those international agreements. Economic and social outcomes are not on the same footing in our international obligations as environmental. There is a hierarchy. The environment is at the top. Ultimately, the ESLT report proposed a level of take of 10,873 gegalitres. That is 2750 gegalitre reduction of consumptive take. This became the figure in the Basin Plan when it was legislated in 2012.

Thus, the Basin Plan was, when legislated, and until recently, sometimes referred to as a 2750 gegalitre plan in respect of surface water. There is no need in this opening to refer to all the expert reports that followed the ESLT report in October 2011, or following the enactment of the Basin Plan in 2012. Suffice to point out these  
5 matters. The Basin Authority’s own hydrologic modelling showed more environmental flow indicator targets it had set as environmental watering requirements were met with a 3200 gegalitre recovery than a 2800 gegalitre recovery. Meeting environmental flow targets required removal of system constraints, many of which are still in place.

10 By constraints, I know you mean things like the Barmah Choke, bridges, development on floodplains, etcetera. It is still a massive problem. In its 2012 report, entitled “Hydrologic modelling of the relaxation of operational constraints in the southern connected system: methods and results”, the MDBA modelled relaxed  
15 constraint scenarios for a 2800 gegalitre recovery and a 3200 gegalitre recovery. The 3200 gegalitre recovery of water for the environment met 17 target met – 17 targeted flows out of 18, the 2800 gegalitre recovery met 11 out of 18. While there will be a range of expert reports tendered during the Commission’s hearing that will suggest that a water recovery of 2750 gegalitres leaves, as an example, the Coorong at the  
20 risk of degradation, particularly in drier years, in a report titled “Science Review of the Estimation of an Environmentally Sustainable Level of Take for the Murray Darling Basin”, the CSIRO expressed the opinion that the modelled 2800 gegalitre reduction scenario:

25 *...does not meet several of the specified hydrologic and ecological targets –*

for the Basin. In a report prepared by Jason Higham in March 2012 for the South Australian Department of Environment and Natural Resources, the opinion was expressed that under the 2750 gegalitre water recovery scenario:

30 *...there are multiple years within the 114 years modelled in which the average salinities in the Coorong South Lagoon exceed known thresholds for important plants and animals. Only the provision of larger volumes reduces the number and duration of consecutive years when salinity thresholds are exceeded.*

35 Under the 2750 gegalitre scenario, the Coorong would remain at considerable risk of ecological degradation during drier periods. There are reports to similar or greater effect by the Wentworth Group and, also, by the Goyder Institute. As at October  
40 2017, it was estimated by the Basin Authority that about 2108 gegalitres of water had been recovered for the environment. Doubts have been expressed about the accuracy of that figure. But for the purposes of these introductory comments about the plan as adjusted, it can be accepted. A little over 1300 gegalitres of this amount was recovered by the Commonwealth purchasing water entitlements, the buy-back  
45 scheme.

Just under 800 gegalitres was said to be recovered through efficiency measures, which I will address shortly. In round terms, that leaves about 650 gegalitres to

recover in order to reach 2750. This no longer needs to happen. Recently, the Commonwealth Senate did not disallow by a motion, an adjustment to the sustainable diversion limit of the Basin Plan under section 23A of the Water Act. That adjustment has been made in relation to 36 projects called supply measures, that  
5 the Basin states notified to the Basin Authority, and that the authority has endorsed for an increase in the Basin-wide long-term average SDL. That is, a reduction of water for the environment of 605 gigalitres. I'm not going to mention the details of most of those supply measures other than to raise these measures – these matters, which also relate to the issues of lawfulness and process. A supply measure is  
10 defined in chapter 7 of the plan as:

*A measure that operates to increase the quantity of water available to be taken for consumptive use, compared to the quantity of water available under the benchmark conditions.*

15 Examples given in the Basin Plan are, for example, reconfiguration of storage systems to reduce evaporation and changing the method of environment watering. Certain matters have attracted your interest, Commissioner, relevant to the supply measures that are directly relevant to some of your terms of reference. Those matters  
20 are the following. These measures, in many instances, are currently concept proposals only. They don't have to be implemented under the Basin Plan until July 2024, six years from now. However, the adjustment of the amount of water to be recovered for the environment is made immediately. That is, although a majority of these measures are not in place, including two that account for 300 gigalitres of the  
25 605, the 605 gigalitres is no longer to be recovered for the environment in the course of at least the next six years.

If 2750 gigalitres to be recovered for the environment does represent an environmentally sustainable level of take, I know that you are interested to know  
30 how 2100 gigalitre per annum can represent an environmentally sustainable level of take in circumstances where supply measures have not been implemented yet and may not be for many years. Now, there might be an answer to that. But, if there is, I can't give it to you. If 2750 gigalitres for the environment represents an ESLT, I can't explain how 2100 gigalitres, on the back of unimplemented concepts, can.

35 That seems only permissible if the Water Act can be interpreted in a way that allows a moratorium for a considerable period as to when the Basin-wide SDL has to reflect an environmentally sustainable level of take. We can't see any textual support for that in the Act. And it seems to us to defeat, rather than promote, the Act's objects.  
40 Certainly, there are opportunities for adjustment and amendment and reconciliation to the plan. And to that extent, it is adaptive. But can you have, lawfully, an SDL that does not reflect an ESLT for six years? If it's six years, why not 10? I know the Basin Authority likes to tell people to be patient, but patience can work both ways.

45 And you can't tell the Coorong to be patient. You can't tell a migratory bird or a Murray cod or another native fish to be patient. Australia's First Peoples consider the water of the Basin to be theirs and that they are entitled to some tangible form of

cultural flow mentioned in a schedule of the Basin Plan. I'm not going to tell them to be patient. And there's another issue about these supply measures. They might not work. Or at least not work as predicted. Certainly, on anyone's view, there has to be a risk. That risk might be in relation to some of these supply measures, very high. Depending on how high, it brings into question that rare issue of reasonableness in decision-making. Usually, administrative lawyers' last resort if for a moving party.

Just on that point, I should make it clear to the extent that I have to, that this Commission is not a court. You won't finally determine legal rights and we are not acting for a party or seeking a remedy. We are raising issues of lawfulness. That is serious enough about government decision making. It may be unnecessary to say any more than that something being unlawful throws doubts on its validity. But we are not seeking legal remedies, or discussing them. Additional to this issue of lawfulness, there are mixed questions of law and merit in relation to the measures themselves. It can be fairly said that neither the State Governments nor the Basin Authority have been overzealous in making business cases for the supply measures publicly available.

That's perhaps a curious position. Presumably, issues relating to the proper management of Australia's water resources should not be equated to State secrets. One would have thought the public might be entitled to examine the business cases for supply measures, and the MDBA's analysis of them, and for independent non-government scientists to be able to review this important material. One might think that could only be a good thing. It's hard to know how it could not be. Whether it is or it isn't, the Authority has been compelled to produce certain documents in the Senate in February and the Commission has been supplied with other documents. A requirement of a supply measure under the Basin Plan is that equivalent environmental outcomes are achieved for less water compared a pre-existing baseline.

I will mention one supply measure only, of the 36. The proposal to reconfigure the Menindee Lakes. Those lakes are still currently the water supply source for Broken Hill. But they are also ecologically and environmentally significant lakes and they are the breeding ground for many native fish. The Authority's own analysis of the environmental risks of this supply measure, on its face, makes for alarming reading. An environmental impact statement has not been prepared for this measure. The Authority says one should have been or one should be. Even at that point it seems difficult to understand how this measure could have been endorsed if an environmental impact statement is, to use the authority's words in its analysis, required. In its analysis of this particular supply measure, the authority also said this about the business case supplied to it:

*Potential impacts on golden perch as the current proposal may lead to the loss of over 8000 hectares of golden perch nursery habitat in Lake Cawndilla for over 65 per cent of time, over 15,000 hectares of golden perch nursery habitat in Lake Menindee for over 20 per cent of the time, potentially functional*

*nursery habitat in other lakes, not able to be determined yet from this proposal. Pending adequate assessment of potential impacts on golden perch, the water birds component may also need reassessment and this could significantly impact on their food resources. Further, the mitigation strategy proposed for identified environmental risks is the EIS process. Given the schedule time for EIS completion is late 2020, it is not possible to assess whether mitigation strategies from the EIS process are acceptable. The limited supporting site investigations and relatively low level of design maturity represents a high degree of uncertainty associated with this proposal.*

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Now, one might think that was a report of a supply measure or an analysis of a supply measure that was not endorsed by the Authority. I know you are interested to understand how it could have been. And I will emphasise that that Menindee Lakes proposal represents 106 gegalitres of the 605 gegalitres or one-sixth of what is said to no longer be needed for the environment. So the concerns you have with the Authority's interpretation of the Water Act, with its SDL adjustment process and with its northern Basin review caused you to publish an issues paper concerning the issues of lawfulness. That issues paper was published on the Commission's website at the end of April.

20

In that issues paper, you expressed preliminary, but I would say firm, views on these issues: the manner in which the Water Act has been construed in order to determine the environmentally sustainable level of take, what the consequences of that construction might be for the SDL adjustment, what the consequences of that construction might be for the proposed Northern Basin Review, and whether the Basin Plan itself complies with the Water Act, if the Basin-wide long-term average SDL does not reflect an environmentally sustainable level of take.

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There are overwhelming textual and purposive reasons that support the view that the Water Act prioritises environmental outcomes over social and economic outcomes, and that such social and economic outcomes, while central to other requirements of the Basin Plan, are extraneous to the determination of the ESLT. The reasons that I make that submission are these. First, as we've discussed, the Water Act relies on the implementation of various international agreements. Implementing those obligations is central to the validity of the Basin Plan.

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The Ramsar Convention is one of the agreements I have mentioned. That convention requires all its parties, including Australia, to formulate and implement their planning so as to promote the conservation of wetlands included in the list, and as far as possible, the wise use of wetlands in their territory, meaning the maintenance of their ecological character achieved through the implementation of ecosystem approaches within the context of sustainable development.

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As mentioned, there are 16 Ramsar wetlands in the Basin. The objects of the Biodiversity Convention are the conservation of biological diversity, the sustainable use of the components of biological diversity and the equitable share in the benefits of genetic resources of biodiversity. Amongst Australia's obligations under that

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convention is to rehabilitate and restore degraded ecosystem and promote the recovery of threatened species through the development and implementation of plans and other management strategies.

5 The objects and purposes of the Water Act include giving effect to those international agreements and, in particular, to provide for special matters in accordance with those agreements to address the threats to the Basin water resources and to ensure a return to environmentally sustainable levels of extraction. That's the plan in a nutshell.

10 Section 21 of the Water Act you mentioned, and you mentioned that it's based on two statutory facts. The first is the fact that the use of the Basin water resources has had and is likely to have significant adverse impacts on the conservation and sustainable use of biodiversity. And the fact that the Basin water resources require, as a result, special measures to manage their use to conserve biodiversity. It's also a requirement of the Basin Plan to promotion the sustainable use of the water resources to protect and – I emphasise this word – restore ecosystems, natural habitats and species. Keeping things just as they are is not good enough.

20 It also requires the promotion of the wise use of all the Basin resources. Not just the Ramsar sites: all the water resources. It also requires decision makers like the MDBA when exercising their functions to take into account the principles of ecologically sustainable development. Now, development certainly includes notions relevant to economic outcomes, but it does not put those matters on a level of equivalence to environmental outcomes, nor does it create a so-called triple bottom line. Finally, the Basin Authority is obliged to act on the basis of the best available scientific knowledge and socioeconomic analysis. I will come back to the best available science when I mention climate change.

30 So when proper regard is had to the objects of the Water Act, and the objects of the plan, the general basis upon which the plan is to be prepared, a fair observation can be made is that environmental concerns are dominant. To the extent that social and economic outcomes are optimised in terms of how you manage water, that comes after an ESLT is determined. I have mentioned the definition of ESLT, which is defined entirely by environmental criteria. Water cannot be taken if it would compromise key environmental assets, key ecosystem functions and key environmental outcomes. It also provides that the productive base of water resources cannot be compromised.

40 In my submission, that's clearly a reference to an environmentally productive base, but even if it's not, even if that term includes social and economic considerations, each of those criteria must be met. So you still can't compromise or endanger key environmental assets or key ecosystem functions. Further, if you can't endanger something, and it's already in danger, if it's already a degraded ecosystem or wetland, it's almost certain that the warrant and the definition not to compromise requires enough water to restore environmental assets so that they are out of danger. That's almost certain because less is pointless and inconsistent with the objects of the

Act and the Plan. So based on the above, in our view, the requirement of the Water Act in relation to the content of the Basin Plan is that it sets a long-term average sustainable diversion limit first, and that limit must reflect an environmentally sustainable level of take, and that level of take is determined solely on environmental  
5 criteria.

That is not only a view supported by both the text of the Act, its objects and purposes, the statutory facts upon which the plan is to be prepared, but it also makes, in my submission, commonsense. A plan that sets an environmentally sustainable  
10 level of take and after that process has regard to optimising economic and social outcomes within the context of that level of take, has logical force. A Basin Plan that seeks to simultaneously grapple with economic, environmental and social outcomes might achieve the optimisation of none of them. I have already referred to a variety of reports published by the MDBA after the enactment of the Plan in 2012, in which  
15 it indicated that it took into account social and economic outcomes and determination of the ESLT. That is an error of approach.

They, of course, don't nominate a volume of water that is relevant to a social and economic outcome. Can I just raise this issue also that isn't mentioned in your issues  
20 paper. The MDBA appears to have approached the word "compromise" in the definition of ESLT in a manner involving compromise between environmental, social and economic outcomes, rather than in relation to the concept of endangering or putting in danger environmental criteria such as key assets or key ecosystem functions. In relation to the determination task before it the MDBA has said in the  
25 ESLT report:

*The MDBA has adopted the overall management objective of achieving a healthy working Murray-Darling Basin, including a healthy environment strong communities, and a productive economy. The task for determining an  
30 ESLT is therefore to determine the level of take that aligns with this objective and is consistent with the legal definition of ESLT provided in the Water Act. To do this, MDBA is approached implementing the concept of compromise, in the definition of ESLT, having regard to the objects of the Water Act, the purposes of the Basin Plan, the object of a healthy working Basin and the wise use concept and the need to optimise economic social and environmental  
35 outcomes. In this sense taking into account a triple bottom line approach.*

There is no escaping that what I have just read to you is an utterly hopeless statement if it purports to be what the Water Act says about the definition of ESLT. As a piece  
40 of statutory analysis, it has no merit at all. It is wrong. In our view, the ESLT determined for the Basin Plan has resulted from either advice being given to the MDBA which involved an incorrect interpretation of that term as defined by the Water Act, or the MDBA misdirected itself. Either way, as a result of its misconstruction of the Act, the Basin-wide SDL may not reflect an ESLT, and there  
45 will be scientific evidence about that.

If the sustainable diversion limit for the Basin Plan does not reflect an ESLT, there is a real risk that that part of the Basin Plan is unlawful. Further on this issue, it should be noted that the matters I've just expressed in relation to the proper construction of the Water Act, and those that you expressed in issues paper 2, are substantially similar to those urged long ago in submissions made to the Legal and Constitutional Affairs Reference Committee in 2011. For example, there was submissions substantially similar to the submissions I've made and in issues paper 2 from Professor George Williams and Mr Paul Kildea from the Gilbert and Tobin Centre of Public Law, and from the Australian Network of Environmental Defenders Offices and also from the New South Wales Law Society. The Commission has written to the authors of those key legal submissions and asked them whether they had retained the views they expressed seven years ago. They have all indicated that they do. The Commission has received 20 submissions in relation to the matters of construction that I've just mentioned.

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THE COMMISSIONER: 20 submissions?

MR BEASLEY: 20 submissions, including from one I haven't mentioned yet, from Dr Anita Foerster, from the Melbourne Law School and Professor Alex Gardner of the University of Western Australia Law School, who, again, have indicated substantial agreement with approach to construction in issues paper 2. Dr Foerster does raise the prospect that the adjustment to the SDL made recently may not be unlawful at the moment because the Act doesn't set a particular time limit in relation to it. She has referred to section 24, and it is something to be considered whether the issue of lawfulness only arises once the water resource plans are approved on 1 July 2019. Her submission is in writing and will become part of the material that is tendered.

The National Farmers' Federation, the Queensland Farmers' Federation, Cotton Australia, Australia Vignerons, whilst perhaps not directly commenting on the legal issues, have each given a submission where they support the triple bottom line approach. The South Australian Dairyfarmers' Association represented by Mr Elferink, E-l-f-e-r-i-n-k – and Mr Elferink is here, and he's welcome to make a submission if he wants to – takes some issue with your construction in issues paper 2 concerning the term "productive base" in the definition of ESLT and considers that it should be considered to be able to be construed broadly enough to incorporate considerations of social and economic matters.

Now, that's not a submission I agree with because the context in which the phrase "productive base" is included with other criteria that are only of environmental – that only relate to environmental matters, but it's certainly – Mr Elferink has presented the Commission with a considered submission. I'm going to tender it, and if he wants to say anything to you orally, he's welcome to do that when I finish. I have also received the submission from the Southern Riverina Irrigators, which disagree with your assessment in issues paper 2. Ms Gabriel Coupland who, I think, is the head of the Southern Riverina Irrigators, put out a press release which she said:

*Do these people –*

I assume it's a reference to you. Perhaps it's a references to all the Commission staff:

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*Do these people really think that [the then minister] would have drafted and written a plan that included clauses that would make it non-compliant with its ruling Act.*

10 Now, that's not quite precisely the submission I have made, but yes, I do really think it's unlawful. The Riverina and Murray regional organisation of councils support the triple bottom line approach, but they tend to agree, or are concerned about issues paper 2 and suggest there's now urgency to amend the Act and the plan to properly reflect that triple bottom line approach. I understand that submission, but, of course,  
15 making a submission that the Water Act should contain a definition of environmentally sustainable level of take in which social and economic outcomes are given the same priority as, environmental outcomes, might put the Act's constitutional validity at risk if you are no longer implementing Australia's international agreements.

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The Nature Foundation of South Australia have put in a submission agreeing with your interpretation in issues paper 2, your preliminary interpretation. The Murray Lower Darling Rivers Indigenous Nations, or MLDRIN, also agree with your interpretation of the Water Act and that the Act requires the environment to be given  
25 priority in determination of ESLT. MLDRIN have also argued that the terminology of "have regard to" – and I say that in reference to the requirement of the Basin Plan to have regard to indigenous views concerning cultural flows and the drafting of water resource plans – they say that that wording is inconsistent with the obligations Australia is under in the Biodiversity Convention, and in the Ramsar Conventions,  
30 and they suggest something similar to the Canadian model of "deep consultation", and we will be calling some evidence concerning that at a public hearing.

Those, essentially, are a summary of the views that have been expressed in issues paper 2. There was, of course, a publicly released opinion or part of an opinion  
35 released by Mr Burke when he was then the relevant minister from the Australian Government solicitor which on one reading supports the view that an ESLT can be determined by taking into account not just environmental outcomes, but social and economic outcomes.

40 Importantly, in my submission, that advice, with respect, fails to grapple with the environmental criteria in the definition of environmentally sustainable level of take. Interestingly, although that advice has been made publicly available, no other advices from the AGS – and there must have been many to the Basin Authority – have been made available. I want to mention briefly, again, the 36 supply measures that form  
45 the basis of the ESLT adjustment.

THE COMMISSIONER: Before you do, I'm looking at the time. It's just after 11.30.

MR BEASLEY: We can have a break now, and I will be finished in 20 minutes.

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THE COMMISSIONER: That might be more convenient. Would you mind speaking to Mr Elferink as to his convenience?

MR BEASLEY: I already have, and what he said was if I cover the point he wants to make, he won't speak. If I haven't, I said he's more than welcome to.

10

THE COMMISSIONER: Yes. It will be convenient if I could hear him.

MR BEASLEY: I will speak to him, and I will invite him again to make a submission orally if he wants to.

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THE COMMISSIONER: Thank you. So far as I'm concerned, 15 minutes will suffice for a break. Thank you.

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**ADJOURNED** **[11.32 am]**

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**RESUMED** **[11.45 am]**

THE COMMISSIONER: Mr Beasley, before you resume, may I just draw to attention, probably as a matter of pedantry, you have, from time-to-time referred to my interpretation, my preliminary interpretation, my construction, my assessment.

30

MR BEASLEY: Yes.

THE COMMISSIONER: And described my views as firm. I don't think any of those descriptions are really unfair at all, but I do want to make crystal clear that in relation to legal argument and consideration of legal opinion, it is in the nature of things that we take positions. I have taken a position in Issues Paper Number 2, the language of which makes it clear that I consider issues have been raised upon which I have a preliminary or provisional view. It would be silly for me to pretend that the view was expressed or, indeed, is held diffidently. But it is held in the usual professional way, my training and experience produces, which is it invites contradiction, correction, and qualification. And I am completely open to all of that.

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The reason why the Issues Paper Number 2 is produced in the way it does, and why it is fair for you – although a little uncomfortable for me to attribute things as my views – the reason why that's appropriate is that it would be misleading for me, as it were, to be silent about arguments that I am finding attractive. Because people who wish to contend against those arguments have to have a full opportunity to do so.

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And, in my experience as an advocate and as somebody who forms legal opinions, you are assisted in that knowing what it is you may be contending against. So I just want to make it clear, not for Mr Beasley who understands all of that, I know, but for everybody else, that my mind is open to persuasion that the views expressed in Issues Paper Number 2 are either without foundation or require revisiting or perhaps need to be qualified. With that in mind, if it's convenient, we can move on.

MR BEASLEY: I think in Issues Paper 2, the wording used by you was, "I think there's real force in these arguments but my view is not final."

THE COMMISSIONER: That's correct.

MR BEASLEY: Yes. I want to return, briefly, to the 605 billion litre adjustment that's recently been made to the amount of water that needs to be recovered for the environment. The Basin Plan, at various sections, suggests – well, commands that the Authority shouldn't even propose such an adjustment or such a supply measure unless it is satisfied of certain criteria. Now, one of those criteria, I've said, is "equivalent environmental outcomes". I have read to you, and it will be part of the evidence from one of the MDBA's analysis of one of the supply measures, which mentions some alarming – what appear to be alarming risks to the environment from one supply measure. I should emphasise that is not the only supply measure in that category. I would also like to make a submission in relation to the SDL adjustment that goes beyond issues of law but also relates to issues of policy.

As I've already discussed, let's assume for the moment that 2750 does represent an environmentally sustainable level of take. 605 gegalitres – 605 billion litres of water is now said to no longer be required for the environment on the basis of many measures that will not be implemented for up to six years and, as I will come to, carry perhaps high risks of success in terms of achieving what they are modelled or anticipated to achieve. Leaving the issue of law aside, in my submission, that cannot possibly be a good policy. The whole purpose of the Basin Plan and the Water Act is to, in colloquial terms, fix the river system. Fix the dying system that has had too much water taken from it and has suffered environmental degradation.

Leaving issues of lawfulness aside, what's proposed here is that a figure of water for the environment has been determined, 2750 gegalitres. And then it's said, "Well, we are going to put in these supply measures, they might take six years, we don't know what outcome they will have, but we are going to take that water from the environment now." That, in my submission, Commissioner, is a policy that's a fraud on the environment. Not a fraud in the criminal sense, but a fraud as a policy in the sense that it deprives the environment of 605 billion litres of water that has already – that is part of what has been determined is needed for it to reach an environmentally sustainable level of take.

And the measures that are said to reach the equivalency of that 605 billion litres will not be in operation for up to six years. Many of them, anyway. Two of them that account for half of the 605 billion litres. So whether or not there's a legal problem

for the SDL adjustment - as a policy, it seems an entirely strange way of doing things, at best.

5 Finally, on the issue of the SDL adjustment, I mentioned that there is some  
uncertainty as to whether these supply measures will achieve what they are either  
modelled to achieve or anticipated to achieve. And I assume the Basin Authority has  
a great deal of confidence that they will achieve what they are proposed to achieve  
because, otherwise, they shouldn't be endorsing them. But there are reports that will  
10 be tendered during the course of these public hearings that indicate that there is a  
"substantial error space" in relation to the assessment of these SDL adjustment  
supply measures and a "great deal of uncertainty" in relation to their outcome. That  
also goes to the issue in relation to the policy criticism I made of taking water from  
the environment first and working out whether something works in six years' time or  
beyond that.

15 I only very briefly want to mention the proposed – the Northern Basin Review and  
the proposed reduction in the amount of water for the environment in the Northern  
Basin of 70 gigalitres from a recovery of 390 gigalitres down to 320 gigalitres,  
because exactly the same legal issues arise in relation to that proposed amendment to  
20 the plan that arise in relation to the SDL adjustment. The Northern Basin Review  
Amendment is said to be based on, one, the economic, social and environmental  
outcomes of the northern basin. Again, I would say legal error. And:

25 *...commitments from the Commonwealth Queensland and NSW Governments to  
implement what are called tool kit measures that will deliver improved  
environmental outcomes in the northern basin.*

And I'm quoting from MDBA's Northern Basin Review Report. Now, the language  
used there raises the prospect of illegality because it equates social and economic  
30 outcomes on the same footing as environmental outcomes and consistent with the so-  
called triple bottom line approach. But in its Northern Basin Review Report, the  
MDBA also noted that:

35 *...under a 320 gigalitre recovery, environmental outcomes are slightly reduced  
compared to the Basin Plan.*

Reducing even slightly environmental outcomes because of social and economic  
considerations may be an appropriate policy approach, I make no comment about  
that. But there is a risk that it's inconsistent with proper construction of the Water  
40 Act for the reasons I've already mentioned. I do want to emphasise, also, that the so-  
called tool kit measures, firstly, they are not things that have statutory force, they are  
not within the MDBAs control, there is very little publicly available information  
about them or how they could justify a 70 billion litre reduction in recovery of water  
for the environment.

45 THE COMMISSIONER: There is a Bill now to legislate them. Is that right?

MR BEASLEY: There is a Bill to amend the plan under different provisions of the Water Act than the SDL adjustment. A Bill to amend the Water Act and the Basin Plan, it must be. And it's anticipated that that will go through. Following on what I was saying about the tool kit measures though, the final point about them is, again,  
5 they may never be implemented nor may they be achievable. So, again, similar issues of lawfulness arise under the Northern Basin Review.

THE COMMISSIONER: Under the Northern Basin Review, the 70 gigalitres is currently understood to be an enacted – I will call it adjustment.  
10

MR BEASLEY: Yes.

THE COMMISSIONER: But the 605 gigalitres - - -

15 MR BEASLEY: Amendment, yes.

THE COMMISSIONER: - - - which has been implemented by amending the Basin Plan has been done pursuant to, amongst other things, division 4 of the Basin Plan itself?

20

MR BEASLEY: Division 4, I would go chapter 7. But - - -

THE COMMISSIONER: It is in chapter 7.

25 MR BEASLEY: Yes. You're right.

THE COMMISSIONER: So it is in division 4 of chapter 7.

MR BEASLEY: Yes.  
30

THE COMMISSIONER: So for the 605 gigalitres - - -

MR BEASLEY: There is a footnote of the 605 because of the five per cent rule.

35 THE COMMISSIONER: Yes.

MR BEASLEY: It can only be 543 until there is some clawback through efficiency measures but - - -

40 THE COMMISSIONER: Quite so. So - - -

MR BEASLEY: The - - -

THE COMMISSIONER: 605 itself adjusted itself for the five per cent ceiling.  
45

MR BEASLEY: Yes.

THE COMMISSIONER: I will call it 605 for convenience. But it itself needed the Authority to be satisfied that the proposed adjustments would meet the criteria in section 717 of the Basin Plan.

5 MR BEASLEY: Correct. Which, primarily, for supply measures are environmental  
- - -

10 THE COMMISSIONER: For supply contributions, which the 36 are. They are and  
are only that the proposed adjustments achieve equivalent environmental outcomes  
- - -

MR BEASLEY: Correct.

15 THE COMMISSIONER: - - - compared to the benchmark environmental outcomes.  
And the benchmark environmental outcomes are those that are taken into account  
when originally fixing the sustainable diversion limit.

MR BEASLEY: That's right. That's right.

20 THE COMMISSIONER: So does that mean that for this Commission, an inquiry  
into the lawfulness of what I am calling the 605 gigalitre reduction in water for the  
environment will include attention to what was available to the Authority so as to be  
satisfied that, for example, with the Menindee Lakes, what was proposed would  
achieve equivalent environmental outcomes compared to the benchmark?  
25

MR BEASLEY: The answer to that is yes in relation to all measures to be  
comprehensive in terms of their legality. The Menindee Lakes, there's a comment in  
the document I read suggesting that the environmental equivalency criteria is, for  
some reason, for that particular supply measure, outside of the so-called equivalency  
30 environmental framework. How that can be the case, I don't know. We would need  
someone from the Authority to tell us why they say that. I - - -

THE COMMISSIONER: Has the public been told?

35 MR BEASLEY: No. Well, they have now because the document I read has been  
produced in the Senate because someone required it to be produced. But outside of  
that, no one would know. Nor would they know anything about the MDBAs analysis  
of these 36 supply measures.

40 THE COMMISSIONER: Did the Murray-Darling Basin Ministerial Council  
approve any processes for opportunities for public consultation?

MR BEASLEY: I'm going to have to say I don't know, but I doubt it.

45 THE COMMISSIONER: So if there had been any such approved processes, then  
they would need to be gone through under 717(2)(c).

MR BEASLEY: Yes.

THE COMMISSIONER: If they are to be gone through, the public will need to have been told of the relevance if any - - -

5

MR BEASLEY: Yes - - -

THE COMMISSIONER: - - - of equivalent environmental outcomes for the Menindee Lakes.

10

MR BEASLEY: I think I'm right in saying the Basin Officials Committee has to approve these measures to, or put them forward after the states. There is no – yes, they notify them, and we don't know what material they had when they made that notification. Presumably, they had feasibility studies. There is a feasibility study framework. There's a business framework, but I'm guessing.

15

THE COMMISSIONER: Has there been any policy announcement by the Authority or by any Commonwealth minister as to why such material should not be generally and publicly available?

20

MR BEASLEY: I'm going to again have to say I don't know, but I'm going to say I doubt it.

THE COMMISSIONER: Thank you.

25

MR BEASLEY: What I can tell you is that the Victorian Government, for example, has, when requested, been more forthcoming in providing interested parties with copies of their business cases for their supply measures than, for example, the New South Wales Government. I think the South Australian Government has supplied business plans in relation to supply measures to interested parties when they've been requested. I still think, as I speak right now, the New South Wales Government has still not made their business plans publicly available, and the Basin Authority has still not ever made publicly available, and as far as I'm aware, its analysis of the supply measures which would justify them having .....

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35

THE COMMISSIONER: Is this conduct by the Authority, which is governed by the provisions you've drawn to attention in paragraph 21(4)(b) of the Act - - -

MR BEASLEY: Yes.

40

THE COMMISSIONER: - - - namely, acting on the basis of the best available scientific knowledge, the adjustment process?

MR BEASLEY: Well, any exercise of their functions must be on the best available scientific knowledge.

45

THE COMMISSIONER: Because - - -

MR BEASLEY: If you are thinking along the lines I have, the fact they asked for an environmental impact statement on Menindee Lakes – and it hasn't been prepared – makes one doubt whether they are exercising their powers and performing their functions on the best available scientific knowledge when they are asking for the best  
5 available scientific knowledge to be given to them.

THE COMMISSIONER: Yes. And under paragraph A of subsection (4) of section 21, in relation to the making and amendment of the Basin Plan, the Authority must take into account the principles of ecologically sustainable development which are  
10 defined in subsection 4(2) of the Act.

MR BEASLEY: You are ahead of me Commissioner, but we may as well stay it now, that it seems very difficult to understand how you are taking into account the principles of environmentally sustainable development which includes, as we know,  
15 the precautionary principle in relation to measures that are at high risk.

THE COMMISSIONER: By the precautionary principle, in particular, you mean if there are threats of serious or irreversible environmental damage, the lack of full scientific certainty should not be used as a reason for postponing measures to prevent  
20 environmental degradation.

MR BEASLEY: That is what I mean.

THE COMMISSIONER: And so that, I take it – it underlies your concern about the lapse of time apparently proposed between 2018 and 2024 for these supply measures.  
25 Is that correct?

MR BEASLEY: Yes. It is probably underlining it better than I have been, but yes.

THE COMMISSIONER: I have in mind returning to the question of best available scientific knowledge as to whether, in your submission, scientific knowledge is knowledge which has been sufficiently exposed to criticism by peers and others as to survive scrutiny.  
30

MR BEASLEY: It can't be the best, if it hasn't.  
35

THE COMMISSIONER: So the failure on the part of the Authority to publish at least a modicum of the scientific knowledge it claims to have would be a falling short of the scientific method, that is, that cultural approach that makes that science rather  
40 than assertion.

MR BEASLEY: Of course. I thought that was the basis of science. One of the important elements of science is that you expose your reasoning to other people with similar expertise, or even greater or lesser get to comment from them, and people can  
45 help each other and inform each other in a way.

THE COMMISSIONER: I too have understood that to be why we have a culture, not a universal culture, of peer review publication.

MR BEASLEY: Yes.

5

THE COMMISSIONER: Peer reviewed, that is, criticised before it's then published, and then upon published – publication open to an informed critique by those who read it.

10 MR BEASLEY: If you're heading towards asking me whether there's a good reason the base authority hasn't disclosed all of this information, I am sorry. I'm going to have to tell you I can't give you that reason.

15 THE COMMISSIONER: I am bound to say that under my terms of reference, administration of the Water Act and the Basin Plan by the Authority which falls - - -

MR BEASLEY: Proper administration.

20 THE COMMISSIONER: - - - short in relation to the provision of a proper opportunity for the scientific basis to be examined seems to me to be an extremely serious shortcoming from a national point of view.

MR BEASLEY: I have no doubt that's the case.

25 THE COMMISSIONER: Thank you.

MR BEASLEY: I need to briefly mention efficiency measures and the volume of – the 450 gegalitre volume of water because it's – if, amongst other things, central to what was said to be the enhanced environmental objectives in the Basin Plan that largely relate to South Australia because they largely relate to the Lower Lakes, the Coorong and the Murray Mouth. Before I do, however, because I've said the words Murray Mouth, can I take a moment to address some talk we have heard during the course of our community consultations and that I've heard even said by members of the Federal Parliament that flow going out of the Murray Mouth is unimportant. All it does is irrigate the southern ocean, and some people go as far as to say that the Coorong Lower Lakes should be left to degrade.

30

35

Apart from the fact it will be in breach of a huge number of our international obligations, flow out of the Murray Mouth is not just important to South Australia. Flow out of the Murray Mouth – and there will be evidence about this – is important for flushing salt and nutrients out of the entire Murray River system, and it's important to the state of the Coorong. The Coorong itself is also not unimportant to the rest of the Basin. The Coorong, of course, is home to native fish and birds, but it's also a place where migratory birds go. In – at the height of the drought, up to 90 per cent of the migratory birds in Australia relied on the Coorong for their survival. So the flow out of the Murray Mouth, the state and health of the Coorong and Lower

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45

Lakes are not only South Australian issues, they are Basin-wide issues, and we will call some evidence in relation to that.

5 THE COMMISSIONER: As a matter of policy, if thinking about a delay between the making of an adjustment for a supply measure and the achievement, if ever, of the supply measure's success, you, therefore, want at least to look at the period of time before which a bird population would collapse; is that right?

10 MR BEASLEY: We might.

THE COMMISSIONER: So that if – and I pick this by way of example – a breeding cycle left only, say, five more years for the population to sustain itself, an improvement in the state of the waters that wouldn't occur for, say, eight years, would be too late for those birds.

15 MR BEASLEY: In that scenario, yes. Now, in relation to the supply measures, the MDBA often points to the fact that there's a reconciliation process under the Basin Plan whereby things get resolved after six or more years depending, I suppose, on how long it takes to actually analyse whether supply measures once implemented are actually achieving what – or not achieving what they are predicted or modelled to achieve. There is a number of problems I think with that approach, outside of the legal ones and the policy ones I have already mentioned. What's to be said to irrigators that now think the the plan is a 2100 gigalitre plan for recovery from the environment? So they base their businesses around having more water.

25 THE COMMISSIONER: Incur debt, presumably.

MR BEASLEY: Talk to their banks and say, "We've got this water", and then come 2024 or beyond, the Basin Authority – and this is a possibility – and not a remote one, says, "Whoops, these measures don't achieve 605 gigalitres, they only achieve 50". And all that water has to go back to the environment. That seems entirely messy. Perhaps it's messy the other way, perhaps recovering 2750 for the environment now and finding out you only had to recover 2100 gigalitres in six or more years creates its own mess, but with an Act and a plan designed to restore the health of a river system, that sounds like the more sensible way of approaching things, but, no doubt, there will be some evidence before you about that.

Commissioner, the plan has sometimes been called, in error, a 3200 gigalitre plan by adding 450 gigalitres to 2750 gigalitres. The 450 gigalitres for the enhanced objectives for South Australia forms a note to the legislation. There is a Commonwealth program with funds for what are called efficiency measures in the plan and for this proposed 450 gigalitres volume of water equivalency.

45 THE COMMISSIONER: What's the statutory basis for the Commonwealth spending that money?

MR BEASLEY: I'm not sure. I can't answer that. I can only answer there is a Commonwealth program about \$1.7 billion.

5 THE COMMISSIONER: It's referred to in the intergovernmental agreement.

MR BEASLEY: Yes, it is.

10 THE COMMISSIONER: I'm just wondering what Act of the Commonwealth Parliament authorises the expenditure of that money.

MR BEASLEY: I will have to ask Mr O'Flaherty to look that up for you. He knows, and will tell you later.

15 THE COMMISSIONER: Thank you.

MR BEASLEY: As I said before, 450 gigalitres itself is reflected only in a note to the Basin Plan.

20 THE COMMISSIONER: That note, even if it's part of the statute, it doesn't seem to impose any obligation.

MR BEASLEY: No, it's not mandatory.

25 THE COMMISSIONER: And, in any event, it seems to be tied to enhanced or neutral social or economic outcomes.

30 MR BEASLEY: Yes. It's not mandatory – I will have to come to this because there was something said in relation to a deal struck recently regarding money for supply measures. So the position is not currently clear, but it's – first of all, it's not mandatory, and, secondly, as you have seen through the travel through the Basin, at least as far as the information provided to you, there is no appetite for these programs at all.

35 THE COMMISSIONER: It depends where you are in the river system.

MR BEASLEY: Well, there is none in Victoria. I didn't hear any in New South Wales.

40 THE COMMISSIONER: No. All of them upstream of South Australia.

MR BEASLEY: I didn't hear any in Queensland. That doesn't leave many other places.

45 THE COMMISSIONER: Except South Australia.

MR BEASLEY: It does, but – maybe – I think the South Australians consider themselves to be fairly efficient already. We are, however, being told in press

releases that rather than on-farm efficiency measures, off-farm efficiency measures will deliver this 400 gigalitres of water. How that is going to happen isn't clear and whether it will be in the equivalent of real H2O is also not clear. Through arrangements suggested by the Commonwealth Government, as I said, the funding for these efficiency measures may be linked to the funding to the supply measures. And so depending on how that space develops, States might be forced into off-farm efficiency measures if they want money for supply measures. The final position of that, though, at the moment, is less than perfectly clear.

10 In any event, what you will be inquiring into beyond that in relation to efficiency measures are these issues: first of all, the prospect of the – any efficiency measures amounting to 450 gigalitres of real water and whether they will be implemented. Whether, even if efficiency measures are implemented, they can be reliably considered to recover certain amounts of water for the environment, if any. And whether efficiency measures said to have already been implemented and to represent the equivalent of over 700 gigalitres of real water actually do have such equivalency.

The Commission will hear from several experts on that issue, all of whom have provided submissions to the Commission already. The concerns they raise about efficiency measures and return flow have not, on our researches ever been adequately addressed publicly by the Basin Authority or by the relevant government Department. They have issued press releases about it, made criticisms. There will be evidence they have done worse than made criticisms. But there has been no response of substance that we have found to the concerns that several of the experts that will give evidence to you have, experts that are both hydrologists and water economists about efficiency measures.

This opening statement would also not be complete without a brief mention of climate change. The CSIRO prior to the enactment of the Basin Plan made projections for weather patterns in the Basin up to 2030. A very short summary it is projected to rain less and it's going to be hotter. That work done by the CSIRO in a 2008 report has subsequently been built on. Now, climate change presents challenges to the environment and to those who have the responsibility of managing the Basin's water resources.

In the guide to the Basin Plan in 2010, where I mentioned the figures of 3856 and 6983, as the range of water required for environment, the Authority did adjust its proposed sustainable diversion limit scenario to take into account at least a percentage of the CSIRO's climate change projections. For the Basin Plan, however, a policy decision – a policy decision – was made to ignore climate change projections, at least for determining the environmentally sustainable level of take and setting the long term SDLs.

The fact that a policy decision has been made by a government authority, I repeat, does not make it lawful. Whether in ignoring climate change the Authority has breached a mandate on them to apply the "best available science", is, I know, a matter you wish to consider. The Authority, as I understand its published work, and

there's not a lot on this, but it contends that the Basin Plan is adaptive, which is true enough, and can be changed in the future which is true enough, and can be reconciled after 2024. No doubt, that will inform part of your consideration. For our part, however, we don't understand how a policy decision not to consider climate change projections represents the best available science.

THE COMMISSIONER: Or, for that matter, abides by the principles of ecologically sustainable development.

MR BEASLEY: No. That too. And can I also draw on this question to your attention, section 21(4)(c)(iii) of the Act which says that:

*The Authority must, in exercising their powers and performing their functions, have regard to the diversity and variability of the Basin water resources and the need to adapt management approaches to that diversity and variability. Now, variability of the Basin water resources is going to be impacted by climate change.*

So there's a direction there to take into account climate change.

THE COMMISSIONER: So you read variability as not just differences in the weather, which the world has always been familiar, but also changes in the climate.

MR BEASLEY: I do.

THE COMMISSIONER: Thank you.

MR BEASLEY: Because it should be read that way if we are to make – if it's to be applied in the proper context of the Act. And bearing in mind what is said, as you've referred me to, just above in subsection (b), best available science. I would certainly reject the suggestion that climate change projections by our leading institutions and universities don't reflect the best available science. Moving away from that topic to the issue of have regard to indigenous views. Commissioner you have already had meetings with the First Peoples of the Ngarrindjeri Nation in Goolwa, the Yorta Yorta in Shepparton, with the Barkandji in Broken Hill, with the representatives from the Northern Basin Aboriginal Nations and with representatives from the Murray Lower Darling River Indigenous nations.

The Basin Plan requires that their views be had regard to concerning the making of water resource plans. There will be public evidence about what's occurred there. I know you are interested in not just factually what has occurred, but whether there has been real consultation, what is meant by the words "have regard to", in the Water Act in the Basin Plan, what should be understood by cultural flows and whether the Basin Plan and Water Act adequately deal with the concerns, rights and beliefs of our First People.

Consultations. I briefly want to mention some of the work done by the Commission and I know you have people who you wish me to thank. The Commission has received 144 submissions to date. Many are lengthy and detailed and have taken considerable time and work. Many are from people with relevant scientific  
5 expertise. Some of are from independent representative bodies. To give you one example, Cotton Australia has lodged a detailed and helpful submission on the cotton industry and its views on the Basin Plan, responsive to the terms of reference. The Commission is grateful to all those who took the trouble of lodging a written submission to the Commission.

10

The Commission's approach will be that it will allow all such persons and groups with a submission that is relevant to the terms of reference to give evidence at a public hearing if that is their wish and they will be assisted by the Commission staff to do this. I do emphasise relevant to the terms of reference and, obviously,  
15 decisions will have to be made about repetitive evidence. The Commission over the last month or so has travelled to Goolwa and Murray Bridge in South Australia, Deniliquin and Albury in New South Wales, Bourke and Broken Hill in New South Wales, St George and Goondiwindi in Queensland, Moree in New South Wales and Mildura in Victoria, Wodonga in Victoria and the South Australian Riverland.  
20 Public consultations have been held in many of those places. It is impossible, unnecessary and probably inadvisable to sum up every view of the Basin Plan and the terms of reference you've heard during those consultations or during some private meetings that have taken place during the course of those travels.

25

I do wish to indicate, however, and mention, so that people know they are going to be considered, some of the views that have been expressed to you during the course of those consultations and visits. One thing, however, that is a – was a unanimous view, everywhere we travelled in the Basin, was that water theft is unacceptable. Since the Commission commenced, there have been some prosecutions commenced  
30 in New South Wales concerning allegations of people taking water beyond their licence entitlements. In relation to any matter in which a prosecution has been commenced, and in relation to any matter in which there is a police investigation, you have obviously taken the view that it is not appropriate for the Commission to take any further steps in relation to investigating any of those matters.

35

You have also made a decision that you will not compete with or take any steps in relation to an investigation other than cooperation and the provision of materials in relation to any matter concerning the water theft or noncompliance if another investigative body is also looking into that issue. For example, an ICAC. The  
40 Commission has, however, received evidence in relation to matters of noncompliance outside of those matters and will continue to investigate those matters. Some evidence has already been taken in private and the Commission remains interested in it and is investigating the issues of both compliance and enforcement and I won't say anything further about that in opening.

45

In relation to other matters that were raised throughout the travels through the Basin, it's fair to say that everywhere we went, the Commonwealth scheme of buying water

entitlements from entitlement holders was at least unpopular with people other than the sellers. Why it was unpopular was generally said to be that it damaged the economy and social fabric of local communities, it caused a loss of jobs, etcetera. No doubt, there is some evidence to support the concerns in relation to buy-backs but, of course, there was also a great deal of evidence in relation to technological change that has happened over the last 10 years in regional communities that has also cost – has had a significant impact on employment, as an example.

10 There was a community consultation in Murray Bridge. I think it's fair to say that in relation to what was said at that consultation, many of the speakers expressed support for the Northern Basin Review. Many expressed unhappiness that the review at the – that the amendment at the time had been blocked in the Senate and thought it was some form of political stunt. However, other speakers said the Senate was right to block the Northern Basin Review amendment and that the SDL adjustment shouldn't go through. That sort of divergence of opinion amongst the crowds was common as well. There was a decision about climate change in Murray Bridge and concerns that the barrages in the Goolwa channel may be out of date once sea levels rise.

20 We had a consultation at Bourke. It was the least attended of any of the consultations. It was attended only by irrigators, at least in terms of who spoke, and they were all involved in the cotton industry. They supported the SDL adjustment and the Northern Basin Review and expressed the view that the Basin Plan was an overreaction to drought and too much water was being taken for the environment. We had a community consultation at Broken Hill. Whether representative of the entire community at Broken Hill or not is hard to know but it was a very well attended community consultation with many members of the community that spoke there expressing grave concerns about, for example, the lack of flow in the Darling River and the proposed reconfiguration of the Menindee Lakes by the NSW Government, a lack of cultural flow and lack of consideration for the Barkandji People and concerns that too much water is being extracted in the northern part of the Darling by big irrigators, in particular, big cotton irrigators.

35 In relation, specifically, to the Menindee Lakes water saving project which, of course, also volunteers a pipeline from Wentworth to Broken Hill, taking water out of the Murray for the Broken Hill water supply, criticisms were made by community members about some of the things we've already discussed; that is, business cases not being made publicly available, MDBAs analysis not being made available, concerns regarding the transparency of the MDBA, etcetera. There were also grave concerns mentioned out there by members of the community about the NSW Government's proposed floodplain harvesting legislation and its current floodplain harvesting policies and how much water is being extracted before it actually – from floodplains before it ever reaches a river.

45 Very similar concerns were mentioned at the community consultation in Mildura. Similar concerns about the Darling River, similar concerns about over extraction of water in the Darling by cotton growers in the northern part of the Darling. Similar concerns about the proposed SDL adjustments supply measure by the reconfiguration

of Menindee Lakes. But, also, I think specific to Mildura and the Sunraysia region – and this is a matter that I know you are interested in – tremendous concern about unregulated development for permanent plantings. In particular, almond trees that have been planted, seemingly, without any proper thought as to how much water they require with the suggestion by some people, “Well that’s okay, that will be left in the market. If there is not enough water for those plants they will just die.” But with other people suggesting there should be some closer form of regulation as to how many permanent plants go in in that part of the Basin.

10 Again, concerns about the Menindee SDL proposed supply measure, concerning environmental concerns, particularly in relation to the golden perch in relation to matters that I read from the MDBA’s analysis of that. In – at the St George, Queensland, community consultation, concerns again about the way the buy-back scheme approached, concerns that even 320 gegalitres recovery of water for the environment in the Northern Basin is too much water for the environment and will continue to cause economic impacts and commentary that the economies of various small towns in the region up there have been horrendously impacted by the Basin Plan and the recovery of water, criticism that the MDBA has a just add water approach, which only in the words of some of the people that made submissions provides very little environmental positive outcomes.

25 There was also a community consultation at Albury. At that meeting the speakers, again, expressed concerns about the accuracy of the SDL adjustment, volumes of water that are said to apply to each supply measure. People were concerned there should be greater recognition of indigenous knowledge of the Murray River. Again, people criticised the buy-back program and suggested that farming families had suffered through forward implementation of the plan. There was also a great deal of concern in Albury concerning the constraints that currently exist in the river, for example, development on floodplain, and how the Authority can possibly achieve the flows at various parts of the river system that it intends to without flooding properties, etcetera, and concerns about who compensates those farmers for that recommendation.

35 These were particular concerns about the idea of piggybacking higher flows with an environmental flow on top, causing a widespread flood. There was community consultation at Renmark where, again, the issue of floodplain harvesting was mentioned as a concern. There was mentions – again, concerns raised about the Northern Basin Review tool kit measures and the supply measures. And concerns about flows in the Darling River were mentioned again at Renmark. And also about salinity at Lake Victoria was another issue that was raised there. Almost everywhere you travelled, Commissioner, you invited representatives of local government to meet you. Some of those meetings have gone better than others.

45 There have been very helpful discussions however with the mayors and council representatives of the Alexandrina Council, Deniliquin, Mildura, Broken Hill, St George and Moree. The Mildura Council assisted you with tour of efficiency measures at a pecan farm. The relevant departments of the South Australian and

Victorian Governments have also provided a high level of assistance to the Commission and its work. South Australian Department of Environment and Water, the Department of Primary Industries and Regions, have assisted with visits to icon sites such as the Coorong, the Lower Lakes and the Chowilla floodplain. The  
5 Victorian counter clerks have assisted in tools of the Barmah Choke, the Barmah Millewa Forest and the Hattah Lakes.

The Victorian and South Australian governments have also assisted you with tools of various on-farm efficiency measures funded by the Commonwealth Government,  
10 with supply measures that constructed under The Living Murray Program, such as the regulators at Hattah Lakes and Chowilla and the visits to privately owned farms to see on-farm efficiency measures. Representatives of the Victorian Department of Environment and Water have demonstrated to you more than once, its metering and compliance infrastructure. And you've had various discussions with employees and  
15 officers who have responsibility for measuring and compliance in Victorian irrigated areas.

The Commission also sought assistance from the Murray Darling Basin Authority, which provided staff at the Commission with some advice concerning the community  
20 consultation process. A meeting between you and employees and executives of the Basin Authority was scheduled for May. However, the Basin Authority cancelled it shortly after publication of Issues Paper 2. They indicated that they were too busy to meet and have not offered another time for a meeting. If that position changes and Authority officers and executives of the Authority do decide to meet with you for  
25 discussions, I know you would welcome it.

I forgot – I'm reminded I forgot to mention we had a community consultation at Shepparton, for which I apologise. There was a great deal of concern mentioned at  
30 Shepparton regarding any further reductions in water available in that part of the world for efficiency measures. I think that was the main thrust of that. We had a submission from their local – the local member of Victorian Parliament who met with you privately and who spoke with a great deal of knowledge concerning the Basin Plan and concerns about efficiency measures and impact on the economy at Shepparton and surrounding area.

35  
THE COMMISSIONER: While we are on that addendum about consultations, it was at Moree that the council arranged a visit to the pecan farm?

40 MR BEASLEY: Did I say Mildura? I apologise.

THE COMMISSIONER: That's all right. They both start with M but they're a long way away from each other.

45 MR BEASLEY: Yes. No. Look, I've been so many places recently that I'm surprised I can - - -

THE COMMISSIONER: That's all right. That sounds like a country and western.

MR BEASLEY: I know. I apologise. It was Moree. And they were – the council employee that took us around was extremely helpful. And I at least remember him very clearly.

5 THE COMMISSIONER: Quite so.

MR BEASLEY: We have a witness today, who is David Bell. He is a former employee of the Basin Authority and worked for the Basin Authority from 2009 to 2017. He, at one stage, had responsibility for determining the environmentally  
10 sustainable level of take and he moved on to have a responsibility for the preparation of the environmental watering plan. And he will give evidence and has provided a statement concerning the processes to reach the determination of the environmentally sustainable level of take and I will call him in due course, probably after lunch, given we have one other – we have Mr Elferink who is going to make a submission to you  
15 about construction matters in a moment.

Commissioner, you mentioned in some detail the fact of the High Court proceedings which, ultimately, will, I assume, result in a judgment in the Commonwealth Law Reports called Commonwealth v Walker. I don't want to make any comment on the  
20 merits of those proceedings or any other aspect of it. You have decided not to enforce, for now, the summonses that have been served on present and past employees at the Basin Authority and the Commonwealth. I merely wish to only say this about the High Court proceedings, which are only peripheral to the fact they have been commenced and that summonses have been existed.

25 Any current employee of the Basin Authority, any current executive and any relevant Commonwealth employee or past Commonwealth employee is welcome to come to the Commission to meet with the staff and, if they have something relevant to say in relation to the Terms of Reference, or in relation to any matter that is responsive to  
30 evidence that has already been given, the Commission staff will facilitate the giving of that evidence. They will be dealt with expeditiously and they will be dealt with politely. If they require the lawyers of the Commission to assist in the preparation of a statement, that assistance will be given in good faith. I, of course, can't promise not to challenge any evidence that any current employee of the MDBA or executive  
35 or any past employee of the MDBA or current employee of the Commonwealth might want to give. That will be pointless. But the invitation is there and it is up to them.

I otherwise don't wish to respond to anything in relation to the High Court  
40 proceedings but I do think it's incumbent upon me to respond to one public announcement since the High Court proceedings have been commenced because it is quite wrong. In an article in the Guardian on 15 June, a quote from the – there was a quote from what's called a spokesman for the Agricultural Minister David Littleproud, who said the Federal Government has taken the High Court proceedings  
45 because:

*...the States could, effectively, stop the Commonwealth from governing by requiring staff to appear at Royal Commissions into any policy they didn't like.*

I'm going to make the assumption that the journalist has accurately quoted the  
5 spokesman. I'm going to make the assumption that the spokesman did not get  
approval from the Minister to make that statement. Firstly, because it's factually  
incorrect. This Royal Commission is not an inquiry into a government policy, it's an  
inquiry into legislation, it's an inquiry into the lawfulness of what's being done under  
that legislation and it's also an inquiry into science. Secondly, when there is, as I  
10 said at the beginning, a proper concern and a serious concern that what a government  
instrumentality has done is lawful or not, the fact that the government instrumentality  
might or should respond to that is not a disruption to government.

If there is a serious concern raised about the lawfulness of a government  
15 instrumentality's actions, it's a fundamental part of the government's job to respond  
to that. It's part of their job, it's part of the role of public representatives, it's a part  
of the role of public servants. Let's not forget that a Minister in 2010 released part of  
an advice from the Australian Government Solicitor suggesting that certain things  
could be done or taken into account in relation to setting the environmentally  
20 sustainable level of take. That clearly involved a change in advice that had  
previously been given to the Authority. All those advices are advices the public is  
entitled to see.

The MDBA and the Commonwealth Government are not involved in litigation. The  
25 management of the water resources is not a State secret. All of that information  
should be publicly available and publicly available now and it is part of  
government's role, not a hindrance to it, for it to provide an explanation about the  
legal decisions that it has made. Further, in responding to real and proper substantial  
scientific concerns raised about what the Basin Authority is doing or has done,  
30 responding to those matters is not a distraction to government. It's, again, part of  
their job and it can't be done through press releases.

So, again, on behalf of the Commission we invite any current or past executive or  
employee with the Basin Authority to come to us and give any evidence that they  
35 wish to that's relevant to the terms of reference, or that is responsive to the other  
scientific and other evidence that will be presented to you this week, next week and  
through July and perhaps beyond. That's all I wanted to say in opening,  
Commissioner.

40 Mr Elferink is here from the South Australian Dairyfarmers' Association. He has  
filed a detailed and helpful submission concerning the issues of construction of the  
Water Act that I have dealt with in detail. He has one specific point relating to, I  
think, how the criteria of productive base in the definition should be construed, and I  
have welcomed his participation in making submissions

45

THE COMMISSIONER: Thank you, Mr Elferink.

MR J. ELFERINK: May it please the Commission. My name is Elferink. I appear on behalf of South Australian Dairyfarmers'. It wasn't my intention to make opening comments at this point. However, I find that having listened to my friend at the hearing table, there are – it offers me a window of opportunity in which to make  
5 the points that I seek to make, or the South Australian Dairyfarmers' seek to make in this place today. This plan is about ambition, about an ambition to be able to generate a future for all people who live along the Murray Darling Basin, and so I certainly don't need to tell you that.

10 But my issues cannot cover issues paper number 1. We don't have the resources to undertake such a mammoth undertaking as will be required by a proper examination of issues paper number 1, but we were galvanised into action, particularly in relation to issues paper number 2, and the assumptions that were constructed into it, particularly those assumptions relating to paragraphs 36 through to 38 of that  
15 particular issues paper.

Commissioner, for the Murray-Darling plan, if you read the objects – and I'm sure you have done – as well as many of the other sections, generate the notion there is a balance to be struck between the demand for the environment and the socioeconomic  
20 outcomes of the plan itself. We have heard in submissions today that that – the essence of that construction in the Act is – creates a hierarchy. And in evidence of that, my learned friend has made any number of submissions in relation to quoting sections of legislation, such as section 21 outlining the need of the legislation to pursue its environmental outcomes. We don't for one second suggest that it is  
25 otherwise.

However, we also need to note that if we quote section 21, we may also quote sections that pertain to the socioeconomic outcomes required by the plan, namely, section 21(c)(ii): the consumptive and other economic uses of the water basin  
30 resources. In essence, to find out what the intention of the plan is and where it seeks to go, you have to peel back the layers of the onion until you get to the nub of the issue, and my friend quite correctly brought us to the definition of ESLT and how to cope with it. This is the point – and this is the only point – that the dairy farmers seek to make in relation to this because much flows from its definitional  
35 construction.

THE COMMISSIONER: Now, just to put it in context – and I'm very grateful for what you have supplied in writing. Just to put it in context, we get into this via section 23, don't we?  
40

MR ELFERINK: Yes.

THE COMMISSIONER: So we go back to section 4.

45 MR ELFERINK: Yes, which then gives us a - - -

THE COMMISSIONER: And that gives us four matters where there was to be avoidance of compromise. Is that correct?

MR ELFERINK: That is correct. And that is the - - -

5

THE COMMISSIONER: But if I can cut to the chase, the third of those four matters is the productive base of the Water Resources Act.

MR ELFERINK: You know where I'm going to.

10

THE COMMISSIONER: Yes. Quite. And it's correct, isn't it, that the defined concept of environmentally sustainable level of take, which, in turn, in section 23 must be reflected in the long term average sustainable diversion limit, is one which, if exceeded, would compromise any one of A, B, C or D?

15

MR ELFERINK: Yes.

THE COMMISSIONER: The word "or" appears between A, B – between B and C, and between C and D. So if any one of those measures – matters would be compromised, you have reached the limit of the environmentally sustainable level of uptake.

20

MR ELFERINK: The assumption, of course, in paragraph 36, the exclusive environmental considerations is applied. What we submit - - -

25

THE COMMISSIONER: I'm not asking about paragraph 36. I'm asking about your argument about whether it is right. Looking to the statute, just looking at the statute which I entirely accept, you are right in saying is what we are construing. When we look at that definition, is it correct that that ESLT, to use the jargon, is the level at which water can be taken which if that level is exceeded would compromise A, B, C or D?

30

MR ELFERINK: Yes.

THE COMMISSIONER: Doesn't that mean that a level which, if exceeded, will compromise A wouldn't satisfy the definition, and even if it satisfied B, C and D - - -

35

MR ELFERINK: Yes.

THE COMMISSIONER: And the same goes for each of them, that is, if it didn't – if it would compromise any one of those, then it fails to meet the statutory definition.

40

MR ELFERINK: Quite. However, I would suggest that - - -

THE COMMISSIONER: Why does it then matter if, say, key environmental outcomes would be compromised – why does it matter if A, B and C, including productive base, would not be compromised?

45

MR ELFERINK: Because the intent of the legislation and the legislators can be found in C, which means that it has got to be considered in terms of compromise.

5 THE COMMISSIONER: Unquestionably. But when you say compromise, I don't mean give and take; I mean endangered which, if exceeded, it would compromise key environmental assets, the ecosystem functions, productive base or environmental outcomes.

10 MR ELFERINK: My argument is that definition catches the flavour and nature of what the legislature was intending to find a – strike a balance between those outcomes.

15 THE COMMISSIONER: Where do I find a balance in those words? If it would compromise A or B or C or D, doesn't it mean that it fails to meet the definition if it compromises any one of those?

MR ELFERINK: The position that - - -

20 THE COMMISSIONER: That's what "all" means, isn't it?

MR ELFERINK: That's what "all" means, but that's the position we take, is that it does not create an exclusive consideration for the environment, is that the consideration may also turn to the productivity.

25 THE COMMISSIONER: All right. You may well be pushing an open door there because the Act elsewhere – not only here, but elsewhere makes it clear it is one of the obligations to optimise economic and social outcomes as well as environmental outcomes, and that's a point you made well.

30 MR ELFERINK: It raises - - -

THE COMMISSIONER: Yes. Paragraph 20D of the Act makes that clear. As I'm sure you are aware.

35 MR ELFERINK: Which raises the issue of the hierarchy.

THE COMMISSIONER: Yes.

40 MR ELFERINK: Our contention simply put to the Commission here today is that the hierarchy is not as pronounced as one would make out. In fact, it doesn't exist. The intention of the legislation, the intention of the definition is to create the triple bottom line which is denied by my friend.

45 THE COMMISSIONER: Sure. Could it be an environmentally sustainable level of take if it would compromise, if exceeded, key environmental outcomes?

MR ELFERINK: Perhaps, but my - - -

THE COMMISSIONER: How is that possible?

MR ELFERINK: I'm sorry. Say that – just ask the question again.

5 THE COMMISSIONER: Could a level be an environmentally sustainable level of take as required by section 23 and defined in section 4, if the level is one which, if exceeded, would compromise key environmental outcomes.

10 MR ELFERINK: If humans are part of the environment, then I would suggest that that's the case.

THE COMMISSIONER: Does that mean the key environmental outcomes don't provide by their threat and compromise a limit on the take? Because I can't read it that way, I have to tell you.

15 MR ELFERINK: Okay. Well, those are our submissions to you, Commissioner. The point is that that we do believe that the structures of that section enable the interpretation of a triple bottom line approach.

20 THE COMMISSIONER: Now, does a triple bottom line approach mean that a level scientifically considered necessary to avoid, say, salinity or to provide appropriate resources for migratory waterfowl were set, it can and, indeed, should be reduced below that minimum if farmers wanted the water?

25 MR ELFERINK: That enlivens the consideration of the word key in front of each of the three other elements in the definition.

THE COMMISSIONER: It does. You're right. What is your submission about "key"?

30 MR ELFERINK: Well, key, actually, enlivens the notion that consideration of the productivity of the Murray-Darling scheme creates an environment where key environmental considerations have to be considered.

35 THE COMMISSIONER: Yes.

MR ELFERINK: However, there is a process by which the Authority, at that point, has to determine what key actually means.

40 THE COMMISSIONER: You are not suggesting the authority makes the law, are you?

MR ELFERINK: No. I'm not suggesting it, but they are required to interpret it because they are the Authority that holds it out.

45 THE COMMISSIONER: We all are. Now, a key environmental outcome – is that one that is required by the treaty or treaties that are used to justify the enactment?

MR ELFERINK: That's a matter for the authority to consider and this Commission, but from our perspective - - -

THE COMMISSIONER: What's your submission?

5

MR ELFERINK: Our submission is in relation – to that particular issue is that, of course, the Ramsar treaty and associated treaties are required to be attended to by the Murray-Darling Basin Authority, but it has to be balanced off. It comes back to the ambition that the legislators had to have the environment and socioeconomic outcomes dealt with by equal measure.

10

THE COMMISSIONER: Now, where would I find the high point in the statutory test for this balance off with equal measure?

15

MR ELFERINK: I imagine you will find it in section 3 in the objects themselves, Commissioner. And the objects themselves do cover off on the notion of a – of the socioeconomic outcomes as well as the environmental outcomes.

20

THE COMMISSIONER: So I don't want to put words in your mouth; I want to know what your submission is. In the objects provision, it is paragraph C, I think, which is the most plain statement of the text that you urge should be read as you say? In giving effect to those agreements which are the treaties to promote the use and management of the basin water resources in a way that optimises economic social and environmental outcomes. That's should I take it, as it were, the high-water mark, if you forgive the expression?

25

MR ELFERINK: Yes. As well as giving effect to those arrangements to promote the use and management of the Basin Plans in a way that optimising economic, social and environmental .....

30

THE COMMISSIONER: So it's paragraph (c) of section 3.

MR ELFERINK: Yes. Sorry. I was reading the wrong section. Yes.

35

THE COMMISSIONER: No. That's all right. There is a lot of sections. I'm much obliged. Now, again, I repeat, I am also obliged for your client's written submission. And if there's nothing else.

40

MR ELFERINK: That's basically it. Thank you very much, Commissioner. We appreciate your time and trouble.

THE COMMISSIONER: Not at all. Thank you.

45

MR BEASLEY: In fairness to what Mr Elferink said, I think his submission has some similarities to, at least, part of the argument in the publically released AGS advice which seems to suggest that in making the determination about what's a key environmental asset or a key ecosystem function or a key environmental outcome,

you can permissibly consider social and economic outcomes and the optimisation of those in deciding what is key. That's not an interpretation, or a construction, in my view, that can be maintained in the context of this Act, but just to follow through on some of the debate or the discussion between you, Commissioner, and my friend,  
5 you are in my view, with respect, correct that you don't get an ESLT if any of A, B, C and D is compromised.

In other words, if you satisfy ecosystem functions and productive base key environmental outcomes, but you have endangered key environmental assets, you  
10 don't have an ESLT. That is why, in my submission, subparagraph (c) where it refers to the productive base of the water resource is talking about the environmentally productive base because if it is talking about a productive base that has notions of economic and social outcomes, the provision becomes unworkable. Because - - -

15 THE COMMISSIONER: It could never be satisfied.

MR BEASLEY: You will never be satisfied. So A, B and D and the need to satisfy not endangering key environmental assets, key ecosystem functions and key  
20 environmental outcomes is a very good guide, and the definition has to be workable. It's a very good guide. The productive base is not talking about something that is related to economic or social outcomes. I thank Mr Elferink for that.

MR ELFERINK: Just one more comment in passing, please, Commissioner.  
25

THE COMMISSIONER: Of course. Yes.

MR ELFERINK: The legislation itself seeks to find a balance. It, as you quite  
30 rightly point out in your issues paper – it seeks to achieve all of the desired outcomes at the risk of finding none. We are ambitious enough as producers at the lower end of the Murray to believe that all can be achieved.

THE COMMISSIONER: No. I'm much obliged. Thank you. Very well. We will  
35 adjourn until 2 o'clock.

**ADJOURNED** [1.01 pm]

40 **RESUMED** [2.00 pm]

MR BEASLEY: Commissioner, before the luncheon break, during the course of my  
45 opening statement I referred to a number of reports both of the MDBA and of other people and organisations. All of the reports and documents that I referred to in my opening statement will be tendered and that will be dealt with administratively

behind the scenes. They will be given an exhibit number or a Commission number and made available on the website shortly.

THE COMMISSIONER: Thank you.

5

MR BEASLEY: Mr Bell is here, Commissioner, to give evidence. Mr Bell has already provided the Commission with a statement and a submission. So he will need to be sworn. You can either give your evidence by oath or affirmation.

10

**<DAVID ANTONY BELL, SWORN**

**[2.01 pm]**

**<EXAMINATION-IN-CHIEF BY MR BEASLEY**

15

MR BEASLEY: Mr Bell, you have provided the commission with a statement dated 14 June 2018?

20

MR BELL: I have.

MR BEASLEY: Do you have a copy of that with you?

25

MR BELL: Yes, I do.

MR BEASLEY: And you have also supplied the Commission with a written submission dated 12 June 2018?

30

MR BELL: I did.

MR BEASLEY: Do you have a copy of that with you as well?

MR BELL: I do.

35

MR BEASLEY: Good.

MR BELL: With one minor correction to make, if I may.

40

MR BEASLEY: I will come to that in a second.

MR BELL: Okay.

45

MR BEASLEY: But thank you for telling me that. Commissioner, both the statement of Mr Bell and, also, his submission will also be tendered. Just before you take us to the correction, for your statement, Mr Bell, can you give the Commissioner your full name, your address and your present occupation?

MR BELL: My full name is David Antony Bell, no H. My address is 1618 Sutton Road, Sutton, New South Wales, and I'm retired.

5 MR BEASLEY: And is the correction to your witness statement or to the submission?

MR BELL: It is to the submission.

10 MR BEASLEY: All right. What page?

MR BELL: 11.

MR BEASLEY: All right. Just let me turn that up. Yes.

15 MR BELL: In the paragraph before five, I refer in the fourth – fifth line up:

*... system is likely to have longer viability and, thus –*

20 and I am missing the word “not”:

*... fail the test of wise use.*

25 MR BEASLEY: And to, thus, you want to put the word “not” before the word “fail”?

MR BELL: Yes, yes.

30 MR BEASLEY: All right. Commissioner – thank you for that. To assist you, I don't think you have got a copy of Mr Bell's witness statement or his submission in front of you. So perhaps if that can be given to you so you can follow.

THE COMMISSIONER: Thank you.

35 MR BEASLEY: Mr Bell, I just want to ask some questions of clarification of your witness statement. First of all, that statement is true and correct and contains your best recollection of events, as far as you can remember them?

MR BELL: It does.

40 MR BEASLEY: Yes. You mention in your statement that in the early 1990s you worked for the then New South Wales Department of Water Resources in Dubbo?

MR BELL: That's correct.

45 MR BEASLEY: Can you tell us what you did there?

MR BELL: I was employed as a scientific officer. Well, the job title was Environmental Officer.

MR BEASLEY: All right. What did that involve?

5

MR BELL: A range of things. Everything from reviewing and assessing environmental impact assessments, undertaking environmental reviews of water licence applications, and then there were a host of sort of scientific projects which included working in the Narran Lakes, Macquarie Marshes and on the Darling River.

10

MR BEASLEY: I'm getting the impression the work you did was largely relating to water resources?

MR BELL: Absolutely. Yes. And the biology associated.

15

MR BEASLEY: Thank you. You then worked for 14 years for the New South Wales Environmental Protection Authority?

MR BELL: That's correct.

20

MR BEASLEY: And would I be right in assuming that that was in relation to pollution investigations or was it more broad than that?

MR BELL: It was broader than that. There was some of that. I also did work on contaminated site assessments, changes to legislation in relation to waste. And as my period there proceeded, I moved into a management role.

25

MR BEASLEY: Right. And that role was?

30

MR BELL: Regional manager.

MR BEASLEY: Right. All right. And where were you based?

MR BELL: In Queanbeyan.

35

MR BEASLEY: Was that in Sydney or - - -

MR BELL: In Queanbeyan, in southern New South Wales.

40

MR BEASLEY: Okay. And you then went and worked for the Commonwealth Environmental Water Holder. Is my understanding correct the Commonwealth Environmental Water Holder was created with the creation of the Water Act or through the Water Act 2007 or was it before then?

45

MR BELL: No. The role was established by the Water Act.

MR BEASLEY: Right.

MR BELL: The first holder was appointed during my time there.

MR BEASLEY: Right. And does that mean your employment with the Commonwealth Environmental Water Holder commenced sometime after 2007?

5

MR BELL: That's correct.

MR BEASLEY: Right. Okay. And, precisely, what was your role there. I know you were part of the Environmental Water Scientific Advisory Committee. But - - -

10

MR BELL: No. I wasn't a part of that committee. I had a role in it being appointed and the members being appointed.

MR BEASLEY: I see.

15

MR BELL: At that time, the Commonwealth Environmental Water Holder was supported by one section and I was the director of that section.

MR BEASLEY: Yes.

20

MR BELL: And there were a range of responsibilities. I think probably chief amongst them was to get the Environmental Water Holder – what's the – I can't think of the correct word, essentially, established under legal instrument.

25

MR BEASLEY: Yes.

MR BELL: I also produced a business plan for them and then we sort of moved into operations. There was some water that the Commonwealth held at that time and there were just the early decisions about how to use that water.

30

MR BEASLEY: What was the business plan – what was the contents of the business plan? What was it directed to you?

MR BELL: Really, the role and responsibilities of the Commonwealth Environmental Water Holder. How he – as it was a he – would discharge his responsibilities.

35

MR BEASLEY: Is that, essentially, in relation to the delivery of environmental water, where it's held, when it's delivered, how it's delivered, how?

40

MR BELL: It was those things. I think it also included his responsibilities in relation to the special account. There was publishing – he had requirements under the Act to publish his work and a variety of other things that were called up under – I think it was section 114 of the Act, from memory.

45

MR BEASLEY: Right. And you mentioned in your statement you commenced your employment with the Murray Darling Basin Authority in March 2009. And

you've told us that at least when you commenced your employment, you had responsibility for – you were part of the group that had responsibility for determining the environmentally sustainable level of take?

5 MR BELL: That's correct.

MR BEASLEY: Did your job have a title description in 2009?

MR BELL: I'm sure it did.

10

MR BEASLEY: You can't remember?

MR BELL: I don't know what it was. It probably wasn't a great deal different to when I left, in fact.

15

MR BEASLEY: In your statement, you say when you started with the Basin Authority there were two or three directors. Do I understand that use of that term to be like two or three heads of various departments that were responsible for a particular part of the Basin Plan?

20

MR BELL: Yes. There were – so the intention, I think, was that there would be 12 directors, one for each of the anticipated Basin Plan chapters. But when I arrived there, there were only two or three of those. And prior to my arriving, those people had, you know, very broad responsibilities indeed.

25

MR BEASLEY: Right. Can I ask you this: when you first started the MDBA and had a role in the development, I will call it, of the environmentally sustainable level of take, how many people were in your particular team?

30 MR BELL: Two. Well, three if you include me.

MR BEASLEY: All right. What qualifications did those other people have?

35 MR BELL: I don't know the answer to that question. They were there before I arrived. I didn't interview or appoint them.

MR BEASLEY: Right. Were they scientists or - - -

40 MR BELL: One had worked for the Department of Environment in the order divisions there.

MR BEASLEY: Yes.

45 MR BELL: So it, perhaps, might be fair to call her a policy officer.

MR BEASLEY: Right.

MR BELL: And the other had not so long before joined the Murray Darling Basin Commission, as it then was. And he was doing some work, at that time, around risk assessment.

5 MR BEASLEY: All right. You mentioned in your statement that when, initially, the MDBA you had responsibilities, some responsibility in relation to both the environmentally sustainable level of take and work on the environmental watering plan. But, ultimately, that job became too big for one person and you took responsibility for the environmental watering plan part of the Basin Plan?

10 MR BELL: That's correct.

MR BEASLEY: So what is now chapter 8, I think?

15 MR BELL: Yes.

MR BEASLEY: And when did that – when did you take over that specific responsibility?

20 MR BELL: I don't have a clear recollection but it was something in the order of six to 12 months after I commenced there.

MR BEASLEY: Let me help you. Was it before – do you recall whether it was before or after the publication of the guide, for example?

25 MR BELL: Before

MR BEASLEY: So at some stage prior to October 2010, your role became – went from being a joint role in relation to ESLT and Environmental Watering Plan to focusing on drafting those parts of the Basin Plan that related entirely to the Environmental Watering Plan?

30 MR BELL: That's correct.

35 MR BEASLEY: You say in your statement, though, that you maintained a high level of interest in what became the determination of the ESLT. Correct?

MR BELL: Yes.

40 MR BEASLEY: Can you just describe the working environment there. Does that mean you were, for example, having regular conversations with people that were working on the ESLT part and they having regular conversations with you concerning the environmental watering plan part of the Basin Plan?

45 MR BELL: Yes. Although, as the work in both spaces hotted up, the regularity of that diminished somewhat.

MR BEASLEY: Okay. And I will take it the work in that would – would I be right in assuming the work in relation to those matters hotted up mainly in 2011, after the publication of the guide? Or was it - - -

5 MR BELL: It probably continued to hot up starting before the publication of the guide.

MR BEASLEY: - - - fairly intense at the publication of the guide and preparing the guide?

10

MR BELL: It was.

MR BEASLEY: Okay. You say in your statement that, I think, where you say responsibility sat with the board members to determine the ESLT and EWP. Does that mean – do I take it you mean ultimate responsibility resided with them?

15

MR BELL: Yes. That's correct.

MR BEASLEY: Presumably, for the board to be informed by the scientists and other people with particular expertise in drafting parts of the Basin Plan such as environmental watering plan or in determining crucial parts of the plan like sustainable diversion limits and ESLT?

20

MR BELL: Yes. I would agree with that.

25

MR BEASLEY: All right. But it was up to them to make the final decision?

MR BELL: That's correct.

MR BEASLEY: All right. Did – what was the size of the team, for example, that was working on the Environmental Watering Plan that worked under your authority?

30

MR BELL: I think it started out as three people, including myself.

MR BEASLEY: Right.

35

MR BELL: And it stayed at about that level for most if not all of the time leading up until the publication of the Basin Plan of 2012.

MR BEASLEY: Right. And how many people, to your recollection, were working on the determination of the ESLT. Say up to and including the date when the plan was legislated in 2012?

40

MR BELL: Something in the order of six to 10, I think. I'm not completely sure.

45

MR BEASLEY: All right. And those people, of course, had a job at one of the – I assume, one of the big tasks for the people working on the ESLT. No doubt one of

many, but one of the first ones would have been deciding what were the key environmental assets?

5 MR BELL: I think that's probably the challenge.

MR BEASLEY: The biggest challenge?

MR BELL: I think so. Because that's where you have to exercise judgment.

10 MR BEASLEY: Do you recall there was something like – I think the states were asked to identify what their – each of their key environmental assets. And they nominated something like 20,000. Does that ring a bell?

15 MR BELL: Yes. I don't really – I couldn't sort of swear the actual number but there were many thousands. They did it in quite a different way at very different scales as well.

MR BEASLEY: Was that part of the work you were doing when you had responsibility for the ESLT?

20 MR BELL: Yes.

MR BEASLEY: All right. And, I think, ultimately, about 2442 were settled on as key environmental assets. Does that - - -

25 MR BELL: That number was used. But I don't think that characterisation was very accurate.

MR BEASLEY: Right.

30 MR BELL: And, in fact, those were the ones that had a name.

MR BEASLEY: All right. But is my understanding correct that during the period of time when you were – had responsibility in the environmentally sustainable level of take space, one of the things that you were particularly interested in and concerned with was the definition of that term in the Water Act?

35

MR BELL: Absolutely.

40 MR BEASLEY: That wasn't something you ignored or took in faith; that was something you went and looked to the Act and went to the text of the Act to see what did we have to do?

MR BELL: Repeatedly.

45 MR BEASLEY: And am I right in considering that in relation to the work that you were doing in relation to environmentally sustainable level of take – and I want you

to ignore for a moment any external legal advice that you were given – in terms of the work you were doing for whatever reason, social and economic outcomes didn't factor in to your consideration of what's required by an environmentally sustainable level of take under the Act?

5

MR BELL: That's correct.

MR BEASLEY: All right. And I assume, also – and tell me if I'm wrong, but your reading of the Act and the definition of environmentally sustainable level of take was one where you considered that the environmentally sustainable level of take couldn't compromise any of the criteria that were listed in that definition. In other words, you couldn't sacrifice key environmental assets for key ecosystem functions. You couldn't sacrifice or compromise key ecosystem functions for the productive base, and you couldn't compromise the productive base for key environmental outcomes. They all had to be achieved to reach an environmentally sustainable level of take, as you understood the Act?

20

MR BELL: Yes. And further to that, it was my understanding that which of those criteria might have most constrained the limit of take was going to be determinative.

MR BEASLEY: All right. Can you just explain that perhaps a little bit more fully so that I – I might be the only one that doesn't fully understand that?

25

MR BELL: Sure. So there are sort of four broad criteria. Key assets, key functions, shorthand here of course, productive base and key environmental outcomes. And each of those separated by an "or". And my understanding was to the effect of that was for example if the limit imposed by A was 10 and the limit imposed by B was 5, then 5 would prevail because of the effect of "or" between those four elements.

30

MR BEASLEY: I understand. So the level of water required for the environment for achieving B might be less than the water required for the environment to achieve outcomes for key assets, it was the higher volume for the environment that had to be met then?

35

MR BELL: Exactly.

40

MR BEASLEY: Had to be part of the ESLT. All right. You mentioned in your statement that you formed the view that the use of the word "compromise" in the definition was – in the sense you had that was – connotes that things will work, and functions are sustainable. Could I ask you to explain that more fully, "things will work, and functions are sustainable"?

45

MR BELL: Yes. So what I mean by that is that taken as a whole, the assets and the functions productive base – perhaps the outcomes are slightly different – of the environment of the Basin would be placed on to a sustainable footing wherein it would be sort of resilient to droughts and floods and hopefully some degree of

climate change, depending on how extreme that was, and that the – those ecosystems would become sort of self-maintaining without the need for constant intervention.

5 MR BEASLEY: And does that also include – and tell me if I'm wrong, but does that also include the concept in relation to, for example, key environmental assets that were in a degraded state prior to the plan – an element of restoration?

MR BELL: Yes.

10 MR BEASLEY: Can you tell us in your statement that the hydrological indicator sites referred to in the guide were places in the river where hydrological data is collected, from which – which can be used in models. Can you just explain what a hydrological indicator site actually is. What's the hardware there, if you like?

15 MR BELL: In most instances, as far as I understand it, there's a gauge. So there is an automatic gauge on the river that measures flows, that is periodically – there's periodic testing of it and calibration of it, and that that data sort of collectively will tell you something that flows in the river over time at that place.

20 MR BEASLEY: All right. You also tell us that decision-making in relation to the determination of the environmentally-sustainable level of take was all based on environmental and economical considerations. Just so I understand that, is that – was that your experience when you were working and had some responsibility for the ESLT, or was that your understanding not only in that period, but for a period after  
25 that time?

MR BELL: That's my understanding of both when I was working on it and up until the guide.

30 MR BEASLEY: And by decision-making, do you actually mean more the work that was being done by people like you and people working for you to determine an ESLT in terms of presenting it to the ultimate decision makers, that work was only influenced by ecological environmental considerations?

35 MR BELL: That's my understanding.

MR BEASLEY: All right. You mention – when you – was Mr Taylor the chair of the MDBA when you started in 2009 or did he come - - -

40 MR BELL: No, he hadn't been appointed.

MR BEASLEY: He was appointed some time in 2010 or late '09?

45 MR BELL: I think it was later in 2009.

MR BEASLEY: Okay. We know he resigned in I think December 2010. So he was only there for about 12 months?

MR BELL: May have been a little longer. I'm not sure.

MR BEASLEY: Yes. All right. You quote him in paragraph 25 of your statement where you say he said on many occasions:

5

*Well, this is what the Act requires us to do. So this is what we are going to do.*

Tell me if I'm wrong, but is that directed to him saying something about what needs to be considered in relation to – sorry, what is a relevant consideration in terms of determining an environmentally sustainable level of take?

10

MR BELL: Yes. That's broadly what he was referring to.

MR BEASLEY: And am I right and again, tell me if I'm wrong, but he was referring to the Act requires us to either prioritise or only consider environmental considerations and that the ESLT can't be compromised by social and economic outcomes?

15

MR BELL: Yes.

20

MR BEASLEY: All right. Now, when you have quoted him, is that – when you say he said on many words to that effect on many occasions, was that in discussions within the MDBA, or were they words that were relayed to you by another person, or you actually heard for yourself?

25

MR BELL: I've heard him say it. I've seen it purported, but he said it in public meetings.

MR BEASLEY: When you say – when you are talking about the times you heard him say it, were these – what sort of occasions were they? Describe the nature of the occasion?

30

MR BELL: Staff meetings or when I was in attendance at the board or that sort of thing. And I think he also said it – this it was quite a considerable amount of meetings, public meetings that sort of thing.

35

MR BEASLEY: Just pausing the staff meetings. He's the chair of the Authority at the time. Obviously, from that, there were times when Mr Taylor attended staff meetings?

40

MR BELL: Yes. Not very frequently, I don't think, but yes.

MR BEASLEY: And there were times when your responsibilities meant that you had to attend board meetings?

45

MR BELL: Yes.

MR BEASLEY: And were – the times that you had to attend board meetings were in order to update the board on work being done either on the ESLT determination, or the environmentally sustainable audit?

5 MR BELL: Yes. Particularly the latter, I think.

MR BEASLEY: Yes. And at the same board meetings that you attended to discuss the environmental watering plan, were responsible people for the environmentally sustainable level of take also at that meeting updating the board concerning that  
10 work?

MR BELL: They would have been at various stages, but I technically would only go for those items that I was responsible for.

15 MR BEASLEY: Okay. During the course of those board meetings you heard Mr Taylor say words to the effect in the context that I've asked you to consider – can I ask you whether he – was this something he was saying with a – any element of frustration?

20 MR BELL: I got the impression that he felt it was a challenging constraint from his perspective. And certainly when the guide was published and there were public meetings with quite a bit of resistance, he had to front – did front many of those meetings, and I guess he felt – well, I gained the impression that he felt a bit uncomfortable about the task that he was given.

25 MR BEASLEY: Right. Through the constraints of the legislation?

MR BELL: Yes.

30 MR BEASLEY: Yes. And, in particular, the definition of ESLT I assume?

MR BELL: Yes, particularly.

MR BEASLEY: Amongst anything else, that was a key one?  
35

MR BELL: Yes. And I think also the then interpretation of the objects of the Act and perhaps to a slight lesser extent sections 20 to 23.

MR BEASLEY: Right. All right. You talked about the reaction to the guide.  
40 Perhaps you can just explain that the guide was published in October 2010, and you say in your statement, there was a strong negative reaction to it. Can you just explain what you knew about that?

MR BELL: I think it was – it has been most characterised by the burning of a  
45 number of copies of the guide outside the place where the meeting was being held in Griffith at – I'm not sure when, but, you know, sort of late 2010, early 2011, I guess.

MR BEASLEY: And was that the subject of – is that rather unfortunate incident the subject of discussion between you and other employees of the Basin Authority?

MR BELL: Yes.

5

MR BEASLEY: And what was the nature of those discussions concerning that sort of reaction to the guide?

10 MR BELL: I think they ranged from a degree of frustration, some amusement because apparently the guide had been printed fairly quickly and had to put some sort of a finish on it which made it a bit fire retardant. So they had some struggle getting a bonfire going. All the way through to probably unfair characterise it as a degree of alarm at the sort of resistance that was being displayed.

15 MR BEASLEY: Were people shocked by that reaction?

MR BELL: I think some people were, yes.

20 MR BEASLEY: When you say some people, do you know either directly or second-hand whether Mr Taylor or other members of the board were shocked by that reaction?

MR BELL: I don't think I know whether they were shocked or not, but they - - -

25 MR BEASLEY: So you are talking mainly about the reaction of members of staff?

MR BELL: Yes. I think people were probably displeased by it, perhaps an understatement, but whether they were shocked, I'm not so sure.

30 MR BEASLEY: All right. You say in your statement in paragraph 27 – and we are going to – I'm going to need you to expand on what you precisely mean by this – but you say that you think that the board interpreted the provisions of the Act as it suited them and that that decision was driven by the strong negative reaction you just described in relation to the guide. You then say:

35

*Some people were concerned about the states pulling out of the plan and the need to find a compromise and ensure that the plan could be legislated.*

40 Just breaking that up, where you say “Some people were concerned about the states pulling out of the plan”. Who were you precisely talking about and tell us the source of your knowledge?

45 MR BELL: There was quite a lot of conversation about that in the MDBA at the time and I had seen managers talk about it. And I don't specifically recall either hearing or not hearing board members talk of it, but it was – it was generally conversed about. I will put it that way.

MR BEASLEY: Right. Okay. Interpreting provisions of the Act as it suits the board – is that a reference to the report that was actually ultimately prepared on the environmentally sustainable level of take in 2011? Is it a reference to the guide? Is it a reference to the final Basin Plan as enacted, or some combination of the lot?  
5 Please answer that in any way you want?

MR BELL: I think it's a reference to a transition from a pre-guide or publication of guide point to the subsequent publication of the ESLT report and the making of the Basin Plan. Somewhere there was a change in understanding about what the Water  
10 Act required the Murray-Darling Basin Authority to do.

MR BEASLEY: It is probably no secret, but I assume that that change was that now by ultimately some volume of water social optimising social and economic outcomes, or not creating social and economic impacts of particular magnitude  
15 would become part of the framework for determining an environmentally-sustainable level of take?

MR BELL: Yes. I think particularly the latter.

20 MR BEASLEY: The impact?

MR BELL: The limiting – some limitation on the impact needed to be given weight.

MR BEASLEY: And when - - -  
25

MR BELL: I should say social and economic impact.

MR BEASLEY: Yes. When did it become, as far as you can remember, clear to you that that was – that change in approach had taken place, and in what manner was  
30 it communicated to you, and what way did you find out?

MR BELL: As to when, I can't be precise, but I think it was at some point following Mr Knowles' appointment as chair of the board.

35 MR BEASLEY: That's early 2011?

MR BELL: If you say so, I'm happy to agree to it. I don't actually recall.

MR BEASLEY: You don't have to agree with anything I say, but just helping you, Mr Taylor resigned in December '10, and, perhaps, again to help you, we know the  
40 guide came out in October '10 and the ESLT report October '11. So did this change happen some time during the course between those two things?

MR BELL: Yes, in my opinion.  
45

MR BEASLEY: All right. And was there – was it conveyed in any direct way by anyone with authority to do that, or did it simply become clear by the nature of what was going on in terms of determining an ESLT?

5 MR BELL: I think both things are true. At some point, there was a very clear understanding that the sustainable diversion limit of it had to be beginning with a number two.

10 MR BEASLEY: All right. Now, just pause there, then. When you say there was an understanding that the – it had to be a number beginning with a two, where did you come to have that – where and in what circumstances did you come to have that understanding?

15 MR BELL: My understanding is that it was a decision of the board conveyed by the senior management.

MR BEASLEY: Right, but was it - - -

20 MR BELL: But I don't recall hearing the board say so.

MR BEASLEY: Who said those words or words to that effect to you then, or how did you hear that?

25 MR BELL: I – I imagine I heard it from a number of parties. But, for example, the – the chief executive at the time, Dr Rhondda Dickson. Dr Tony McLeod had a fair bit to do with the ESLT and SDL assessment at that time. I can recall him talking about it. And it was a topic of general conversation.

30 MR BEASLEY: When you say “general conversation”, it has to start with a two. Do I take by that being topic of general conversation, this was something simply discussed amongst the staff in a relatively frequent manner that whatever work we are doing on this, ultimately, it has to end up with a result that starts with a two?

35 MR BELL: Yes. To the extent that as often happens in these circumstances, jokes would come – jokes are made about it.

MR BEASLEY: Yes.

40 MR BELL: So one of the jokes was about, well, which – which postcode should it be. And at the time, Tony Windsor was the member for New England, and somebody quipped, “Well, perhaps it should be Tony Windsor's postcode”.

MR BEASLEY: That starts with a 4, does it?

45 MR BELL: No, it starts with a two, New South Wales.

MR BEASLEY: It starts with a two. Someone else starts with a four?

MR BELL: It does. My sort of contrajoke, as it were, was I wish it were Senator Joyce's postcode, as he then was, because at that time, he was resident in Western Queensland, and so it would have started with a four, in those circumstances.

5 MR BEASLEY: Can I ask you this in relation to this issue, your evidence you are  
giving about discussions and statements that it has to start with a two, and let me  
refresh your memory this way, that the guide, you will recall, in its technical part,  
said that the amount of water required for the environment would be between, in  
10 round terms, 3900 billion litres and 6900 billion litres, with the lower figure having a  
high uncertainty of achieving environmental watering requirements and targets and  
the higher figure having a lower uncertainty of achieving those targets. Was it  
generally – can you tell us whether it was generally the view amongst the staff, the  
expert staff of the Basin Authority at the time, that somewhere between that range  
15 was the figure that would satisfy the definition of environmentally sustainable level  
of take based on environmental criteria etcetera from the Water Act?

MR BELL: Yes, I think that was the general consensus.

MR BEASLEY: All right. So the ESLT report models 2400, 2800 and 3200 and  
20 ultimately an amount for the environment is determined as 2750 just 12 months  
later?

MR BELL: Mmm.

25 MR BEASLEY: And you've told us of the discussions between staff and the  
comments from management, etcetera, that it has to start with a two. Was there any  
discussions between staff about whether that was a satisfactory position for  
determining an environmental sustainable level of take, and in relation to that, please  
feel free to tell the Commissioner whether there was any – and there may not have  
30 been – but whether there was any impacts on morale, etcetera, amongst the  
organisation in relation to it has to start with a two?

MR BELL: There certainly were conversations amongst some staff. I think it  
highlights those that were there because they were hoping to do something good for  
35 the environment of the Murray-Darling Basin or aquatic environment were  
somewhat discouraged by that, and those who were particularly the frontline of that  
work, I guess, found themselves doing work that sought to justify or quantify both  
what was to be achieved by an SDL of 2800, or subsequently 2750.

40 MR BEASLEY: Tell me again if I'm wrong, but saying the number has to start with  
a 2, doesn't sound like an approach to determine an environmentally sustainable  
level of take that is based on the best available science. Was that the feeling amongst  
the Basin Authority staff at the time?

45 MR BELL: Certainly amongst many, and I don't agree – well I agree with what you  
say. I don't think it is use of the best available science.

THE COMMISSIONER: Now, if science had already established that whatever the  
ESLT was, it would not be as high as 3000 or above, then logically you might say it  
has to be less than three if science had already established that 3000 or above would  
be too high. Have any science established a 3000 or above would be too high for an  
5 ESLT to your knowledge?

MR BELL: None that I'm aware of.

THE COMMISSIONER: Were you ever aware of any published information that  
10 there was anybody alive who thought that the figure could not be 3000 or above, had  
to be less, as a matter of science?

MR BELL: I'm not aware of any scientific publication to that effect.

15 THE COMMISSIONER: I take it - - -

MR BELL: Or opinion, I should say.

THE COMMISSIONER: Because there are matters of judgment involved by  
20 definition in the concept, aren't there?

MR BELL: Yes, particularly by effect of the word "key" in three of those criteria.

THE COMMISSIONER: But whatever the word key means, I take it that in your  
25 understanding and attempt to apply it, it involves, say, an asset or an outcome, the  
restoration or protection of which is important for the ecosystem. Is that correct?

MR BELL: Yes.

30 THE COMMISSIONER: Or to put it another way, which if it was not restored or  
protected, or if it was further degraded, would mean that the state of the system was  
not improving?

MR BELL: Yes. And/or was being compromised.

35 THE COMMISSIONER: But why I say that in particular is that correct me if I am  
wrong, as I read the agreements, the interstate intergovernmental agreements as well  
as the Water Act and the Basin Plan, it's not neutral about an outcome. The outcome  
is to improve the system from a state of degradation which all the governments  
40 agreed existed?

MR BELL: That's my understanding.

THE COMMISSIONER: Have you ever heard anybody suggest any different  
45 understanding, that is, that it was not about improving?

MR BELL: Not that I can recall.

THE COMMISSIONER: Were you aware of any kind of public consultation about the setting of an ESLT?

5 MR BELL: I think the answer to that must be yes because there was publication about how it was set, the so-called ESLT report ..... referred to.

THE COMMISSIONER: There is a requirement to explain it, is there not?

10 MR BELL: I think so. And there's also a consultation undertaken as part of setting the Basin Plan which, it seems to me, must include the SDL and, therefore, the ESLT, however explicitly or implicitly that might be.

15 THE COMMISSIONER: Have you ever seen anything published, including by or on behalf of the authority, to the effect that as a matter of science, the ESLT would be a figure lower than 3000?

MR BELL: No.

20 THE COMMISSIONER: How shall I understand that, that – because it sounds as if an essential step to promulgating some figure less than 3000 is missing, if there has not been a scientific determination to that effect?

25 MR BELL: Well, my understanding is that a number less than 3000 is a function of some assessment of not only what's been sought to achieve for the environment, but also how much social or economic pain was acceptable in setting that number. I don't know how that equation was settled, but to the sense you ask how should you understand that, well, I think the answer is because other matters were entered – or other factors played a role in the decision about the number.

30 MR BEASLEY: If a determination has been made, say, by the Basin Authority as to what the key environmental assets, key ecosystem functions, key environmental outcomes, etcetera, are, under that definition, and that an ESLT that satisfies all those criteria, say, an amount of water going back to the environment of, say, 4000  
35 gegalitres, as a hypothetical, I suppose would I be right in saying one way of reducing that figure would be to start removing, for example, certain environmental assets from the definition of being key environmental assets?

MR BELL: Yes. That's logical.

40 MR BEASLEY: But, of course, that decision could only be made if it was made not to try and drag the number down but if, based on the best science, an environmental asset should not be considered a key environmental asset?

45 MR BELL: That's a fair assessment.

MR BEASLEY: So, for example, it would be hard to justify a decision under that – in the sense that it requires judgment, a decision under that – the criteria for

environmentally sustainable level of take that said, for example, the Coorong, or the Hattah Lakes, or the Barmah Forest should not be considered a key asset?

MR BELL: I'd agree with that.

5

MR BEASLEY: That sounds the idea of the best available science, given they are icon sites and Ramsar wetland, etcetera?

MR BELL: Exactly.

10

MR BEASLEY: Yes.

THE COMMISSIONER: Well, I have come across a deal of material which suggests there are widely divergent views about the merits of taking steps to restore and protect the Coorong ecosystem. Are you aware of – in general terms of such material?

15

MR BELL: Yes, I am.

THE COMMISSIONER: Now, it won't be my role as a Royal Commissioner to enter that contest in what one would call a political sense. But I have noticed that some of the statements about the Coorong are to the effect that it might as well be written off in order to avoid further reductions in consumptive take upstream. Have you heard such things being said?

20

MR BELL: I have heard them or read them. Yes.

THE COMMISSIONER: Now, what I have never heard or read is that the Coorong would not be a key environmental asset in the sense the Water Act uses that expression. Have you heard anyone say it's not key?

25

MR BELL: No.

THE COMMISSIONER: If I am correct in my recollection of what many people have said and written, then, it does occur to me that anything which would not – anything which would further degrade the Coorong, which could be avoided by more water for the environment, would have an effect on the level of environmentally sustainable level of take, by definition?

30

MR BELL: I would say in all probability – I'm hedging a little bit because it depends – I might be splitting hairs but it depends how that water is used.

35

THE COMMISSIONER: Quite.

MR BELL: So if you don't – if you were not to spread it around and allocate it only to Coorong, then, that may be less true.

40

45

THE COMMISSIONER: Yes. The almost impossible task, at least to me as a scientific layman, that the Act gives or gave to people like you, was the restoration and protection, if you like, of the whole system, including all its key assets and outcomes?

5

MR BELL: If I understand you correctly, Commissioner, I think what you are saying is that – that the question – the question that was posed to us is, well, what's key and what parts less than everything is not key?

10 THE COMMISSIONER: Yes.

MR BELL: And that's a difficult decision to make and if – you know, I guess you are indicating that's what your question was, well, I couldn't agree with you more. Very difficult. But maybe not impossible, but difficult. And would require some degree of judgment. I don't think it could be determined empirically.

15

THE COMMISSIONER: Unquestionably. Well, at least not mechanistically. Yes. It would be empirical in the sense that you would be always open to experience teaching you a lesson, would it not?

20

MR BELL: Yes. I guess that's a fair point.

THE COMMISSIONER: You have to revisit, not least because the system is variable?

25

MR BELL: And the climate has changed.

THE COMMISSIONER: And the climate is changing?

30 MR BELL: Yes.

THE COMMISSIONER: That leads me to the next thing, if it is convenient to ask now. Are you aware of any material published by or on behalf of the Authority which would answer the description of an identification of the effects of climate change on the continued availability of the Basin water resources?

35

MR BELL: I'm aware of material, I'm not sure what its status is but, certainly, there has been some – and it may never have settled. But there has certainly been some consideration been given to, you know, the effect of climate change. Having said that, my understanding is that it was – did not form part of the determination of the sustainable diversion limit, per se.

40

THE COMMISSIONER: You may be anticipating me. I'm finding it difficult to find references to the risks arising from the effects of climate change to the condition or continued availability of the Basin water resources in the Basin Plan?

45

MR BELL: Bear with me, I will see if I can find some. I'm not sure if it's there or not.

5 THE COMMISSIONER: Sorry to put you in into this but I'm sure you sympathise, the plan is not the most straightforward document to read. Except chapter 8, of course?

10 MR BELL: That's very kind of you Commissioner. Others have a different view. I – my recollection is that there is something in here on risks.

THE COMMISSIONER: Well, normally that's required by section 22?

MR BELL: And I know work was done on risks.

15 THE COMMISSIONER: I'm just finding it hard to identify them. 4.02 is where I naturally look?

MR BELL: So that chapter, chapter 4, is it. There was - - -

20 THE COMMISSIONER: Is this really the case, and I ask this with some incredulity, but there you go. Is it really the case that 4.02, section 4.02 of the Basin Plan, is where I'm meant to find compliance with section 22, item 3. That's it?

25 MR BELL: Sorry, I don't recall precisely what you asked me, Commissioner.

THE COMMISSIONER: Is 4.02 where I find identification of the risk arising from climate change?

30 MR BELL: I think that's what it's intended to do. It was intending to address all the risks, whether it - - -

MR BEASLEY: Can I help you, Commissioner?

35 THE COMMISSIONER: Please.

40 MR BEASLEY: I will just read from the CSIRO report. This isn't directly coming from the Basin Plan but it's in answer to what you are asking the witness. CSIRO report titled 'Science Review of the Estimation of an Environmentally Sustainable Level of Take for the Murray-Darling Basin.' It is dated November 2011. Authors Young, Bond, Brookes Gawne and Jones. And I'm reading, I think, from page 3. I don't have the report in front of me, I have my notes of it. But in the CSIRO report which is a review of the ESLT report, the CSIRO says this:

45 *The MDBA has modelled the likely impacts of climate change to 2030 on water availability and this modelling is robust. MDBA has not used this information in the determination of SDLs for the proposed Basin Plan but, rather, has determined SDLs using only the historical climate and inflow sequences.*

That is the climate and inflow sequences from 1895 to 2009. Continuing on:

5            *This reflects a policy decision by MDBA to initially accept the climate change risk sharing amongst users that is representative of current water sharing plans.*

10 I have no idea what that means. But one thing you do take from that is that climate change projections, which include climate change projections for the Basin, that are contained in a CSIRO report at 2008, were not used in the determination of SDLs in the Basin Plan.

15 THE COMMISSIONER: Well, it's just that – this is relevant to Mr Bell's evidence about the making of these provisions. But, also, to the questions of legality, is it not? Because under section 22, the Basin Plan not only under item 3 has to identify the risks for the effects of climate change, but under item 5 it has to include strategies to be adopted to manage or address those risks.

MR BEASLEY: Yes.

20 THE COMMISSIONER: So that it was never legally available to the Authority to make a plan which identified, say, in very general terms, that the climate may change without also identifying what you were going to do to address that.

25 MR BEASLEY: Well, perhaps if they were here they might say that the capacity to amend or adjust the plan or reconcile it covers that. I'm not suggesting to you it does.

30 THE COMMISSIONER: No. Well, that doesn't sound right, bearing in mind the Water Act permits amendment of the plan and the Water Act requires you have to strategies. It's unlikely that one renders the other unnecessary. So, Mr Bell, assume the Basin is drying, we fear, as a result of what we call climate change. And assume that that's a relatively long term process that is unlikely to reverse itself so that we could talk about a Basin becoming wetter?

35 MR BELL: Mmm.

40 THE COMMISSIONER: What is the kind of thing which, in your experience – what's the range of possibilities by which you might devise a strategy to address that risk?

MR BELL: Hitherto I haven't given it perhaps a great deal of thought. But it seems to me the obvious one might be to make some additional provision for the environment now on the basis that that provision might finish towards its exact need at some point in the future.

45 THE COMMISSIONER: One might also consider, as it were, a warning or caution for consumptive purposes that users of water may not be able to count on as much in the future as they have enjoyed in the past?

MR BELL: They could do. Yes.

THE COMMISSIONER: For the purposes of deciding to invest money, that could be quite important information, could it not?

5

MR BELL: It absolutely could be. At the risk of perhaps going slightly off topic – well, two things if I may. If I can return to your first question or your earlier question, is 4.02 where it's meant to be found?

10 THE COMMISSIONER: Yes.

MR BELL: I mean, I think the answer is yes. If you can't find it, then, I guess it is not there. And I don't know that it's anywhere else

15 THE COMMISSIONER: Well, I'm sorry. I don't want to be rude about the genuineness with which the drafting exercise was undertaken but I am to be rude about its result. That seems to be nothing more than a slightly more long-winded description of what the statute required to be identified. You asked to identify a climate change risk and they're saying it is a risk from climate change. Which  
20 doesn't seem to have been a very useful public exercise?

MR BELL: Quite. Now, I've lost my train of thought. I apologise.

25 THE COMMISSIONER: So 4.02, yes, probably that's where – that's the best they did. Yes?

MR BELL: I think you asked me a question that I was about to leap into and I've lost it, sorry.

30 THE COMMISSIONER: Was it about strategies?

MR BELL: Yes. Well, yes, you could certainly alert people to the fact that, you know, maybe – maybe they can't rely on water. You might also contemplate how you operate storages, how conservative you are with the allocation of water against  
35 the entitlements. Some work that was in consideration prior to my retirement and may or may not be being progressed now is to think about the effect that climate change would have on the environmental assets and functions and how that was distributed geographically and what that might mean in terms of keyness, for want of a better term, for particular assets and functions at a time. And, therefore, what that  
40 might mean more immediately for how you might go investing scarce water. So, for example, you may have something, an asset or a place which is of particular value now but with the application of an understanding of where the climate is heading and what that means, you realise that perhaps it's not destined to survive. Whereas,  
45 there's another location perhaps in another part of the Basin which perhaps not in as good a condition is more likely to survive, then, you may, in that kind of abstract scenario, say to yourself, "Well I should invest more water in the one in poorer condition even though, at the moment, it doesn't seem like it's as valuable because

it's the one that's likely to survive. This other one may not under climate change.”  
So that's a piece of work that - - -

5 THE COMMISSIONER: So a strategy might include something in the nature of a triage looking over the horizon for climate change, working out amongst those things which will get destroyed, the things which present the best prospect of avoidance of that?

10 MR BELL: Yes. And start to focus on those now. Because they may not be the things that are most important right now.

THE COMMISSIONER: Strategies then would also, presumably, involve irrigation use and similar triage decisions about it?

15 MR BELL: I would think as a matter of public policy it would be wise to do that.

20 THE COMMISSIONER: So if you don't think about climate change as the Act seems to require you, the Authority, to do, then, it would appear that you would postpone these decisions that I've called triage decisions about both environmental assets and the personally, socially and economically important decisions of – on how to use irrigation water?

25 MR BELL: Yes. And I guess as – as with many decisions postponed, sometimes you lose options in the process. And all of that, I suppose, might be taken to assume that climate change will progress smoothly. But I think the evidence is it's likely have steps. And so if you get a step change, you don't gradually move from one situation to another. It just shifts.

30 THE COMMISSIONER: Well, now, one of the strategies identified, supposedly, in 4.03 of the plan, at 4.03(3)(h)(iii), is to improve knowledge of the impact on Basin water resources of climate change. Have you seen anything published by the Authority contributing to improved knowledge of that?

35 MR BELL: I have no recollection of such.

THE COMMISSIONER: So – knowledge of the impact on Basin water resources of climate change is at least partly scientific. Is that right?

40 MR BELL: Yes.

THE COMMISSIONER: Indeed, largely one would have thought?

MR BELL: Yes.

45 THE COMMISSIONER: And full of judgment calls where there's room for legitimate and perhaps very considerable difference of opinion among people of good faith?

MR BELL: Absolutely.

THE COMMISSIONER: That sounds to me like it's the kind of area where one needs public debate?

5

MR BELL: I agree.

THE COMMISSIONER: And it sounds to me, therefore, as if there needs to be as much information as possible published in order to inform that debate?

10

MR BELL: I agree. In fact, I was about to say, informs public debate.

THE COMMISSIONER: Again, are you aware of anything published by or on behalf of the Authority adding to the public information on the basis of which there could be a debate concerning knowledge of the impact on water resource of climate change?

15

MR BELL: Nothing that springs to mind, Commissioner.

20 THE COMMISSIONER: Thank you.

MR BEASLEY: Commissioner, Ms Masters has just directed my attention to section 8.04 of the Basin Plan, which is part of the Environmental Watering Plan. You will see there, Overall Environmental Objectives. One is to ensure that water dependant ecosystems are resilient to climate change. Then if you go to 8.07, there's a range of setting out particular objectives to make ensuring water dependant ecosystems are resilient to climate change and other risks and threats.

25

THE COMMISSIONER: The difficulty is this is only chapter 8. This is only for environmental watering plans. It doesn't tell you about consumptive use.

30

MR BEASLEY: There is a bigger difficulty. How do you do this when you are ignoring climate change for the purposes of the Basin Plan? It's one thing to state an objective. I mean, that's almost slightly mad.

35

THE COMMISSIONER: Mr Bell, you are familiar with chapter 8, aren't you?

MR BELL: I should be.

THE COMMISSIONER: Yes. And you've had some of its relevant provisions just drawn to your attention by Mr Beasley. Again, are you able to point to anything outside this plan itself, including its chapter 8, whereby the Authority has made available information concerning proposed responses to climate change?

40

MR BELL: No, I'm not, Commissioner. I should say, in relation to 8.07, that it's really – well, it's about what you are trying to achieve with the environmental water you've got as opposed to how much environmental water you should have. If I can put it that way.

45

THE COMMISSIONER: Yes. Quite. So chapter 8 is about Environmental Watering Plan, which, as you say, takes as a given what is available for environmental watering?

5 MR BELL: Mmm.

THE COMMISSIONER: And this is regulating what you are going to do with it?

MR BELL: Yes.

10

THE COMMISSIONER: In other words, it's not just add water, it is a whole lot more than that?

MR BELL: Yes. And, however achievable these objectives might be for a given  
15 quantity of water, they help to focus the mind on how to use that water.

THE COMMISSIONER: Yes.

MR BELL: Along with various other things.

20

THE COMMISSIONER: Does resilience to climate change, this notion of resilience, does that involve these triage decisions that you were talking about where some sites may be given up in recognition of unstoppable changes in order to salvage some others?

25

MR BELL: It may do.

THE COMMISSIONER: So that's – that resilience on an overall system approach but if not resilience for a particular site, etcetera?

30

MR BELL: That's right. I mean, I think the one thing that is listed in chapter 8 we have endeavoured to do is to take a broader focus, sometimes called a landscape focus, or we called it a whole of Basin focus. Easy to say, hard to do. But if you – if you find yourself in a constrained – in situations of constraint which, almost by  
35 definition, we must, and more so if it's drying – if the Basin is drying as you postulated, then, if you take – it's only wise to sort of stand back and look at the landscape as a whole and try and work out what the – what the best thing that you can achieve over the longer term taking into account what you know about the trajectory of change. And that's going to mean, I think, not everything can survive.  
40 And, I suppose, in a sense, that's implied in a notion of key and it's also implied in what I think is a general understanding is that we are not trying to turn the Basin back to a predevelopment state. So some change is accepted there and the question is, well what's – what's the degree of acceptable change?

45 THE COMMISSIONER: Now, it doesn't surprise me to hear you say that the act – you don't understand the Act and the Plan or those working to implement them it's intended to produce a return to the state of affairs which would have obtained but for

European settlement. I understand that. But some content needs to be given to the repeated statutory formulation of protect and restore, which is picked up in intergovernmental agreements where there is an acceptance that there has been degradation and depletion that needs to be reversed?

5

MR BELL: Yes.

THE COMMISSIONER: How should I understand, do you think, the notion of restoring water dependant ecosystems? Restore them to what?

10

MR BELL: That's not specified. That's – that's left to the judgment of others, those who didn't write – other than – other – people who didn't write the Act. And so - - -

15

THE COMMISSIONER: It couldn't mean, though, making that which used to be wet even dryer, could it?

MR BELL: No. I wouldn't have thought so.

20

THE COMMISSIONER: That would be the opposite of restoring?

MR BELL: It would. Although, to be fair – or to be complete, I suppose, in my answer, having regard for that previous – most recent question and answer, some of that is going to be required, I think. But some restoration will also be required.

25

THE COMMISSIONER: Is it a fair generalisation that we seem to have reversed the system, in this sense, at least for the Murray and its tributaries, high in winter low in summer used to be the case and it's now the opposite?

30

MR BELL: Broadly. Yes.

THE COMMISSIONER: Is it unfair to say that one of the reasons for that is that the weather has been operated in a regulated regime so as to become a conduit for irrigation requirements?

35

MR BELL: It is fair to say that.

THE COMMISSIONER: And we all know that irrigation requirements tend to be higher with the crops we use in summer than in winter?

40

MR BELL: Yes.

THE COMMISSIONER: What does it mean in that state of affairs to talk about restoring water prevented ecosystems, do you think?

45

MR BELL: I think that it means some change to the regime imposed upon those ecosystems by the development of regulation of the water resources. So – and that

could be affected in a variety of ways. But, in essence, you would seek to have an increase in, broadly, those winter flows and winter-spring flows which are biologically relevant.

5 THE COMMISSIONER: That is to the invertebrates, plants and animals and birds, etcetera?

MR BELL: Yes, yes.

10 MR BEASLEY: Just to put some – this isn't a question for Mr Bell but just to put some precise or as precise as a science or best available science that I can before the Commission in relation to climate change projections, there are more recent projections that build on this work but there was a report by the CSIRO entitled 'Water Availability in the Murray-Darling Basin' in October 2008. And I'm – I  
15 won't paraphrase. Its key findings were that:

*The impacts of climate change by 2030 are uncertain, however, surface water availability across the entire MDB is more likely to decline than increase. A decline in the south is more likely than in the north and in the south a very  
20 substantial decline is possible. The median decline for the entire Basin is 11 per cent, nine per cent in the north and 13 per cent in the south.*

Now, using those projections for the guide, I think a figure of three per cent was factored into the SDL in the guide and then for the policy reason I described in  
25 reading from another CSIRO report, climate change was ignored in the actual Basin – sorry in the actual Basin plan. Paragraph 36 of your statement, Mr Bell, I would like you to explain this. You say that you were, early on in your employment with the Basin Authority, given the task of identifying key sites and sent away for half an hour to come up with an estimate of the SDL based on what those sites needed.  
30 Now, just reading that out loud, that sounds an impossible task. Can you explain it?

MR BELL: Well, I'm not sure why I was asked to do it but I had inferred that somebody had asked my boss at the time something along the lines of, well, what are we looking at here. Now, I don't know who that person might be.  
35

MR BEASLEY: Who was your boss at the time?

MR BELL: Tony McLeod.

40 MR BEASLEY: Right. Okay. Go on.

MR BELL: And so it was sort of a two-stage process, well, what do you think are the sort of key assets, functions. Our understanding of functions at the time was fairly rudimentary and so that sort of started with the obvious 16 Ramsar sites,  
45 although not all of them are really available for the Basin Plan to influence. And then worked out from that. And then subsequently, well, okay fine how much water do you think is required for that. We won't hold you to it, we just need some kind of

an estimate. And so as unscientific as it is, I sort of went away and extrapolated estimates from the areas I was familiar with and - - -

5 MR BEASLEY: In terms – by that do I take it that there had already been some estimates of, say, flow required for certain key environmental sites to - - -

10 MR BELL: Not – not as part of the work I was aware of in the Authority at the time, but there had been work done previous to that in other places. For example, there had been quite a lot of work done on Macquarie Marshes. So I sort of took some of that information, extrapolated it, did some rough calculations and came up with a recovery number, with some trepidation, I guess, but that’s the world I was living at the time, 4000 to 4,500 gigalitres from memory. Now, I think that’s not a bad estimate but I don’t want to suggest that is rigorous or necessarily or even at all reflects the ESLT. It’s just a kind of rule of thumb ballpark kind of figure.

15 MR BEASLEY: You say – or you tell us also that Mr Young, who was at the CSIRO but was doing some work on secondment with the Basin Authority, was given a similar task?

20 MR BELL: Yes. Dr Young. So you mentioned - - -

MR BEASLEY: Was he also given half an hour, or was he given slightly longer?

25 MR BELL: I don’t know the answer to that. I do remember having a conversation with him about how he approached it. I don’t actually recall specifically how he approached it but it was a different approach to mine. I think he built from the bottom up, as it were.

30 MR BEASLEY: Can I ask though, he wasn’t given days and weeks and months, this was a relatively short timeframe he was also given to do this task?

MR BELL: That’s my understanding.

35 MR BEASLEY: All right. And did you have a discussion with him about what number he came up with, or were you told by someone else?

40 MR BELL: I thought I was told by someone else that we weren’t very far part from one another which – and the reason I remember it because it struck me as more than surprising, given how I had approached it and that he had reached it in quite a different way. So by making reference to that I am really not suggesting either his number nor mine has any particular veracity. Really, it was coincidental. And I also think – and this is a matter of opinion rather than science or fact – that that’s about the right number. But it’s just my opinion.

45 MR BEASLEY: Well, it’s certainly a number, to everyone’s knowledge, including yours, that was within the range that was within the guide?

MR BELL: That's correct.

MR BEASLEY: I think we've covered "It has to start with a two". But as you were aware from the ESLT report there were three scenarios modelled: 2400 gicalitres, 5 2800 gicalitres and 3200 gicalitres. And the number, though, for the Basin plan – and I think also in the ESLT report – became 2750. And you have given some evidence in paragraph 44 of your statement, about Mr Knowles giving 2800, reduced by 50, to use your words, to get Queensland in the tent. Can you explain the circumstances as far as you know it in relation to 2800 becoming 2750?

10 MR BELL: Yes. I – well, as far as I am aware, Queensland were not comfortable with – perhaps I should back up a bit. So there's the overall sustainable diversion limit and there is then how it applies in each catchment. And there is a sort of third tier which is, you know, how each catchment contributes to downstream catchments 15 but leaving that aside for one moment. But Queensland were not comfortable about the sort of cuts that – that might have been applied, particularly in the Condamine-Balonne which is the most developed of their rivers, I guess, with the possible exception of the Border Rivers.

20 And so although I wasn't in attendance at and not privy to the details, my understanding is that Mr Knowles met with Queensland counterparts and they subsequently agreed to support the Basin Plan and that the cost of that was 50 gicalitres less return to the environment of the Condamine-Balonne. And in a sense – and I understand that the conversation today is about the legality and I'm not 25 making any observation on that, I guess that says two things. One, how was the number arrived at. But for me it also says something about what the number is purported to do. And I find it problematic that subsequent changes to the SDL are being portrayed as having environmental equivalents when I think they don't. And at least Mr Knowles deals transparently .....

30 THE COMMISSIONER: You mean he didn't pretend to a scientific foundation for the change?

35 MR BELL: Yes, that and also he didn't pretend that the change would have no effect.

MR BEASLEY: In paragraph 48 of your statement, you say this:

40 *That after the Basin Plan was made there were ongoing attempts to water down its requirements –*

and that you came under similar pressure too, for example, to produce documents that watered down the requirements that water resource plans have to meet. And you go on to mention chapter 10. Can you give us some specific examples of what you 45 mean by those statements?

MR BELL: Sure. So chapter 10, as you probably know, sets out the requirements that water resource plans have to meet in order for them to be accredited. Part 6 of chapter 10 deals with planning for environmental watering.

5 MR BEASLEY: Yes. You had responsibility for that?

MR BELL: Yes.

MR BEASLEY: Yes.

10

MR BELL: That's drafted a little differently to other parts of chapter 10, because of our understanding of the effect of section – I think it's 39 of the Act, maybe it's 36. I think it's 39. The gist of which, as I understand it is that if there are Basin Plan provisions that relate to water resource plans which are the same or similar to those elsewhere in the Basin Plan then the water resource plan provisions prevail if there is any conflict.

15

MR BEASLEY: Yes.

20

MR BELL: And having written chapter 8, which has at least a moderate amount of detail, what we – I was at pains to do was to avoid trying to reproduce it in some fashion that might lead to such a conflict. So 10.26 in particular, but also, I suppose, 10.27 and to a much lesser extent 10.28 reflect that. So 10.28 is really a restating of 21(5) of the Act, if my memory serves.

25

MR BEASLEY: Yes.

30

MR BELL: And I think one of the subsections of section 28 as well. So probably the most relevant is 10.26 where we say, where – sorry, I should rephrase – where the Basin Plan says, you know, the water resource plan must provide for environmental watering, so that's a very sort of positive language and you go out and make it happen, to occur in a way that is consistent with the Basin – with the Environmental Watering Plan – the Basin-wide environmental watering strategy and contributes to the achieving of the objectives in part 2 of chapter 8.

35

Now, probably in about 2014 or '15 – it may have been earlier, I'm not sure – the Authority decided that it was going to publish what it called position statements which were essentially statements that were supposed to help states to understand their obligations under chapter 10 and to some degree how the MDBA would assess water resource plans as they were submitted – and so position statements were required for 10.26, 10.27 and 10.28 respectively. And this – this caused an enormous amount of debate over years, I think, and part of that debate was, well, couldn't we just say to states just don't do anything inconsistent with the Environmental Watering Plan. And in my opinion the words don't say that, they definitely weren't intended to mean that and I thought that we shouldn't tell the states that because the provision required them to do something more than not doing worse, if you like.

45

And - - -

THE COMMISSIONER: You mean it requires you positively to seek to implement the watering plan?

MR BELL: Quite.

5

THE COMMISSIONER: Not to – not merely not to prevent it?

MR BELL: Correct. And that was done quite – from my perspective that was done quite deliberately because there are rules and processes and provisions that exist within the Basin now that are either designed for consumptive take or for one reason or another tend to block the best use of the environmental water. So there needed to be change to those, I thought – think. So in terms of your question, Mr Beasley, I think, you know, in essence the – there was – there was considerable effort to convince me that that needed to be, my words, watered down, and I felt very strongly, and still do, that that was in – that that was not the right position for the MDBA to tell states that they should adopt.

MR BEASLEY: The only – subject to anything the Commissioner wants to ask you, the only further matter of clarification I wanted to ask you that comes out of your – arises from your statement, in paragraph 74 you make mention of the Menindee Lakes reconfiguration supply measure. And you describe it as nothing short of environmental vandalism. I just want to understand where your knowledge of that supply measure comes from. Have you had access to and read, for example, the documents that have been produced to the Senate, such as the MDBA's analysis of the New South Wales Government's business plan in relation to the Menindee Lakes supply measure or did you gain knowledge of that during the course of your employment at the MDBA?

MR BELL: Both. Although, for the sake of accuracy, I should say that I haven't read it all. I've just read parts of the documents that were supplied to the Senate.

MR BEASLEY: What were you aware of the Menindee Lakes reconfiguration supply measure from your employment at the MDBA?

MR BELL: So my understanding, broadly, was that arising from the Basin jurisdictions agreement to seek so-called down-water up to 650 and up-water and so on, which is what you are aware of - - -

MR BEASLEY: Yes.

40

MR BELL: There were then sort of attempts to find, well, how can we find those savings? And one place to find such a saving might be to reduce evaporation and Menindee Lakes being a very large area, obviously, appeared to some to be a good candidate for such a reduction. And, I guess, it was argued that if you reduce evaporation at Menindee Lakes, then, you don't need to recover as much water for the environment. And I presume that means you don't need to recover as much water for the environment upstream in Menindee Lakes. So I had some general

understanding of that and I had some specific but, I emphasise, lay understanding of the importance of Menindee Lakes for the biology of the Basin. It has for a long time been well known as an important water bird site. Obviously, it depends on there being water there.

5

MR BEASLEY: I have seen pelicans there.

MR BELL: Yes. And various other species, I'm sure.

10 MR BEASLEY: Yes. I'm sure there's more than that. In fact, I know there is?

MR BELL: But more recently and, I think, perhaps more critically, the understanding of its role in the biology of the Basin population of golden perch has advanced enormously. And it turns out that a very large proportion of the population of all golden perch started there or spend their juvenile period in Menindee Lakes.

15

MR BEASLEY: Can I just ask you to pause there. When you were still employed by the Basin Authority, prior to or up to November '17, were there environmental concerns within the Authority about the supply measure relating to the golden perch or any other water birds or any other species during the time that you were there? Were those concerns being discussed about the supply measure?

20

MR BELL: They were.

25 MR BEASLEY: Was that from the time that the business case was delivered or prior to that even?

MR BELL: I think prior to that, Mr Beasley, but I can't be certain of that.

30 MR BEASLEY: Because there is a feasibility study, I think, as well that has to be supplied. But your recollection is that there has been a general concern about impacts on environment and ecology with reconfiguring the Menindee Lakes for the whole period you were aware of this proposed supply measure. Would that be a fair characterisation?

35

MR BELL: I think so.

MR BEASLEY: All right. And so your concerns in relation to environmental vandalism predate reading any documents you may have that the MDBA has produced to the Senate?

40

MR BELL: Yes, that's correct.

MR BEASLEY: That's what I wanted to ask the witness in relation to clarifying matters from his statement.

45

THE COMMISSIONER: Thank you.

MR BEASLEY: I don't know if you have anything more, Commissioner. I know Mr Bell has to get on a plane relatively – or leave to catch his flight relatively soon?

MR BELL: What time is it?

5

MR BEASLEY: It's nearly – it is 25 to 4. I don't have any questions. Thank you for coming.

MR BELL: Thank you.

10

THE COMMISSIONER: Is there anything further you wanted to add in light of what you've been asked?

MR BELL: Probably what I would like to do is to just reemphasise some of the points I made about my statement in my submission.

15

MR BEASLEY: Yes. Feel free?

MR BELL: So questions today sort of go to matters particularly at hand, I think, at the present which relate to the SDL and whether it, indeed, reflects the environmentally sustainable limit of take. And I understand those and they are broadly not a surprise to me. Most of that was in sort of common discussion when I was there. But my sort of overriding concern – and perhaps I'm jumping the gun a little bit here, is not so much whether 2750 is a satisfactory number. I don't think it is, but that's – that's by the by.

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25

My concern is how much more how is this plan being implemented and what is the effect of this the implementation? And whereas, you know, if my view is right, the 2750 is not enough, there is at least some potential to come back and revisit that and correct it. If the Basin Plan and all the elements around that are being implemented poorly, and I'm not singling out the MDBA alone here, I think the Commonwealth, broadly, and the states as well, if together they don't give it their best effort, then, my fear is we may end up in a situation worse than we were in when the Water Act was written.

30  
35

And that will be compounded by distrust of science and bureaucracies and governments, or further distrust, perhaps, I should say. And that will be very hard to recover a decent outcome as a result of that. And so it does seem to me that, in a sense, doing the best you can with what you've got might be a jolly good start. And that's what my concern has been and the reason I've volunteered information.

40

MR BEASLEY: Can I just – you just prompted me to ask you another question. You were with the Authority from 2009 to 2017. Whilst the Authority has produced a number of – large number of reports during that period and made them publicly available, such as the ones we've discussed, like the guide and the ESLT report, there have been – I think it's fair to say, amongst the Australian scientific community, a

45

general complaint made of the Authority concerning a lack of transparency and a lack of public disclosure of even all of its scientific work.

5 One example might be the concerns raised by the Authority in relation to the  
Menindee Lakes project we've discussed, in terms of risk to golden perch that  
you've mentioned. With the Authority not making that analysis publicly available,  
we only get to see it through processes via the Senate. Was that – I'm not sure policy  
is the right word but was the approach taken by the MDBA of not releasing all  
10 matters of its scientific and other inquiries and work available to the make – making  
it available to the public something that was discussed among the staff while you  
were there?

15 MR BELL: I don't recall that, Mr Beasley. Although, I do think, as time has  
passed, the inclination to disclosure, if I can put it that way, has diminished.

MR BEASLEY: I take it that comment is just made by you on personal  
observations about what occurred rather than anything that has been expressly said to  
you by any executive?

20 MR BELL: Yes.

MR BEASLEY: All right. Does anything arise out of that question? Thank you for  
coming. Can Mr Bell be excused?

25 THE COMMISSIONER: Yes. And with my thanks. I'm much obliged for your  
assistance?

MR BELL: Thank you.

30

<THE WITNESS WITHDREW

[3.41 pm]

35 THE COMMISSIONER: The hearing will now adjourn to Wednesday, 27 June.

MR BEASLEY: Yes. And there will be witnesses on the 27th and the 28th and I  
imagine their statements will be going up in the near future on the website and their  
evidence continues to deal with, amongst other matters, including some scientific  
matters but also issues of process that were discussed today.

40

THE COMMISSIONER: Thank you.

MR BEASLEY: Thank you, Commissioner.

45

**MATTER ADJOURNED at 3.42 pm UNTIL WEDNESDAY, 27 JUNE 2018**

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