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TRANSCRIPT OF PROCEEDINGS

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MR B. WALKER SC, Royal Commissioner

IN THE MATTER OF THE MURRAY-DARLING BASIN ROYAL COMMISSION

ADELAIDE

10.01 AM, THURSDAY, 20 SEPTEMBER 2018

Continued from 6.9.18

DAY 27

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

MR BEASLEY: Before we begin, we acknowledge that the land we meet on today is the traditional lands of the Kaurna people and that we respect their spiritual relationship with their country. Also acknowledge the Kaurna people as the custodians of the Adelaide region and that their cultural and heritage beliefs are still
5 as important to the living Kaurna people today. We also pay respect to the cultural authority of the Aboriginal people attending from other areas of South Australia or Australia present here. This morning we have Dr Carmody from the New South Wales EDO, who is going to make a submission on several topics. I've got a list of topics that she's going to address on. I will hand it to you.

10 THE COMMISSIONER: I've got that list.

MR BEASLEY: You've got it? All right. That's fine. Tomorrow we have Professor Pitman, who is a climate change expert, and also Mr Lamey, who's going
15 to give evidence concerning some floodplain harvesting issues and the impact on his property of those.

THE COMMISSIONER: Good.

20 MR BEASLEY: Since the last hearing date, the Federal Minister for Agriculture and Water Resources, the Honourable David Littleproud, has released a media release indicating that the Commonwealth will now be making a written submission to this Royal Commission and expects to do so by 10 October 2018. It is headed
25 'Cooperating with South Australian Murray-Darling Royal Commission'. I note that submissions were due on 30 April 2018, so there has been an unexplained delay.

THE COMMISSIONER: Well, it may be unexplained, but it won't go without comment in my report.

30 MR BEASLEY: And I can add that the Commonwealth has declined the invitation to appear to give evidence at the Commission.

THE COMMISSIONER: And, equally, it should be clear to the Commonwealth that that won't go without comment – adverse comment in my report.

35 MR BEASLEY: In relation to the South Australian Government, you, Commissioner, asked a series of questions to that Government in response to its submission and a series of questions that are on the Commission website to the Queensland Government, Victorian Government and the New South Wales
40 Government concerning their submissions that they've provided to the Commission. The South Australian Government has provided a detailed response to a – that list of questions. I'm not sure if it has gone up on the website yet. It will. They've also been sent a supplementary list of questions which they've indicated they are responding to. And Mr Ben Bruce will be giving evidence next Wednesday from the
45 South Australian Government, on behalf of the South Australian Government.

The Queensland Government have indicated to the senior solicitor for the Commission, Ms Masters, that they will be providing a written response to your questions, but they have also not accepted an invitation to appear. The New South Wales Government has informed Ms Masters that they will not be answering any of the questions sent and will not be appearing at the Commission. I think I will tender their response. It was a letter that I think contains a link to – sorry – an indication of a number of websites they suggest that we visit.

The Victorian Government has not either indicated yet whether it will be answering your questions or whether it will appear at the Commission. The solicitor from the Victorian – I'm not sure whether it's the Victorian Crown Solicitor's office. The Government solicitor's office I can say has been incredibly rude to Ms Masters. Whether they appear or not or answer the questions is a matter for it, but the rudeness is completely unnecessary and I completely accept Ms Masters' version of events in relation to that.

I will tender Mr Littleproud's, the Minister's, media release, but I will wait till I've got a clean copy. Also since the last time, Commissioner, I've been provided with a copy of a letter from Mr Knowles, when he was Chair of the Basin Authority, to Mr Burke when he was the Minister for Sustainability, Environment, Water, Population and Communities. It's a letter dated 21 November 2012 and it actually contained a copy of the Basin Plan that ended up being the Plan that was passed through Parliament.

Attached to that letter is an explanatory statement concerning the Basin Plan, which is a fairly odd document. It summarises the Basin Plan, or purports to summarise each section. It's nearly as long as the Basin Plan. It almost seems a totally unnecessary document. The only thing that could happen is that it could go wrong, because it may mis-describe the sections. But I'm going to tender that.

Also attached to that letter is a document called attachment F whereby Mr Knowles indicates that the Basin Plan has been prepared pursuant to the requirements he asserts, I should say – that the Basin Plan has been prepared pursuant to requirements under section 21 of the Water Act, including the two statutory facts that you're very familiar with in section 21(2). It also asserts that the Authority has prepared the Basin Plan in accordance with section 21(4) and, in particular, taking into account the principles that ecologically sustainable development and (2) acting on the basis of the best available scientific knowledge.

Now, those matters are highly debatable. It also asserts that proper, genuine and realistic consideration has been given to the principles of ecologically sustainable development and the best available scientific knowledge, which, of course, is not the requirement of the Water Act.

THE COMMISSIONER: I assume that is some adviser's paraphrase from the jurisprudence on having regard to as a matter of administrative law.

MR BEASLEY: I imagine it's just muddled thinking by the adviser. There's a further attachment called attachment G which is headed 'Synthesis of Analysis Associated with the Determination of Environmentally Sustainable Level of Take For Surface Water and Groundwater in the Basin Plan', which contains the admission, in my view, an admission of an error of law, that the Authority in determining the ESLT "undertook" – and I'm quoting now:

10 *Undertook an extensive program of harnessing relevant knowledge including environmental, social and economic information to inform its judgment of an appropriate Basin Plan ESLT.*

THE COMMISSIONER: So where do I find that?

MR BEASLEY: I'm going to tender all this.

THE COMMISSIONER: No, that last quote. That was in an attachment, is it?

MR BEASLEY: It's in attachment G.

20 THE COMMISSIONER: Thanks very much.

MR BEASLEY: Yes. And it goes on to say:

25 *This included ecological, hydrologic and social assessments informed by an extensive array of previous studies, modelling, new research and management plans.*

THE COMMISSIONER: Well, now, in the covering letter - - -

30 MR BEASLEY: Yes.

THE COMMISSIONER: - - - that's slightly differently expressed.

MR BEASLEY: Yes.

35 THE COMMISSIONER: Namely that the Authority has gathered all necessary scientific and other expert advice to support the conclusion, etcetera, etcetera.

MR BEASLEY: I assume that's socio-economic advice, but who knows.

40 THE COMMISSIONER: What it suggests to me is this. And this is something that the Commonwealth might like to consider, bearing in mind the likelihood of adverse findings by me in my report concerning the ascertainment of the ESLT, that is, adverse to the Commonwealth and its officers. That this letter contains definitively a statement of the material upon which that process was based.

45 MR BEASLEY: Yes.

THE COMMISSIONER: So that in the absence of material that would give the lie to this letter, that is, contradict it, and show that statements of fact in it were wrong at the time they were made, whether or not to the knowledge of its author, that this letter justifies my finding what was not before the Minister by the good officers of the Authority when the ESLT was determined, by which in particular, of course, I mean science - - -

MR BEASLEY: Yes.

10 THE COMMISSIONER: - - - to support the statutorily required projected outcome of the level of the proposed sustainable diversion limit.

MR BEASLEY: You see the third-last paragraph, as well. I suppose there's more than one way you can read it, but it seems to indicate that Parliament reached a consensus.

THE COMMISSIONER: Members of Parliament.

MR BEASLEY: Members of Parliament. But on a number of complex and conflicting issues, which could be – I know you've got to get something through – the political reality is you have to get something through the Parliament, but Water Act certainly doesn't make any provision for politicians determining the critical things in the Basin Plan such as, for example, ESLT.

25 THE COMMISSIONER: And I should make it clear the view I take – if anybody wants to contradict this, the time to do so is very soon – there's nothing in the Parliamentary Privileges Act and there's nothing in implied freedom of communication concerning political matters that will prevent me from criticising members of Parliament in or out of the chamber for pretending to be what they are not, namely sources of the best available science.

MR BEASLEY: I tender all those documents as one bundle.

THE COMMISSIONER: Thank you.

MR BEASLEY: There's only two other very short matters of housekeeping. The first is I may have to excuse myself for 10 minutes during the course of today. I've got to go to the Supreme Court, Justice Stanley. I'm acting for a Master Sebastian Masters who has been brutally punished by his parents for a trifling offence.

THE COMMISSIONER: Yes.

MR BEASLEY: I'm going to get that set aside.

45 THE COMMISSIONER: You should take as long as possible to achieve that.

MR BEASLEY: I'm expecting complete overturn of the conviction. It's bad enough he was in a brutal regime where he was only allowed screen time twice a week by his parents. I'm acting pro bono, but he's promised me shares in 28 cheeses when he inherits them. And, also, the Commission should notice that it is the
5 birthday of Aste Corbridge, who is one of our Research Officers. Aste is spelt A-s – sorry. It's Aste. It's Aste. And it's spelt A-s-t-e, which is what confuses me, but I'm being told that I've said Corbridge in perfect Norwegian.

10 THE COMMISSIONER: Good.

MR BEASLEY: Those are the matters.

15 THE COMMISSIONER: Thank you. There's something I need to make by way of public response in relation to the various positions of the governments that you have noted. The view I take is that it is appropriate for me to proceed on the basis that they are aware of what I have said and am saying on public occasions. It has already, I think, been made clear by me, but let me emphasise that my terms of reference include the requirement that I report to the governor concerning matters going to the prospects for the successful implementation of the Basin Plan and related matters
20 going to the appropriate implementation of the Water Act itself.

As is well known, they are both in a sense at least partly the product of intergovernmental agreement which, as is well known, is a very important tool of government in this country. The fidelity of governments to their obligations under
25 intergovernmental agreements relating to the Water Act and the Basin Plan is, therefore, squarely within certain of my terms of reference. And prospects for the success or failure in that regard are likely to be affected, in my view, by consideration of the attitudes and positions of governments, including as demonstrated in relation to this Royal Commission.

30 And so none of the governments to whom you've made reference in summarising their present positions, except perhaps that of South Australia, should be under any illusions I am likely to make adverse findings about their fidelity to and proper support for their own obligations as undertaken in intergovernmental agreements and
35 as reflected in the Water Act and the Basin Plan by reason of either an inability, one possible inference, or refusal, a more obvious inference, to answer what I regard as reasonable questions concerning matters of public importance to which a state, South Australia, has engaged this Royal Commission. So there should be no doubt about it. A failure to attend and a failure to respond will not produce an avoidance of
40 criticism. Thank you.

MR BEASLEY: So there's no doubt, I will tender either this afternoon or tomorrow morning your questions to each government and the responses we've received, picking up your last point. The questions, of course, are what I would describe as
45 basic in nature in the sense that they require a response to you concerning matters such as the lawfulness or otherwise or merits or otherwise of things like the SDL adjustment, Northern Basin Review, efficiency measures, a whole lot of what I

would consider basic matters concerning the Basin Plan for which each of those states should have a ready and immediate answer.

5 THE COMMISSIONER: Yes. Lest I have not made myself clear enough, it's familiar enough in litigious settings – and I stress this is not one – but it's familiar enough for people, parties who might be expected to call certain evidence given their relation to it or its source and the importance for the issues to make a calculation that they prefer to suffer the comment that comes when they don't call that evidence, rather than suffer whatever might happen if they do call that evidence and it is tested.
10 A well-known, if cynical, calculation.

That may be true of litigation which is more or less private, even if about public matters. But in a Royal Commission concerning matters about which there is highly formal intergovernmental agreement for a state party through its government to make
15 that calculation is not only cynical in the way it would be in litigation, but itself calls for condemnation, and if, at the end of my consideration, that is a position that seems appropriate to describe, I will do so, and people advising this government should understand that they are on notice now of that possibility. It is not too late either to attempt to dissuade me or actually to change course and by conduct demonstrate
20 something different.

MR BEASLEY: And just to clarify what I said concerning the Victorian Government, the Victorian Government, despite being pressed through its solicitor at the Victorian Government's Solicitor's office, is refusing or it seems incapable of
25 answering the question whether the Victorian Government will either respond to your questions or come here to be examined. The solicitor dealing with that for Victorian Government may feel as though she's giving that non-answer to an interstate colleague, but she is, in effect, refusing to tell a Royal Commissioner whether the Victorian Government is going to answer a Royal Commissioner's
30 question, which I think that other people in the Victorian Government would be possibly somewhat embarrassed by, and it's inconsistent with the assistance we got from the Victorian Department of Water – I'm sure that's not the full title – when we were having our views of various infrastructure and whatnot in the state of Victoria and when they took us around to show us their compliance measures and metering
35 and whatnot. So hopefully, we will get an answer today on behalf of Victorian Government as to whether they intend to even tell us whether they will answer your questions, or appear at the Commission.

THE COMMISSIONER: Be that as it may in relation to the Royal Commission or
40 the Royal Commissioner, I should say, bearing in mind the way in which these dealings have been carried out, that is, through lawyers, as a lawyer, I am entitled to say that I regard that as substandard and rude professional behaviour. Lawyers are not authorised to be rude because their clients may be obdurate, and the lawyers in the Victorian Government should understand that they personally make themselves
45 available for condemnation by their colleagues for such shoddy behaviour. I should stop.

MR BEASLEY: All right. So I think that takes us to Dr Carmody.

THE COMMISSIONER: Thank you. Dr Carmody, I won't claim to have read
5 everything that you have written on a topic that I have had available to me, but I have
read a fair bit of it. There are some questions I want to ask you about some of those
things. Most of which may well be rendered unnecessary after you've made your
comments. If it helps at all, you can and should assume a high degree of familiarity
by me with the Water Act and the Basin Plan. So if I stop you because I'm on top of
something you're expounding, please don't be offended.

10 DR CARMODY: I certainly won't be.

THE COMMISSIONER: It's because I think it is in both our interests for us to get
to the number of points that need to be got to relatively quickly. On the other hand,
15 please let me warn you, if you think I am, either by silence or by what I say,
demonstrating that I need correction by you, please do so. Don't be shy.

DR CARMODY: No.

20 THE COMMISSIONER: And I take it these 13 topics are more or less the order in
which you want to run.

DR CARMODY: Twelve.

25 THE COMMISSIONER: I've got 13. Sorry, introduction is number 1. Yes.
Thanks.

MR BEASLEY: We've got another couple we want you to address. I will tell you
later.

30 DR CARMODY: All right. Good.

THE COMMISSIONER: Thank you.

35 DR CARMODY: I await those questions eagerly.

THE COMMISSIONER: All right. Away you go, then.

DR CARMODY: Thank you Commissioner. The submissions that I am presenting
40 today are divided at this stage into 12 parts. These are as follows. The introductory
statement. Part 2 addresses the sent concept of an environmentally sustainable level
of take and best available science. Part 3, international obligations. Part 4, climate
change. Part 5, the Northern Basin Review. Part 6, prerequisite policy measures and
water shepherding. Part 7, efficiency works and part 2AA of the Water Act. Part 8
45 addresses access to information. Part 9, the concept of third-party impacts. Part 10,
compliance and enforcement, followed by a discussion on the sale of environmental

water and water markets. And finally, some comments on the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Resources.

5 So I will just commence with an introductory statement. EDO New South Wales welcomes the opportunity to assist the Royal Commission into its inquiry of the effectiveness of the Murray-Darling Basin system. By way of background, EDO New South Wales is a community legal centre specialising in public interest environmental law. We have many years' experience engaging with water law and policies at both state and Commonwealth levels. This has recently included
10 commencing civil enforcement proceedings, the first of their kind, in the New South Wales Land and Environment Court in relation to alleged breaches of the Water Management Act 2000 in our state.

15 We also have extensive experience advising a broad range of clients, including irrigators, dry land farmers, community groups, traditional owners and peak conservation organisations on the Water Act, Basin Plan and state legislation and policies. The majority of our clients seeking advice about water law and policy are irrigators and farmers located across the Murray-Darling Basin including on the following rivers, the Condamine Balonne, the Border Rivers, the Culgoa, Paroo,
20 Barwon-Darling, Lower Darling, Macquarie and Murrumbidgee.

Our work is evidence based and draws on advice from experts on our technical advisory panel and expert register as well as landholders and irrigators across the Basin with considerable experience in managing their properties in variable
25 conditions. EDO New South Wales acknowledges the significant contribution made by primary producers within the Murray-Darling Basin to the national economy and relevantly to the social cohesion of many communities. We therefore strongly support the ongoing prosperity of the agricultural sector in the Murray-Darling Basin within the context of the principles of ecologically sustainable development and
30 other legal requirements set out in the Water Act. This notably includes the requirement that sustainable diversion limits in the Basin reflect an environmentally sustainable level of take.

35 More generally, EDO New South Wales, our clients and expert advisers are of the view that sustainably-managed water resources are essential for the long-term prosperity of the towns, communities and many industries operating within the Basin. EDO New South Wales acknowledges that the passage of the Water Act by the Howard Government in 2007 constitutes one of the most significant national reforms since the federation of Australia within the context of NRM or national
40 resource management laws. While today's submissions explore some of the Act's limitations, most of which were the result of subsequent amendments, we are of the view that on balance, it is an excellent piece of NRM legislation.

45 Over the years, we have observed and accordingly documented possible irregularities with respect to Commonwealth water laws. It has included concerns regarding the legality of the Basin Plan and elements of its ongoing implementation. These issues will be elaborated on in parts two to six of the submissions. EDO New South Wales

has advised clients in relation to the scope of part 2AA of the Water Act, the 1,500 gigalitre limit on the purchase of water entitlement and about legislative gaps with respect to on-farm efficiency projects. We have also raised concerns in submissions in response to public inquiries. These issues will be discussed in part 7 of these
5 submissions.

Requests to access water-related information for our clients under state and Commonwealth freedom of information laws have in certain instances resulted in inexplicable delays, obstruction and protracted legal proceedings, some of which
10 remain unresolved after 18 months to two years. In one instance, our office took the unprecedented step of referring a matter to the Independent Commission Against Corruption and New South Wales Ombudsman.

Our clients have over the last five years in particular been excluded by water
15 agencies at both levels of government from anything other than limited and tokenistic engagement in policy processes. This differs significantly from the level of consultation afforded to key food and fibre and irrigation lobby groups. Evidence of this disparity is manifestly clear in documents obtained under the Commonwealth Freedom of Information Act in relation to the Northern Basin Review and those
20 documents – or some of those documents have been tendered and are available for reference to item 4 of the index.

Clients have also provided us with information regarding this issue, including in relation to processes underpinning Stakeholder Advisory Panels, otherwise known as
25 SAPs. It is axiomatic that lobby groups are entitled to seek to advance their members by engaging with bureaucrats and politicians. We understand and accept this fact. However EDO New South Wales and our clients expect to be afforded equal access to bureaucrats and elected representatives as well as information held by relevant agencies. This is particularly true in relation to a shared resource that is
30 governed by national and state laws and which is of social, cultural, economic and environmental significance to millions of Australians, including Australians living outside the Basin.

The Four Corners evidence pumped together with the aforementioned civil
35 enforcement proceedings being run by this office or by EDO New South Wales has resulted in some improvement in engagement by water agencies with the EDO and its clients. This is particularly true in relation to the Water Reform Action Plan, otherwise known as the WRAP, which is being led by a task force within the New South Wales Department of Industry and to a certain extent in relation to the
40 compliance and enforcement reviews and reforms being undertaken by the Murray-Darling Basin Authority. However, noticeable gaps still remain with respect to implementation of the Basin Plan and access to information.

Inclusion in policy processes and access to information will be discussed in more
45 detail in parts 5 and 8 of these submissions and will include some case studies. The notion of third party impacts is frequently cited by various parties with little explanation as to what it means or its actual legal basis. As this concept has in our

view been misconstrued and at times misapplied in the development of various aspects of the Basin Plan to the possible detriment of our clients and the environment, we have deemed it necessary to address this issue in part 9 of the submissions.

5

Part 10 will touch on issues with compliance and enforcement in Queensland in particular, while the situation has certainly improved in New South Wales with the establishment of the National Resources Access Regulator, which we welcome. I would still like to note for the record that until recently, our observations and concerns regarding compliance enforcement in New South Wales were generally ignored or denied by the relevant agencies and in certain instances by senior bureaucrats, and that's at both levels of government.

10

Part 11 will discuss recent proposals to sell both Commonwealth and state owned environmental water holdings, ostensibly in certain instances to assist with fodder production as suggested by Minister Goward in Parliament on 8 August 2018. Significantly, the trading rules set out in chapter 12 of the Basin Plan prohibit a vendor from imposing a condition on the sale of water. Such a condition that would limit its use to a particular purpose such as growing fodder.

15

As EDO New South Wales advises and represents a number of graziers located across the Murray-Darling Basin, we are very sensitive to the serious challenges faced by this sector at the present time. Part 11 will therefore include a number of observations regarding the limitations of existing water markets as well as possibilities for reformed – reform, rather, designed to improve outcomes for cattle and sheep producers.

20

Finally, the Water Sharing Plan for the Barwon-Darling Unregulated Alluvial Water Resources 2012 has been a source of concern for many of our clients since it was gazetted in 2012. Part 12 of these submissions will outline the differences between the draft and gazetted instrument to allow the Commissioner to consider the implications of these changes for the water resource plan which is in development and which must be accredited by me next year under the Basin Plan. I will also discuss ongoing concerns expressed to our office by clients in relation to the development of that plan. However, and to clarify, I will not discuss the making of the Barwon-Darling Water Sharing Plan per se as we understand that this matter is currently being investigated by the ICAC.

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30

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THE COMMISSIONER: Thank you.

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DR CARMODY: The Commissioner have any questions?

THE COMMISSIONER: Not so far.

45

DR CARMODY: I will proceed. So part 2 is looking at the issue or the concept of an environmentally sustainable level of take and best available science. Forgive me for pointing out the obvious, but the Water Act is a layered and complex statute with

the interaction between sections 3, 20, 21 and 23 giving rise and understandably so to some confusion amongst certain parties regarding the hierarchy of legally binding obligations set out in the Act. As the Commissioner is well aware, section 23(1) of the Act requires SDLs for water resources in the Basin to reflect an ESLT. This requirement is reiterated in section 22 item 6 which states that:

The Basin Plan must include the maximum long-term annual average quantities of water that can be taken from Basin water resources and that the subsequent limit must comply with section 23.

10 THE COMMISSIONER: Just, as you say, it's complex and being Australian, more complex than it needs to be, but that's what we've got. So we have section 20 ascribing purposes to the Basin Plan, and it is particularised by – sorry, it is generally framed so as to refer back to section 3. So the purpose of the Basin Plan is to provide for the integrated management of the Basin water resources in a way that promotes the objects of this Act. So you go back to section 3 for the objects of this Act.

20 DR CARMODY: Yes.

THE COMMISSIONER: And I draw to attention object (c) which is one of the sources for the figure of speech triple bottom line.

25 DR CARMODY: Yes.

THE COMMISSIONER: It says:

In giving effect to these agreements –

30 and those are relevant international agreements:

to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes –

35 Whatever “optimises” means when attached as an operation to each of three perhaps contending values, it doesn't provide an answer to the question which one loses in a contest. So you don't optimise economic by subordinating it to environmental, nor vice versa.

40 DR CARMODY: Yes, I would agree.

THE COMMISSIONER: Which rather suggests the word “optimises” might not bear its most hard edged literal meaning, but in any event - - -

45 MR BEASLEY: You could restore an environmental asset to an extent that it becomes attractive to tourists and thereby achieve an optimisation of environmental

and economic, but what you can't do is if you're giving water to irrigators, optimise the environment.

5 THE COMMISSIONER: No. And then in (d) it says without limiting (c), but not subject to. It says:

Without limiting (c), to ensure the return to environmentally sustainable levels of extraction –

10 Which is pretty close to “take” I would have thought, simply Latin for Anglo Saxon:

...that are over-allocated or overused.

15 It turns out section 21 tells us about that. And then interestingly in (d)(i) and (d)(ii), environmentally sustainable and ecological values, etcetera. In (d)(iii), it's subject to those, to maximise the net economic returns from the use and management of the water resources. So I don't think anyone will suspect that I'm going to give gold stars to the drafters of the Act, but so far, at least, even the first step you take to understand ESLT which is, I think through section 20, if you go back to section 3,
20 and already you see that careful attention is required by the objects of the Act to the science.

DR CARMODY: Yes, indeed.

25 THE COMMISSIONER: And then when you come back to section 21, to which you had just turned, you've got – I shouldn't say that. Before I leave section 20, in paragraph (b), there's this repetition of the establishment and enforcement of environmentally sustainable limits. So that scope as you correctly say is right at the heart of everything. Interestingly, that specifically extends to interception activities
30 which would include floodplain harvesting, would it not?

DR CARMODY: Yes, it would.

35 THE COMMISSIONER: So you're got establishment and enforcement of environmentally sustainable limits, you've got environmental objectives in (c). Then you've got this repetition of the so-called triple bottom line optimising economic social and environmental outcomes. Then you've got efficient water trading regimes. And then there are requirements for accreditation of Water Resource Plans which is spelled out in ways that no doubt you will come to. But section 21 then
40 proceeds, doesn't it, to regulate the making of a Basin Plan?

DR CARMODY: Yes.

45 THE COMMISSIONER: Must be prepared so as to provide, etcetera. So again agreements including Ramsar are right at the beginning of the legality of a Basin Plan, is it not?

DR CARMODY: Yes, well, the constitutional underpinnings, indeed, are derived from the relevant international agreements and, I would say, in particular the Ramsar Convention and the Convention on Biological Diversity.

5 THE COMMISSIONER: Yes, indeed. Well now, you've probably latched onto the fact that in this Commission, as a matter of shorthand, I've been referring to some of the provisions of subsection 21(2) as being so-called legislated facts. The Basin Plan must be prepared having regard to the fact that the use of the Basin water resources has had and is likely to have significant adverse impacts. It's as if the Parliament
10 itself has accepted science to the point of legislating that as a fact - - -

DR CARMODY: Yes.

15 THE COMMISSIONER: - - - which is mandatory to have regard to in preparing the Basin Plan. And then the second one is that the fact that the Basin water is required as a result, that is, as a result of the use, special measures to manage the use to conserve biodiversity. So would – what do you say to my suggestion that together, those facts, picking up the language of object 3(d)(i), suggests that all of this is to be approached on the basis that there has been over-allocation and overuse, and we
20 should do something about it.

DR CARMODY: That's certainly consistent with my interpretation, and it's also consistent with the Second Reading Speech which accompanied passage of the Act. It was acknowledged from memory in that speech that the Basin's water resources
25 had been over-allocated and the reason that the Commonwealth had taken the unusual step of passing legislation, that is, the Water Act, was to address that fact, that the States in and of themselves as independent jurisdictions had not historically done a particularly good job.

30 MR BEASLEY: Yes, we have – it hasn't been tendered yet, Commissioner, but there's a letter from Senator Wong when she was the Water Minister to Mr Whan, who has given evidence in his new role as the head of the National Irrigators Council, but when he was the relevant Minister for Water in the New South Wales Government - - -

35

THE COMMISSIONER: That's right.

40 MR BEASLEY: - - - enclosing – this is a 2010 letter, enclosing a memorandum of understanding between the Commonwealth Government and the New South Wales Government in relation to water shepherding, and that agreement makes it clear that the Murray-Darling Basin – this is in the introduction to the memorandum of understanding between the Commonwealth and the New South Wales Government – that many environmental assets in the Basin are under significant stress due to both river regulation and a lack of available water resulting from many factors, including
45 climate change. So there was a recognition in that agreement between the Commonwealth Government and the New South Wales Government after the

passing of the Water Act that the Basin is under significant stress. There's a – due to the way the rivers are being regulated and because of climate change.

THE COMMISSIONER: Yes.

5

MR BEASLEY: I will tender that in due course. It's in a folder. It's in folder 2 of Dr Carmody's brief.

THE COMMISSIONER: So Dr Carmody, when – I understand why you've gone straight to section 22 because it's item 6 in it that requires an ESLT for the SDL. The – I wonder if I could invite you to turn straight to section 21(4). I've been wondering about just exactly what falls out from the opening words:

10

Subject to sub-sections (1), (2) and (3) - - -

15

DR CARMODY: Yes.

THE COMMISSIONER: So (1) is international agreements.

20

DR CARMODY: Yes.

THE COMMISSIONER: (2) are these legislated facts.

25

DR CARMODY: Yes.

THE COMMISSIONER: And (3) is, if I may say so, a bit of a grab bag of factors that probably overlap with (1) and (2). Isn't that right?

30

DR CARMODY: Yes. I think (3) is a reference to the Ramsar Convention - - -

THE COMMISSIONER: Yes.

DR CARMODY: - - - and the obligations contained therein.

35

THE COMMISSIONER: Wise use is – is that a term of art?

DR CARMODY: No. It's actually a term in the articles of the text of the Ramsar Convention.

40

THE COMMISSIONER: No. That's what I mean. So it's an expression we find from Ramsar.

DR CARMODY: That's correct.

45

THE COMMISSIONER: And so it will be given meaning according to the - - -

DR CARMODY: A COP resolution.

THE COMMISSIONER: Yes.

DR CARMODY: There is a COP resolution from COP 9 of the Ramsar Convention in which that term is defined. It has been defined differently. There are various
5 iterations, but the most recent iteration is to be found in a COP resolution from COP 9.

THE COMMISSIONER: Now, those resolutions, are they in accordance with
10 Vienna Convention means by which one may understand a treaty term?

DR CARMODY: I think legally at the level of international law it's ambiguous as to what their legal status is, whether or not they're - - -

THE COMMISSIONER: That's what I was asking. So what do I say about them?
15 Do they or do they not tell me what they mean or are they just advice of what it might mean?

DR CARMODY: They tell you – well, the contracting parties have decided
20 amongst themselves that the concept “wise use” is defined in a particular way, so the maintenance of ecological character of listed wetlands within the context of sustainable development.

THE COMMISSIONER: Does the Vienna Convention actually help me in terms of
25 how that gets to be used in understanding the terms of the treaty?

DR CARMODY: It helps with the interpretation of the treaty itself.

THE COMMISSIONER: So subsequent – does it have to be unanimous or is it just
30 majority view of parties as to what a term means?

DR CARMODY: Under the convention – under the Ramsar Convention, resolutions are passed on a consensus basis.

THE COMMISSIONER: But it doesn't regulate what it means itself. Just in terms
35 of trying to understand what the terms of the treaty mean.

DR CARMODY: What the terms means. It's – well - - -

THE COMMISSIONER: All I've got is the Vienna Convention, I think.
40

MR BEASLEY: I've got – the definition of wise use is:

45 *Wise use of wetlands is the maintenance of their ecological character achieved through the implementation of ecosystem approaches within the context of sustainable development.*

THE COMMISSIONER: Yes. Now, does that come from the treaty or is it from a subsequent COP?

5 MR BEASLEY: It comes from – no. It comes from – the definition was adopted by the 1997 Brundtland Commission and subsequent COPs.

DR CARMODY: Yes. It comes from - - -

10 THE COMMISSIONER: Yes, but is it in the treaty, though?

DR CARMODY: It's not – no

15 THE COMMISSIONER: So it comes from travaux preparatoires and from subsequent COPs?

DR CARMODY: That's right. It's a resolution - - -

20 THE COMMISSIONER: That may not be a bad basis, but I'm just trying to understand when, as I will, because I'm a lawyer – I'm going to construe the statute.

DR CARMODY: Yes.

25 THE COMMISSIONER: “Wise use” is more than just what those words might mean to us as non-lawyer uses of English.

DR CARMODY: That's correct. And because – I mean, because the term is elliptical, even to people working in the wetlands space - - -

30 THE COMMISSIONER: That's why I'm asking you now. Yes.

35 DR CARMODY: I think there was a consensus amongst the parties that it needed to be defined by way of a COP resolution and because the convention attempts to evolve in line with best available science, there have been various iterations as to what that means. So Mr Beasley just read out the most recent.

THE COMMISSIONER: And the content from time to time will, of course, vary according to scientific understanding.

40 DR CARMODY: That's correct. And there are subsidiary bodies under the Ramsar Convention, including a scientific and technical advisory panel, and that subsidiary body together with other working groups is at times tasked to update, for example, the definition of “wise use” in accordance with most recently available literature and understanding.

45 THE COMMISSIONER: Now, am I correct in understanding that if you look to the travaux preparatoires, if you look at the objects of the convention itself and if you look to the subsequent COPs - - -

DR CARMODY: Yes.

5 THE COMMISSIONER: - - - in relation to “wise use” what you won’t find is an authorised detraction from ecological aims or outcomes by reference to the financial consequences on business?

10 DR CARMODY: Not directly. The definition that Mr Beasley just read out does take into account the concept of sustainable development which, obviously, considers economic factors.

THE COMMISSIONER: Why do you say that? Why do you say that?

15 DR CARMODY: Well, sustainable development in and of itself implies that development occurs - - -

THE COMMISSIONER: Yes.

20 DR CARMODY: - - - but that it occur with a view to maintaining to the extent possible natural resources.

25 THE COMMISSIONER: So that if we look to section 4 subsection (2), which gives statutory meaning to those principles for the purpose of the Water Act, you’ve got this – you’ve got economic, social and equitable considerations along with environmental considerations, all of which should be effectively integrated in decision-making processes, both long term and short term.

DR CARMODY: Which definition are you looking at specifically, Commissioner?

30 THE COMMISSIONER: Subsection 4(2) of the Water Act. I realise that there’s many – I won’t say countless, but there are many definitions around the world in different language, but the principles of ecologically sustainable development.

35 DR CARMODY: Yes. There are as many definitions as there are pieces legislation - - -

THE COMMISSIONER: I know.

DR CARMODY: - - - on biodiversity conservation.

40 THE COMMISSIONER: Mercifully, we’ve got one that has been exhaustively defined.

DR CARMODY: Yes.

45 THE COMMISSIONER: And I was referring to paragraph (a).

DR CARMODY: Decision-making processes should effectively integrate both long term and short term economic, environmental, social and equitable considerations.
Yes.

5 THE COMMISSIONER: To which I'm tempted to say, "Well, that would be a good idea, but how do you do it?"

DR CARMODY: Yes, which is - - -

10 THE COMMISSIONER: Well, how do you do it?

DR CARMODY: I don't think that there's any clear understanding. And the Land and Environment Court has contemplated that issue in various cases, as you're no doubt aware. I think it depends entirely on the circumstances.

15 THE COMMISSIONER: These are decision-making processes that are contemplated by the Act.

DR CARMODY: Yes.

20 THE COMMISSIONER: So they will include decisions by the Minister and the Authority.

25 DR CARMODY: Yes. (b) is interesting because that's a reference to the precautionary principle.

THE COMMISSIONER: One aspect of a precautionary principle, I think, isn't it? It only cuts one way. Lack of what's called, I think, mysteriously, full scientific certainty.

30 DR CARMODY: Yes, and I know you have cogitated over what that may or may not mean.

35 THE COMMISSIONER: Nothing in, my view, but anyhow. Not unless you're not scientific. But anyhow. So lack of full scientific certainty should not be used as a reason for postponing measures. I think you would be more familiar than anyone that the precautionary principle, as perhaps the ordinary English of its title suggests, also has an aspect that says when you're unsure, don't do something that may threaten.

40 DR CARMODY: Yes.

45 THE COMMISSIONER: This is, however – this is a different aspect, isn't it, and one that I hadn't been familiar with before this Commission. Namely, when you don't know as much as you would like to know, don't hold back from doing something that you think will mitigate a risk you perceive.

DR CARMODY: Yes. I guess it's the reverse of the same coin. One is not doing something - - -

5 THE COMMISSIONER: Yes. Exactly. I'm sure it's the same principle. But it's interesting here it's expressed in the aspect of encourage action, rather than - - -

DR CARMODY: Yes.

10 THE COMMISSIONER: - - - as it is normally understood - - -

DR CARMODY: To refrain.

THE COMMISSIONER: - - - to discourage action.

15 DR CARMODY: Yes. And I think within the context of the Water Act that's a materially important point.

20 THE COMMISSIONER: Absolutely. And that last point is something that seems important to me, namely that this is an Act about doing things to change a status quo.

DR CARMODY: Yes.

25 THE COMMISSIONER: The status quo has brought us to a state of affairs that is undesirable, according to the Parliament of Australia. And so the Parliament says things have to be done to address them. And then, pointy end, you have to set an SDL, informed by – that is reflecting in an ESLT.

DR CARMODY: Yes. And based on best available science.

30 THE COMMISSIONER: Are you content – I'm not asking you to as it were give a tick to the drafting of my report in this regard, but does that sound to you like an adequate and proper boiling down of the essence of the Act and Plan?

35 DR CARMODY: It sounds very sensible. It has always been my understanding that the requirement to reinstate or reflect, the SDLs rather reflect an environmentally sustainable level of take, was – that's a substantive provision and a non-negotiable substantive provision. It does say in section 23(1) that SDLs must reflect an environmentally sustainable level of take. That's reiterated in section 22 item 6.

40 THE COMMISSIONER: And 23, yes. It links up back to 23.

DR CARMODY: Yes. Sorry. I've done it in the reverse order.

45 THE COMMISSIONER: That's the problem with this Act. It's written in such a complex way that - - -

DR CARMODY: I have to confess, I think I've read surrealist poetry with greater clarity of purpose, but - - -

5 THE COMMISSIONER: And, if I may say so, a deal more pleasure, I'm sure.
Now - - -

MR BEASLEY: Surely not.

10 THE COMMISSIONER: - - - the next one I wanted to draw to attention was (c) in
the definition of these principles. Inter-generational equity - - -

DR CARMODY: Yes.

15 THE COMMISSIONER: - - - it says – it will be a test in due course of the notion
that a statute always speaks to know what the present generation means, but I'm
going to say it means the generation that enacted this Act. For the present
generation, maybe it means the present generation whenever we're talking:

20 *...should ensure that the health, biodiversity and productivity of the
environment is maintained or enhanced for the benefit of future generations.*

DR CARMODY: Yes.

25 THE COMMISSIONER: Now, leaving aside the oddity of giving a choice between
maintaining and enhancing, health, biodiversity and productivity may well also be
concepts that could be – could – could be in tension with each other. I doubt whether
health and biodiversity would be in tension with each other ever, but productivity,
depending upon what you mean by that, could well be in contest.

30 DR CARMODY: Yes.

THE COMMISSIONER: In – but, again, these words don't permit anybody, surely,
to say that health or biodiversity must yield to productivity.

35 DR CARMODY: No.

THE COMMISSIONER: Any more than they can say vice versa.

40 DR CARMODY: It also says productivity of the environment, which is a curious
concept.

THE COMMISSIONER: Quite so. It might rote back to this notion of productive
base that you will find in relation to environmental outcomes.

45 DR CARMODY: It could also refer to ecosystem services, which is quite an
expansive concept and is broader than - - -

THE COMMISSIONER: Well, I was going to ask you this later, but I will do it now. If I can take you back in the definition subsection 4(1) to the one that is at the heart of much of what you've written, I know, ESLT's definition. I suspect you know it by heart.

5

DR CARMODY: Am I that boring?

THE COMMISSIONER: No. No. No. I'm assuming you haven't forgotten what you've written. See, that definition of ESLT - - -

10

DR CARMODY: Yes.

THE COMMISSIONER: - - - has in the list of the four notions, themselves later defined that must not be compromised. You've got the productive base of the water resource. I am assuming that is cognate with, if not exactly similar to, this notion of productivity of the environment in the ESD principles.

15

DR CARMODY: I think that's a legitimate - - -

20 THE COMMISSIONER: Is that right?

DR CARMODY: I think it's a legitimate interpretation, yes.

THE COMMISSIONER: Which raises a question which I promise I won't waste time in the report, which is why didn't they say so? But anyhow. Well, now, (d) seems to be of real significance, doesn't it?

25

DR CARMODY: Key environment outcomes for the water resources.

30 THE COMMISSIONER: No. Sorry. Not that one. No. I'm so sorry. I'm jumping around. Going back to 4(2).

MR BEASLEY: The MDBA's definition – or interpretation, I should say, of the term the productive base is at page 30 of exhibit RCE6, which is the ESLT.

35

THE COMMISSIONER: Yes.

DR CARMODY: Yes.

40 MR BEASLEY: Ensuring that ecosystem services are supported.

THE COMMISSIONER: That's right. I mean, I think that's right, too. I mean, that is what I'm going to call a basically ecological approach.

45 DR CARMODY: Well, the concept of ecosystem services - - -

THE COMMISSIONER: It's not a commercial approach is what I mean.

DR CARMODY: - - - is quite broad. It can include things like, for example, maintaining the health of a wetland so that it can filter pollution - - -

THE COMMISSIONER: Well, quite.

5

DR CARMODY: - - - from water, for example, which can then be given – some people attempt to ascribe a dollar value to that, although that’s not a particularly easy task.

10 THE COMMISSIONER: I’m not going to waste any time on it, I can tell you. Well now (d), back in subsection 4(2), paragraph (d) - - -

DR CARMODY: Yes.

15 THE COMMISSIONER: - - - the ESD principles, if you will forgive the joke, it’s fundamental surely to my consideration that I see what Parliament called a fundamental consideration?

DR CARMODY: The conservation of biodiversity - - -

20

THE COMMISSIONER: And ecological integrity.

DR CARMODY: - - - and ecological integrity should be a fundamental consideration in decision-making. One would hope so.

25

THE COMMISSIONER: What I’m trying to do is to work out is there a hierarchy of things that a number of people with opposing views among themselves have been pressing on me as having a hierarchy.

30 DR CARMODY: Yes.

THE COMMISSIONER: And some people have suggested that the financial returns on investment in farming comes before the recovery of the environment.

35 DR CARMODY: Right.

THE COMMISSIONER: I can’t find it in the Act.

DR CARMODY: Yes.

40

THE COMMISSIONER: In fact, I can’t even find it anywhere in Parliamentary consideration.

45 DR CARMODY: Yes. Well, I can’t make a value judgment on that statement. But as a lawyer I can certainly - - -

THE COMMISSIONER: I’m sure you can. I can.

DR CARMODY: Well, I will refrain in - - -

THE COMMISSIONER: The values are – I want to make it clear, this is not a court case.

5

DR CARMODY: No.

THE COMMISSIONER: And I'm not just doing a job as a lawyer. My terms of reference involve looking at the values that have been enacted in the Water Act.

10

DR CARMODY: Indeed, which is what I was getting to. As a lawyer, I can interpret the Water Act.

THE COMMISSIONER: Yes.

15

DR CARMODY: And my interpretation is that at the apex of the so-called hierarchy emerging from the Act that apex is a requirement that sustainable diversion limits, Water Resource Plan areas reflect an environmentally sustainable level of take. That is defined in section 4 by reference to four criteria.

20

THE COMMISSIONER: Yes.

DR CARMODY: Which have an environmental focus. Perhaps the exception is a reference to maintaining a productive base, but that's within the context of ensuring that take is limited so as to not compromise the productive base, which in and of itself acknowledges that there is a link between productivity and maintenance of environmental health.

25

THE COMMISSIONER: Yes.

30

MR BEASLEY: The only legal analysis I've seen that differs from that is an AGS advice that suggests that the term "key environmental asset" can be determined by taking into account the social and economic outcomes. But how that could possibly be worked through as a practical matter - - -

35

THE COMMISSIONER: Dr Carmody, you've seen that this is – what is it, 17, 27 October 2012?

MR BEASLEY: I think it's the 2011 advice, late 2011.

40

THE COMMISSIONER: I'm so sorry.

MR BEASLEY: 2011. I'm not sure we brought - - -

45

DR CARMODY: I think it's 2010.

MR BEASLEY: Okay. I will stand corrected. I don't know.

THE COMMISSIONER: You're familiar with that I think, Dr Carmody.

DR CARMODY: Commissioner, I have read it, but before commenting on it again I probably need to glance over it. I have read that advice, yes. And it did – when I
5 read it, it did raise concerns. And I have commented, though, on those issues at various points.

THE COMMISSIONER: Thanks. All right. I'm conscious - - -

10 DR CARMODY: But I couldn't recite it verse and chapter.

MR BEASLEY: It's the only publicly available advice - - -

DR CARMODY: Yes.
15

MR BEASLEY: - - - too, from the government.

DR CARMODY: I'm not sure how one could conclude that defining "key environmental assets" would occur by reference to economic or social factors.
20

THE COMMISSIONER: I think the Commonwealth is already on sufficient notice, but let me repeat it so that they can respond to it. That sounds to me like an unmaintainable position bordering on the intellectually dishonest.

25 DR CARMODY: I know other people have proffered the view that there is a high degree of discretion in determining what constitutes a key environmental asset. I don't - - -

30 THE COMMISSIONER: By which I presume they mean an evaluative judgment about which reasonable minds might differ.

MR BEASLEY: Based on science.

35 THE COMMISSIONER: Isn't that right? When you say discretion, just as an administrative lawyer I want to avoid - - -

DR CARMODY: Yes.

40 THE COMMISSIONER: I want to avoid using discretion in an ambiguous expression.

DR CARMODY: Well, I think it has been suggested by some people that it gives rise – because it isn't defined legally, it gives rise to unfettered discretion on the part of decision makers to choose any - - -
45

THE COMMISSIONER: That sounds like appallingly bad administrative law to me.

DR CARMODY: Personally I don't agree with that, particularly since the Act is underpinned by, for example, the Ramsar Convention. There are 16 Ramsar listed sites in the Basin. I don't see how you could avoid classifying a Ramsar site as a key environmental asset in light of that fact. For example, I don't want to have a protracted discussion - - -

THE COMMISSIONER: To be fair, I've not heard anybody suggest that either.

DR CARMODY: Right. Okay. Perhaps it may have been to me privately, if it had been suggested.

MR BEASLEY: The Ramsar sites would all have

THE COMMISSIONER: Well, yes.

MR BEASLEY: What would make it if they didn't?

THE COMMISSIONER: Very well. Now, so I'm so sorry, I interrupted for longer than I intended to. I think you were at section 22, item 6, section 23.

DR CARMODY: I think so. Right. Really the next two paragraphs of my submissions reiterates the point that was just made, which is that the obligation to reflect – the SDLs reflect an environmentally sustainable level of take is at the apex of the so-called hierarchy of obligations.

THE COMMISSIONER: Yes.

DR CARMODY: And that's consistent with the submission that was produced by what was then known as the Australian Network of Environmental Defenders Offices, now EDO Australia, as you are aware. And that submission was responding to a Senate inquiry and it was dated March 2011. I then go on to just discuss the fact that I published legal opinions in academic text books and peer reviewed journal articles questioning the validity of the 2,750 gigalitre reduction figure in light of this construction of sections 3, 20, 21 and 23(1). And I should add (4), as well, as we've discussed that. And the requirements set out in section 21(4)(b), that the Minister and Murray-Darling Basin Authority in developing the Basin Plan act on the basis of the best available science and socio-economic analysis.

MR BEASLEY: Sorry to interrupt.

DR CARMODY: Yes.

MR BEASLEY: I'm just dealing with that - - -

THE COMMISSIONER: Opinion.

MR BEASLEY: - - - opinion by Robert Orr QC and Helen Neville. The date is 25 October 2010. Right at the beginning at paragraph 4 it suggests the assertion is made that the Water Act makes it clear that in giving effect to international agreements a plan needed to optimise economic, social and environmental outcomes.

5

THE COMMISSIONER: Right. Well - - -

MR BEASLEY: That can't be right.

10 THE COMMISSIONER: We won't spend too much time on that today.

MR BEASLEY: Yes. The - - -

15 THE COMMISSIONER: I will be addressing that report. If the Commonwealth wants to defend that report as correct, they should be on notice fair and square that it is not regarded as self-evidently correct or balanced by me.

MR BEASLEY: And paragraph 28, the last sentence is the opinion:

20 *For example, the MDBA and the Minister could not identify an environmental asset as key if this was not necessary to achieve the specific requirements of the Water Act (such as those under s 21) and would have significant negative social and economic effects. Another object relevant to determining which environmental assets are key is the object of optimising economic, social and*
25 *environmental outcomes.*

THE COMMISSIONER: Well, one of the problems with that opinion, and it's not the only one, and it's one which the Commonwealth should give careful thought to just leaving unattended to in this Royal Commission, is that statements like that don't
30 even begin to address how you detract from what would otherwise be environmental values by reference to any other values. Optimising environmental, as well as economic and social does not permit the choosing of any one of those three to be detracted from any more than the others.

35 And if you do insist in what I would call an intellectually childish fashion of pointing to the word optimise for any of those three, you had better answer the question, "Well, how do you pick any of those three to be less than the others?" And that opinion doesn't even attempt to grapple with that. And as somebody who does statutory interpretation for a living, I can say that is of major concern to me that the
40 only opinion that the Commonwealth has ever seen fit to publish is one which is so light on in that regard.

45 And the Commonwealth should proceed on the basis that I'm very likely to make adverse comment about the opinion about the Commonwealth for treating that as the only one that should be released and about the Commonwealth treating that still, so long after the event, as its last published word on what key provisions of the Act mean. That's relevant to a number of my Terms of Reference, prospects for the

Water Act being properly implemented and not improved by the Commonwealth having that attitude at all.

5 MR BEASLEY: That opinion hasn't been tendered. It will be. I'm told I lost patience with it so I didn't tender it, but I will. Sorry. I interrupted.

THE COMMISSIONER: I think it has been – has it been published on - - -

10 MR BEASLEY: Mr O'Flaherty just - - -

THE COMMISSIONER: I've referred to it a number of times.

MR O'FLAHERTY: It has been referred to as a resource before the Commission.

15 THE COMMISSIONER: Thank you.

MR O'FLAHERTY: But it has not yet been tendered.

20 THE COMMISSIONER: Well, the public published records of this Commission available for the Commonwealth and other governments to understand the possibilities of adverse findings by this Commission, they should certainly include that opinion.

25 MR BEASLEY: All of that - - -

THE COMMISSIONER: Along with, of course, the comments that I've just made.

30 MR BEASLEY: All of that is in the context of the Commission – or you, Commissioner, requesting from both the MDBA and the relevant Federal Government department their advices and their refusal to hand them over.

35 THE COMMISSIONER: The position is clear. The Commonwealth has chosen to be judged as to the maturity and cogency of its legal view of these critical issues by that now almost eight-year-old opinion. Of course, I will make comments accordingly.

40 MR BEASLEY: It is clear from Mr Taylor's resignation in 2010 as Chair of the Basin Authority. It's either 2010 or late – I think it's late 2010 – that the Basin Authority had been given different advice at the time that he was the Chair, because he made it clear in his resignation that – I'm paraphrasing – that the Authority had received advice that the environmentally sustainable level of take couldn't be influenced – or the sustainable diversion limit couldn't be influenced by social or economic factors, or compromised by it.

45 THE COMMISSIONER: Dr Carmody, is there anything you wanted further to add about best available science?

DR CARMODY: Indeed. Shall I proceed to that?

THE COMMISSIONER: Please. I'm interested.

5 DR CARMODY: As you may be aware, I published a book chapter earlier this year in which I advanced the views that a minimum of 4,000 litres would be required to satisfy various obligations - - -

THE COMMISSIONER: Can I just identify that in the documents I've got.

10

DR CARMODY: Yes.

THE COMMISSIONER: Which one is that?

15 DR CARMODY: That is – I will have a look at the tender bundle. I'm not sure. I don't think it's listed in the tender bundle.

THE COMMISSIONER: Could we make sure that that is included. Would you mind just reading the reference onto the record?

20

DR CARMODY: Yes. For the record, the chapter is entitled the 'Unwinding of Water Reform in the Murray-Darling Basin, a Cautionary Tale for Trans-boundary River Systems'.

25 THE COMMISSIONER: And what's the name of the book?

DR CARMODY: It's a book edited by Cameron Holly and Darren Sinclair. The book is entitled 'Reforming Water Law and Governance from Stagnation to Innovation in Australia'. It's published by Springer.

30

THE COMMISSIONER: Thank you.

DR CARMODY: It was published in 2018.

35 THE COMMISSIONER: You may be assured that I will pour over it. What are the highlights you want to tell me about now?

DR CARMODY: All right. So this view that a minimum of 4,000 gegalitres would be required to satisfy various obligations within the Act was based on what I believe to be the correct legal construction of those provisions, informed by the principles of statutory interpretation which you alluded to earlier, as well as information contained in a range of technical documents, including the 'Guide to the Proposed Basin Plan' by the MDBA; the 'Proposed Environmentally Sustainable Level of Take for Surface Water of the Murray-Darling Basin: Methods and Outcomes' by the MDBA, also known as the ESLT report; 'The Science Review of the Estimation of the Environmentally Sustainable Level of Take for the Murray-Darling Basin' by the CSIRO, which I also refer to as the CSIRO review; and the 'Review of the Basin

40

45

Plan Water Recovery Scenarios for the Lower Lakes, South Australia: Hydrological and Ecological Consequences' by the South Australian Department of Environment and Natural Resources. And it also takes into account the work of experts as outlined in peer reviewed journal articles and publications by the Wentworth Group of Concerned Scientists, which is, of course, comprised of eminent scientists with relevant expertise.

THE COMMISSIONER: Dr Carmody, being familiar as I am with all of that material - - -

DR CARMODY: Yes.

THE COMMISSIONER: - - - and understanding and seeing real force in your thesis, I have at various junctures in the evidence of scientists and others, administrators, asked questions to the effect of and are they aware of subsequent, either publications or any form of statement by any scientist contradicting or materially detracting from the force of the material that in aggregate adds up to what I'm going to call the approximately 4,000 gigalitre recovery scale of things. And I have uniformly had the response, no, they are not aware of any such material. Can I ask that question of you?

DR CARMODY: I'm not aware of any such material either, no.

THE COMMISSIONER: I don't – please don't interpret this as flattery, but I'm trying to understand what I should infer from that last answer. It's part of your work to be aware of such things, is it not?

DR CARMODY: It is. And I, in my role as a lawyer at the Environmental Defenders Office frequently liaise with other experts, with a view to at least being aware of recent publications, if not each of the nuances of – contained therein. So it's based on my own research, but also frequent contact with other experts with relevant expertise.

THE COMMISSIONER: It has concerned me, bearing in mind what I think is a depreciable reliance on legal professional privilege, but also a reliance on other matters of secrecy and confidentiality, to speculate whether there are, as it were, undisclosed scientific resources, opinions and material in the possession of the MDBA or the Commonwealth department that answers the description of subsequent or other material that contradicts or materially detracts from the scientific and other material to which you've referred, in such a way as to detract from or contradict the notion of the approximately 4,000 gigalitre recovery for the environment as being the appropriate measure of the SDL. Perhaps not surprisingly, we have come across nothing to suggest there is any such secret cache of such material.

DR CARMODY: Have you made inquiries with ASIO? That may be the last resort.

THE COMMISSIONER: Yes. And putting to one side the - - -

MR BEASLEY: They're likely to cooperate with us, I think.

THE COMMISSIONER: - - - exotic possibility of this being national security information, I much more seriously wanted to raise this with you. It is of great
5 concern to me, systemically, from the point of view of a number of aspects of my terms of reference, that anybody could ever think that under the rubric of "best available science" you could ever have material which you chose to keep from scientific colleagues or, if you must be more nasty, scientific rivals, that is, persons whom you might expect to scrutinise one's work with some scepticism.

10 I – perhaps this is a Pollyanna view that I've entertained to an advanced stage. I thought that science owed existentially its character as such to its openness to scrutiny and criticism.

15 DR CARMODY: Yes. Well, certainly all the scientists who I know - - -

THE COMMISSIONER: That's why we call it science.

DR CARMODY: - - - are very eager to publish their findings. They don't operate
20 under a veil of secrecy.

THE COMMISSIONER: Yes. To be fair, I've not heard anything from any government suggesting that parallel with scholarly science there is government science of a kind that might have characterised the glories of the Soviet Union where peer review was not, shall I say, practiced in its full extent. So I do stress I'm not
25 suggesting that any of the governments in question, either different polities or different times, have sponsored this idea that there could be the best available science within the meaning of the Water Act that the rest of us are not allowed to know about.

30 I'm minded, in response to a number of my Terms of Reference, to say that though it may not be a deficiency in the drafting of the Water Act so far as what any of its provisions that have been enacted do mean, maybe to encourage proper conduct at the Commonwealth level, consideration should be given to ensuring that best
35 available science includes available to everyone.

DR CARMODY: Yes.

THE COMMISSIONER: Always.
40

DR CARMODY: Well, that would be a welcomed addition, because it would ensure greater transparency.

THE COMMISSIONER: Except for the fact that being Australian, of course, I've
45 just committed the Australian habit of suggesting that you respond to a problem by enacting some more law, which I don't think is a good thing. Is it not arguable, well arguable that the word "available" doesn't just mean what happens to be capable of

being detected, but it also means that, to the extent that the government's responsible for that science, that it takes the steps to render it available?

DR CARMODY: I would have ordinarily thought so.

5

THE COMMISSIONER: So that if the government has, through CSIRO or MDBA or experts retained by it, if the government has science, it can't say, "It's not available, because it's still confidential or secret within government."

10 MR BEASLEY: Authority in confidence.

DR CARMODY: Are you suggesting it's available by virtue of the fact it exists, but it should then be published?

15 THE COMMISSIONER: Once the government has it, it is thereby available in the sense that there is nothing to prevent it - - -

DR CARMODY: Yes.

20 THE COMMISSIONER: - - - from being published and therefore should be published.

DR CARMODY: Yes, that's my understanding.

25 THE COMMISSIONER: Yes. I can't see any consideration by government about these things, but, again, to be fair to the MDBA and the CSIRO in their actions at least some years ago with respect to ESLT under the voguish expression of transparency, publication has been treated as a positive requirement, at least as a matter of culture. Now, that may have been departed from. I don't know. Are you
30 aware of whether so-called transparency is still regarded as important by the scientists of the MDBA and the CSIRO?

DR CARMODY: I couldn't really comment, Commissioner.

35 THE COMMISSIONER: So with what security do you think I can draw the inference that the failure to be able to show material that contradicts or detracts from the 4,000 gigalitre recovery scale of things suggests there is no such material?

40 DR CARMODY: Well, I would have thought it would be in the interests of the government, if it were in possession of such material, to have published it. So perhaps one can reasonably deduce that it doesn't exist. But if it does exist, I would certainly welcome its publication, as would many others.

45 MR BEASLEY: In attachment G of the documents that I tendered this morning, apart from an indication that the ESLT was determined, amongst other ways, by assessment of socio-economic implications of the SDL options, which is the last bullet point on page 2, the assertion is made that:

The method to set the ESLT underwent a number of peer reviews, including the CSIRO-led scientific review in 2011 which concluded that these methods are robust and are sufficient to provide a “suitable starting point for an adaptive management process”.

5

The CSIRO report being referred to there in 2001 is the report in relation to which Professor Brookes has, in an answer, said that the 2,750 or 2,800 is not an ESLT and Dr Colloff, who worked on that report, gave evidence that that report itself had been – sorry – yes. I’ve just remembered that I’m talking about another CSIRO report called the Multiple Benefits Report that had been altered by, he thinks, the MDBA in a misleading fashion. But in relation to this 2011 CSIRO report, of course, what isn’t mentioned in this document annexure G is the fact that a 2,800 gicalitre plan fails to achieve several of the environmental watering targets that the Basin Plan Authority set itself.

15

DR CARMODY: That’s a matter I address in more detail.

THE COMMISSIONER: Please proceed.

20 DR CARMODY: Thank you. So in the first instance it’s my understanding, based on the literature and expert opinions expressed to me, that the model of use for the Basin Plan itself were better than those used for the purposes of developing the Guide to the Basin Plan. However, it appears that the MDBA did not necessarily apply those arguably superior models in a scientifically robust manner, thereby

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This is evidenced by the following 11 matters which have been selected on the basis of input from appropriately-qualified and experienced scientists. This input was sought in recognition of the strong interface between water law and science which I touched on earlier. So, first of, the Basin Plan does not adequately demonstrate how it conserves key biodiversity values. As noted by the 2011 CSIRO review, the work lacks:

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A biophysical classification able to demonstrate that the indicator key ecosystem assets and key ecosystem function indicator sites adequately represent the full range of ecosystem types across the Basin.

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While this is unlikely to materially affect the Basin scale SDL, it may introduce significant uncertainty for individual Water Resource Plan areas if indicated science within a Water Resource Area are not adequately representative of the range of ecosystem types in that area.

40

Second, the Basin Plan is not supported by a clear over-arching conceptual model. Again, the CSIRO review stated that the use that the MDBA has made of the collected body of scientific information is not fully consistent, because of the absence of a clear over-arching conceptual ecological model linking site-based key

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ecosystem assets to key ecosystem function assessments to regional and Basin
ecological conditions and flow regime change.

5 Third, again, according to the CSIRO review, the SDL's modelled in the 2,800
gigalitre scenario:

*Do not achieve the majority of the hydrologic targets. They meet 55 per cent of
the achievable targets at either the high risk or low risk frequency. The 2,800
gigalitre a year reduction - - -*

10 THE COMMISSIONER: So at the high - - -

DR CARMODY: High risk or low risk frequency.

15 THE COMMISSIONER: Now, is that an expression making a probabilistic estimate
of achievement?

DR CARMODY: That is my understanding of the meaning of that expression, yes.

20 THE COMMISSIONER: So a high risk frequency means most likely not going to
happen.

DR CARMODY: Indeed.

25 THE COMMISSIONER: This is a variant on other expressions that we find in some
of this material.

DR CARMODY: Yes.

30 THE COMMISSIONER: I think I will get it wrong verbatim. It's high - - -

MR BEASLEY: High uncertainty.

DR CARMODY: Yes.

35 MR BEASLEY: There's a classic - - -

THE COMMISSIONER: A high level uncertainty. Yes.

40 MR BEASLEY: Classic quote in the Guide to the Basin Plan where the MDBA
asserts that – this might be the technical guide – asserts that the Authority, and I'm
paraphrasing – the Authority is confident that the environmental watering targets for
a 3,000 gigalitre recovery can be achieved with a high level of uncertainty.

45 THE COMMISSIONER: High level of uncertainty.

MR BEASLEY: In other words, they can't be.

THE COMMISSIONER: Dr Carmody, I'm really at a loss to understand that use of language or even the concept that underlies it. What is the point of observing of a target chosen for its desirability in relation to the statutory objects and requirements for an SDL? What is the point of noting the conditions in which it's most likely not going to be achieved? Don't you have to move from that then?

DR CARMODY: I would assume that you would need more water to change the level of risk.

10 THE COMMISSIONER: Isn't that the point of having a model? You run your model - - -

DR CARMODY: Possibly.

15 THE COMMISSIONER: - - - and the model tells you you most likely won't achieve what you asked the model, "Will this be achieved?"

DR CARMODY: Yes.

20 THE COMMISSIONER: So you run the model again, don't you, with a different input, more water no doubt?

DR CARMODY: Some of us are of that view, yes.

25 THE COMMISSIONER: Are we just weird or is that – is there any school of thought that says you make any other response?

DR CARMODY: You may have to - - -

30 THE COMMISSIONER: Again, I've not read them.

DR CARMODY: You may have to direct that to somebody with an opposing view. Certainly one of the points - - -

35 THE COMMISSIONER: Are you aware of anybody scientifically defending the idea that if the task is to find out whether a certain outcome can be achieved, with say a certain - - -

DR CARMODY: Yes.

40 THE COMMISSIONER: - - - hydrology, that you get an affirmative answer if the model tells you yes, with a high degree of uncertainty? Which I would have thought means no, doesn't it?

45 DR CARMODY: Well, certainly in my conversations with the experts with whom I work, that that issue has been raised on a number of occasions. Indeed, I had such a conversation last week with an expert and I pointed out that the 3,200 gegalitre plus

relaxed constraints model, the results of that indicated that in most instances the targets were only met with a high level of uncertainty.

THE COMMISSIONER: Which means - - -

5

MR BEASLEY: Well, relaxed constraints itself is hypothetical, isn't it?

THE COMMISSIONER: So, leaving aside relaxed constraints being a rather favourable assumption, what you were raising with your interlocutor was really a state of affairs where the modelling etcetera produced the assessment that that which was desired would most likely not be achieved.

10

DR CARMODY: Yes. Some of them were not - - -

15 THE COMMISSIONER: So what is the - - -

DR CARMODY: Some of the targets were not met. And then I think it was 23 of the 25 – some of them were not met and the remainder were met with a high level of uncertainty.

20

THE COMMISSIONER: See, this is the language that I confess I'm becoming impatient with. Met at a high level of uncertainty - - -

DR CARMODY: It's expressed as a percentage.

25

THE COMMISSIONER: - - - unravelled, means most likely not met.

MR BEASLEY: It's page 115 of the 'Technical Guide to the Basin Plan' which is exhibit - - -

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THE COMMISSIONER: That's the passage that several times.

MR BEASLEY: - - - RCE2. So Page 114 has a table where there's an estimate of reductions and diversions required to achieve environmental water requirements with high uncertainty, as we've noted a number of times, 3,856 and low uncertainty 6,983 gegalitres. There's then a confidence limit expressed at the high end of 10 per cent and a confidence limit of plus or minus 20 per cent with a high uncertainty target, which leads to this quote:

40

MDBA, therefore, believes the environmental water requirements for key environmental assets and key ecosystem functions can be achieved with a high level of uncertainty with a Basin-wide reduction in diversions of 3,000 gegalitres a year.

45

THE COMMISSIONER: I'm beginning to think, you see, Dr Carmody, that it's an approach that Mr Beasley has just quoted an example of that may lie at the heart of a fundamental disobedience to the Water Act in the setting of the ESLT.

DR CARMODY: Yes. Well, it's - - -

THE COMMISSIONER: That nowhere does the Water Act say - - -

5 DR CARMODY: Yes.

THE COMMISSIONER: - - - you may treat as achieved that which is most likely not achieved.

10 DR CARMODY: Indeed. And it's something that we've noted in our submissions. For example, I believe in our submission responding to the Northern Basin Review from memory we did note that some of the targets that were met were met at a high level of uncertainty, but they're still counted as being met.

15 THE COMMISSIONER: It's this use of the word "met" followed by a rider - - -

MR BEASLEY: Achieved.

THE COMMISSIONER: - - - that together means most likely not met.

20

DR CARMODY: Yes. Unless, for example, all favourable conditions are present, thereby - - -

THE COMMISSIONER: No. I understand that.

25

DR CARMODY: - - - allowing in certain circumstances the target to be met. And one point I will make is that the behaviour of the Commonwealth Environmental Water Holder, which is responsible for delivering environmental water with its portfolio of entitlements, that, as I understand it, isn't modelled. That's something that's determined on a yearly basis in accordance with various watering strategies in the law. And it may be that in certain circumstances, all conditions being right, all other things being equal, that some of those low probability – those targets for which the MDBA have ascribed a low probability of achievement, if all of those conditions are present the Commonwealth Environmental Water Holder may be able to deliver its water and achieve the target. But that, you know, it's based on a lot of assumptions, I would assume.

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MR BEASLEY: We should probably have a - - -

40 THE COMMISSIONER: Is that a convenient time?

MR BEASLEY: Can I just put on the record when Dr Carmody was talking about the CSIRO report talking about 2,800 gigalitre per year reduction scenario meeting 55 per cent of achievable targets that is at page 29 of exhibit RCE9. But the 55 per cent of – meeting 55 per cent of achievable targets is at either a high risk or low risk frequency.

45

DR CARMODY: It's not clear. It's not disaggregated.

MR BEASLEY: No. So even the 55 per cent achievement may have a certain percentage where there's no hope of achieving the 55 per cent.

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THE COMMISSIONER: Look, just before we break, the thing I'm really struggling with, Dr Carmody, is this. Why do we talk about 55 per cent achievement?

MR BEASLEY: It's not in the Water Act.

10

THE COMMISSIONER: That is, isn't achievement 100 per cent?

DR CARMODY: One of the points I do make - - -

15

THE COMMISSIONER: Imagine a builder saying, "I've achieved your house, 55 per cent. Give me my payment." I mean, it's nonsense.

DR CARMODY: Some of them do, actually.

20

MR BEASLEY: It will stay up. With a high level of uncertainty it will stay up.

DR CARMODY: I do have colleagues in the legal profession who are tasked with defending those sorts of people, but no – but, in all seriousness, it is actually one of the points that I do go on to raise, that you could argue that the modelling undertaken is undertaken on the basis of experimental bias, because there is no modelled result which shows how much water is required to meet 100 per cent of all the targets that are set at all of the indicator sites.

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THE COMMISSIONER: Thank you. Well, now - - -

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MR BEASLEY: Just before we break, Commissioner, just picking up – I've made a note picking up something you said in relation to conclusions you may reach or inferences you may draw from people not being here. In relation to the Commonwealth supplying you with a submission but not making anyone available for examination - - -

35

THE COMMISSIONER: Or even Counsel just to ask questions.

MR BEASLEY: Or even Counsel. There's probably a million of these things that I could go through, but it does have to be remembered by the Commonwealth that one witness has given unchallenged evidence that a report from the CSIRO that he had worked on was altered in a manner that made that report misleading and not reflect the views of the CSIRO - - -

40

THE COMMISSIONER: Yes.

45

MR BEASLEY: - - - and gave evidence that that caused such unhappiness amongst the scientific staff of the CSIRO that they had to get in a mediator to deal with the issue. Secondly, two witnesses have, effectively, given evidence that is also unchallenged that whatever else the water recovery target was, it had to start with a two. Now, how you deal with that in a written submission rather than meeting it through evidence is currently a curiosity to me.

THE COMMISSIONER: Well, it's why, as I say, I'm moving to a view, that the Commonwealth is very welcome to answer if they want to or can, that this seems to have been a calculation carried out that they would prefer my comment to my finding. They should be aware, however, that comment includes the inference of findings.

MR BEASLEY: So we will – what time shall we resume, Commissioner?

THE COMMISSIONER: 10 to, if you don't mind.

MR BEASLEY: Thank you.

THE COMMISSIONER: Thank you, Doctor.

DR CARMODY: Thank you.

25 ADJOURNED [11.40 am]

RESUMED [11.51 am]

THE COMMISSIONER: So when you're ready.

MR BEASLEY: I should just say now that we've recommenced, but before Dr Carmody resumes her submissions, the documents I tendered this morning were located not on the MDBA website, but they had been removed from the MDBA's website. They were found by our research officer, Mr Traeger, who accessed an Australian Government website which is – I'm paraphrasing. It's something called Australian Government Website Archive, where you can actually go into that website and find government department and agencies website as they existed in previous times.

THE COMMISSIONER: Yes.

MR BEASLEY: And it appears as though the MDBA is removing what might be significant publications from its website. I suppose from time to time all government agencies might archive things that are on their website. Whether fundamental things should be archived, of course, is a different issue, but - - -

THE COMMISSIONER: In any event, it's still available, which is good.

MR BEASLEY: Available if you know what you're doing on the internet. I would never find it.

5

THE COMMISSIONER: No. That's all right.

DR CARMODY: All right. I will just pick up where I left off. The last point was regarding the CSIRO's assessment that only 55 per cent of targets would be met.

10

THE COMMISSIONER: Yes.

DR CARMODY: And then they go on to say that the 2,800 gigalitre a year reduction scenario is thus not consistent with the currently stated environmental targets. Fourth, the precautionary principle, which, as we have already discussed, is a key component of most definitions of ESD, was not applied in relation to the high uncertainty threshold, which, again, alludes to our previous discussion.

15

Fifth, the Basin Plan is undermined by a lack of transparency regarding the environmental outcomes that are likely to be achieved for a range of water volumes. Again, as noted in the CSIRO review, few modelling results were provided for KEF hydrologic metrics. Hydrologic targets developed for KEF had not been linked to specific ecological targets.

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25 THE COMMISSIONER: Sorry, what's KEF?

DR CARMODY: The key ecological function – sorry.

THE COMMISSIONER: Okay.

30

DR CARMODY: Ecosystem function. I apologise. Because of an inadequate knowledge base to specify robust and meaningful ecological targets, that has been confounded by inadequate work on KEF classification and attribution to flow. These shortcomings mean that even when results for KEF hydrologic metrics become available, they will not be able to be linked directly back to environmental objectives. Sixth, and further to this point, the Basin Plan as a whole is not based on clear documentation of methods and results. The CSIRO review found that:

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40 *The coherent synthesis of all modelling results and their interpretation against ecological targets in the context of a robust Basin Scale conceptual ecological model has not yet been produced.*

THE COMMISSIONER: That's still true, isn't it?

45 DR CARMODY: Yes, that certainly – that is true to the best of my knowledge and based on conversations I've had with other experts.

THE COMMISSIONER: Thank you.

DR CARMODY: Seventh, and I have already mentioned this, the Basin Plan is arguably based on experimental bias with only a small number of scenarios being
5 undertaken and published for the purposes of the post-guide modelling runs. There is no published scenario that achieved all flow indicators representing assets and functions, nor was there any explanation provided to the public as to why only some indicators were achieved and others were not.

10 Eighth, the Basin Plan ignored crucial scientific evidence, notably in relation to climate change according to the CSIRO review:

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

By way of contrast, the Guide to the Basin Plan states:

20 *The MDBA has determined that three per cent is an appropriate allowance to account for the effects of climate change in the proposed Basin Plan, that is, the reduction being considered necessary to achieve an ESLT includes a three per cent allowance in the SDL proposals.*

25 THE COMMISSIONER: What does that mean? Three per cent more water than would be?

DR CARMODY: I believe, yes, taking into account climate change modelling. I think the three per cent might be – I don't know for sure, but it may be a reference to
30 the risk assignment provisions in the Water Act, even though those provisions don't apply to reductions in allocations that are attributed to climate change. But it's the only explanation I have for three per cent.

THE COMMISSIONER: Well, I've – you've just referred to item 3, I think, in the
35 table in section 22, which calls for the identification of risks to the condition or continued availability of the Basin water resources. And, specifically, it must include those that arise from the effects of climate change.

DR CARMODY: Yes.
40

MR BEASLEY: Can I just give the reference to the three per cent that Dr Carmody is talking about. It's page 33 and 34 of the Guide to the Basin Plan.

THE COMMISSIONER: Yes.
45

MR BEASLEY: Where they talk about, at the Basin scale, the change of water availability could range from an increase of nine per cent under a wet extreme

scenario to a decrease of 27 per cent under a dry scenario. The Authority considered that incorporation of the first Basin Plan of the full effect of the 10 per cent predicted decline in average annual water availability under the median 2030 conditions is unwarranted. In light of the various issues associated with climate change, the
5 Authority has determined that three per cent is an appropriate allowance to account for the effect of climate change in the proposed Basin Plan. So that's the explanation there.

10 THE COMMISSIONER: Well, that's not an explanation. It's a statement of a change.

MR BEASLEY: A statement.

15 DR CARMODY: Yes.

THE COMMISSIONER: It's not an explanation of a change. Now, I have in mind not so much the three per cent as items 3 and 5 in the section 22 table make it clear beyond any possible contrary argument that the Basin Plan has to identify the risks to the availability of the water resources arising from the effects of climate change.
20 And I interpolate that may well be contributed to by the estimate of, over the relevant period, of a 10 per cent reduction.

MR BEASLEY: Sorry. I should say it's a three per cent allowance in reduction in current diversion limit. So it was – yes.
25

THE COMMISSIONER: But item 5 of the mandatory – table of mandatory content of the Basin Plan is strategies to be adopted to manage or address those risks. And they must relate to the management of the resources.

30 DR CARMODY: Yes.

THE COMMISSIONER: I've interpreted management of Basin water resources as including, among many other things, the setting of an SDL.

35 MR BEASLEY: Yes. I think that's reasonable.

THE COMMISSIONER: Indeed, it's at one level, it's the main - - -

40 DR CARMODY: Fundamental.

THE COMMISSIONER: - - - statutory tool, isn't it?

DR CARMODY: Yes.

45 THE COMMISSIONER: Now, sure, WRPs then fit underneath that to give what might be called fine grained and ecological, as opposed to hydrological, expedience. But if that's true then – and I think this is how you've reasoned, including in some of

your published material that I have read, then a failure to take account of that in ESLT is a legal defect.

DR CARMODY: Yes. I do believe so.

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THE COMMISSIONER: Thanks.

MR BEASLEY: Just to complete that, I should put on the record because I don't – I've only – I don't think I've noticed this before. This is exhibit RCE1, page 33:

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The Authority is conscious that the risks and impacts of climate change and climate variability will adversely affect Basin communities and potentially reduce the ecological resilience of the Basin. It is, therefore, essential that the proposed Basin Plan appropriately addresses the impacts of climate change.

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THE COMMISSIONER: That's not inconsistent with the do nothing which they've said, but it makes it a surprising proposition.

MR BEASLEY: I would have to push back on that. It's not consistent, in my view.

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THE COMMISSIONER: It's logically consistent that you can appropriately address a risk by doing nothing about it.

MR BEASLEY: I've got to think about that, because

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THE COMMISSIONER: The common law of negligence does that every day. The so-called Shirt Calculus – I know we're not allowed to use the word calculus – obviously, says some risks are sufficiently with sufficiently modest adverse outcomes that the reasonable thing is to do nothing.

30

MR BEASLEY: That's a different context.

THE COMMISSIONER: It is. That's what I mean. So when I say it's consistent with the understanding of the existence of a risk to do nothing to address it, you had better be able to explain why its chances and its adverse outcomes are such as to justify doing nothing.

35

MR BEASLEY: Well, the fact is for the Guide they chose not to do nothing. They chose to make a reduction of a small amount.

40

THE COMMISSIONER: Sorry. Now, Dr Carmody, that – what else do you want to say about climate change? I know that's jumping ahead a bit with the best available science, but how should I view the current state of affairs in relation to climate change so far as the Basin Plan is concerned? It remains something not really - - -

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DR CARMODY: It's not addressed.

THE COMMISSIONER: Not really addressed.

DR CARMODY: No.

5 THE COMMISSIONER: I think it's the shortest chapter in the Plan.

DR CARMODY: Yes. It's not – The SDLs are based on a historic climate record, which you will know, not on projected reductions in water availability.

10 THE COMMISSIONER: How should I understand the explanation of the reasons for that being the response, that is, to do nothing?

DR CARMODY: The only explanation I've been given, which wasn't much of an explanation, was that the modelling wasn't good enough to really incorporate climate change projections into SDLs for the purposes of the Basin Plan, which is not
15 consistent with the comments in the CSIRO review.

THE COMMISSIONER: And I've been very puzzled, and I've asked a number of people about the following question. How does one, in managing these water
20 resources, take account of climate change on an assumption, which I stress is an assumption, that at least in the southern portion of the Basin the climate change is, according to consensus, expected to be generally a drying effect? When, how much, even where, subject I think to further investigation and no doubt continuous reassessment. And so I've asked, "Well, what do you do, bearing in mind that the
25 climate is in any event highly variable?"

And I think the summary of the answers I've got from a number of different people suggest that this is how I should under the matter, namely, that what one needs to ensure, that when water is available environmental watering is appropriately
30 undertaken so that what I'm going to call in summary biodiversity is in – is not in a completely marginal state for when drought expected to be more frequent and worse under climate change returns, or recurs.

DR CARMODY: Yes.

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THE COMMISSIONER: Perhaps a better expression. And in one word this has been summed up for me by a number of witnesses who tried to explain this to me as building up resilience, meaning I think that those systems and conditions and biota that together constitute or support biodiversity, are hoped to be in a state of vigour
40 increasing their prospects of surviving – literally surviving – the times of dearth constituted by the more frequent and worse droughts. Is that your understanding as well of what current understanding is, what you might do under a Water Plan to address the risk of climate change?

45 DR CARMODY: Broadly speaking, yes.

THE COMMISSIONER: I don't mean the next thing facetiously at all because there is a totally opposite view that it's all going to dry out. Why bother about looking after it now? I've heard – you hear that view occasionally in relation to the Lower Darling.

5

DR CARMODY: Yes.

THE COMMISSIONER: It's miserable. So let's keep it miserable. Have you heard any scientists suggest that in relation to it, as a proper response to climate change, which is, don't let's worry about it declining because it's going to decline so
- - -

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DR CARMODY: No.

15 THE COMMISSIONER: - - - no need to do anything.

DR CARMODY: It would be anathema to best available science. So to that extent, no. I've never had a scientist express that view to me at all in relation to the management of water. Quite the contrary. And, indeed, we work with a lot of
20 farmers, and a lot of the farmers we work with are concerned about the impact on their businesses of diminished water availability over time. So it's an economic issue as well, a social issue as well.

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THE COMMISSIONER: Thank you. Sorry. I've taken you out of our way again. I'm sorry.

25

DR CARMODY: Not at all.

THE COMMISSIONER: Pick up where you want to.

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DR CARMODY: I think I was at the ninth point. I will just – I will abridge the point. The South Australian review found that the 2,750 reduction scenario and I quote:

35 *While providing some benefits the ecology of the Coorong, Lower Lakes and Murray Mouth region still poses considerable risk to the ecology of the site focussed around drought periods especially those as severe of the period from 2006 through to 2009.*

40 So in other words, the Basin Plan does not adequately guarantee the ecological character of this Ramsar listed site, in particular during dry periods. Tenth, the 3,200 giga-litre a year reduction scenario without relaxed constraints would not necessarily result in significant improvements relevant to the 2,750 scenario. This is evidenced
45 by the MDBA's 2012 regulation impact statement which claims that modelling of this scenario that shows incremental improvements in some indicators compared to the other options. However, its overall assessment was that the 3,200 giga-litre a year scenario delivered few additional benefits relative to the 2,800 giga-litre a year

option, a significant contributing factor to this result is a range of constraints that inhibit – increasingly inhibit the environmental water as environmental flows in creeks which gets me onto my next point, crucially.

5 So I note as discussed previously that modelling was undertaken in relation to a
3,200 gigalitre plus relaxed constraint scenario, and this is, of course, linked to
outcomes stipulated in or specified in part 2AA of the Act and schedule 5 of the Plan.
As I previously stated, only three of the 25 targets set for four hydrological indicator
10 sites on the River Murray, because, of course, the relaxed constraints scenario
concerned the Southern Basin, so only four – sorry, three of the 25 targets for four
indicated sites, under this scenario are met with a low level of uncertainty. We've
already canvassed that issue. This means that for the remaining 22 targets, there is a
not insignificant risk that they will not be met.

15 THE COMMISSIONER: A high level of uncertainty is that point beyond which it is
– it's not just more likely than not, it is very much more likely than not to be
achieved.

DR CARMODY: Yes. That's my understanding.

20

THE COMMISSIONER: Very much more likely to not be achieved.

DR CARMODY: Yes.

25 THE COMMISSIONER: So you are at the point beyond which most likely it will
not happen.

DR CARMODY: Yes, unless various conditions are present to allow it to happen.

30 THE COMMISSIONER: So although it is literally correct to say that's a not
insignificant risk of failure, it's actually a significant risk of failure.

DR CARMODY: To invert the statement, to make it simpler, yes.

35 THE COMMISSIONER: Well, to use English, it's actually saying you've counted
as achievement what you have assessed - - -

DR CARMODY: Yes.

40 THE COMMISSIONER: - - - to be a likely non-achievement.

DR CARMODY: Hence the previous point about a failure to apply the
precautionary principle which underpins – well, the – certainly, the definition of ESD
and the Water Act. There are two elements of that definition which refer to the
45 precautionary principle. I also wanted to add that the impact of increased
groundwater SDLs onto the Basin Plan was not modelled as part of the 3,200
gigalitre a year plus relaxed constraints scenario, and it has been put to me by

scientists that this constitutes a considerable evidentiary gap given the possibility of connectivity between groundwater and surface water in the Basin.

5 THE COMMISSIONER: At the moment, at least, it seems to me that the perhaps flip, but nonetheless accurate comment about that is who knows.

DR CARMODY: Yes. Yes.

10 THE COMMISSIONER: Which seems an undesirable state of affairs to remain if by appropriate expenditure government could find out.

DR CARMODY: Indeed. I think there's five billion dollars left in the \$13 billion kitty.

15 THE COMMISSIONER: Well, to put it fairly, one might also take a different political view, and that is that the conduct of science is not something that should be confined to particular budgets such as under the Basin Plan.

DR CARMODY: Yes.

20

THE COMMISSIONER: But it should be seen as a basic business of government.

25 DR CARMODY: Although, I would have thought in 2018, given the range of environmental challenges we're faced with that that would be a view taken by our government.

THE COMMISSIONER: It seems to be taken in relation to buying war ships. Why not science? I'm serious.

30 DR CARMODY: I'm not an expert in war ships.

THE COMMISSIONER: No, my Terms of Reference involve what needs to be done to make these things work. Expenditure on science is scarcely a luxury nowadays, I would have thought.

35

40 DR CARMODY: Also when we take into account – and I know that this fact is recited on a frequent basis, but it's nonetheless an important one, Australia is the driest inhabited continent on the planet. The original continent that is drier is Antarctica. And I'm pretty sure the penguins aren't too concerned about a lack of fresh water.

THE COMMISSIONER: It's only drier because the whole of the water there is frozen. Yes.

45 DR CARMODY: So - - -

THE COMMISSIONER: No. I – that’s – I make the war ship – it is not a facetious comment by me, or least I don’t think it is, when I compare it to war ships. War ships are regarded as heavy expenditure, intended to be kept up to date, and it’s a
5 bristling fearsome state of protection for the country because it’s critical – it’s the
critical need to defend us.

DR CARMODY: A security interest, yes.

10 THE COMMISSIONER: I would have thought the same is true for the driest
continent of the most productive water system.

DR CARMODY: I am in agreement with you.

15 THE COMMISSIONER: Yes.

DR CARMODY: And the clients who we represent are in agreement as well.

20 THE COMMISSIONER: Well, to be fair, I think the Water Act by its very
enactment and terms rather suggest that.

DR CARMODY: Parliament - - -

THE COMMISSIONER: We are not Robinson Crusoe.

25 DR CARMODY: That’s right.

30 MR BEASLEY: The high uncertainty of achieving environmental water target or
whatever is – it’s clearly an inversion of the precautionary principle that’s even
worse given the Water Act because the precautionary principle is about a risk of
harm.

THE COMMISSIONER: That’s right. Yes.

35 MR BEASLEY: But as you’ve pointed out many times, this isn’t a risk of harm
here. It’s a legislated fact.

THE COMMISSIONER: Exactly.

40 MR BEASLEY: That there has been harm. So it’s already proven.

45 THE COMMISSIONER: So continue my war ship analogy, what I have in mind is
this, you see, Dr Carmody, if you were to set, as I’m sure we do, certain
specifications for a desirable war ship range of navigation, capacity to carry
armaments, capacity to adapt to improvement in armaments, etcetera, and then you
were to model the rival offerings from ship builders around the world, I do hope the
taxpayers aren’t going to buy a war ship about which it is said that these desirable

specifications necessary to be met will pay money to a ship builder whose design promises to achieve them with a high level of uncertainty.

DR CARMODY: Yes.

5

THE COMMISSIONER: I mean, my own view is that that would be a most scandalous waste of our national wealth to buy a war ship which will achieve in the sense that it probably won't achieve.

10 DR CARMODY: It was put to me a few days ago by a colleague who is a scientist that \$30 billion is potentially being spent to achieve half an outcome.

THE COMMISSIONER: Yes. I just don't think half outcomes are outcomes. I think that's nonsense. Any more than half a house is a house.

15

DR CARMODY: Yes.

THE COMMISSIONER: Thank you. Yes. Where are we up to?

20 DR CARMODY: Yes, it's a fascinating narrative, I'm aware. So the failure to meet one third of targets under the 3,200 a year plus relaxed constraint scenario has been compounded by fundamental issues was constraints management state level, and this is the key point. Specifically, the business case is for relevant supply measure projects, proposed at key locations, constraints that are considerably lower than the
25 targets set by the MDBA in its constraints management strategy, and I understand you've received evidence about this already. Affected sites include the Murray-Darling stream at Yarrowonga, the Darling at weir 32, the Murrumbidgee at gunned Guy and Balranald, the Goulburn Murray Bridge and total flows at the South Australian border. So that's a significant deficiency.

30

Of further concern is the absence of scientifically robust evidence linking irrigation efficiency works which are currently legally tied to the 450 gegalitres of additional water which makes up the 3,200 reduction scenario. The failure to link this to actual increases in environmental flows, and I will discuss this in further detail. I know
35 you've already quite a lot of evidence so I will focus on the legal issues. Eleventh, and I've alluded to this already, groundwater extractions were increased significantly under the Basin Plan from 2,095 gegalitres a year to 3,334 gegalitres, and these were further increased pursuant to the Northern Basin amendment 3,394 gegalitres, representing a total increase in SDLs of 1,108 gegalitres. However, these increases
40 occurred in the absence of any scientific justification or supporting documentation that I'm aware of, or modelling assessment, rather modelling assessing the connections between effective groundwater and surface water sources. By way of contrast the Guide stated that extractions from several of the affected groundwater sources actually needed to be reduced or capped.

45

So in summary, these 11 matters indicate significant deficiencies in the work underlying the Basin Plan, thereby arguably leaving the Guide, though imperfect, as

the best available science. It accordingly follows that the 2,750 gigalitre reduction scenario which is now reduced to 2,680 pursuant to the Northern Basin amendment and obviously subject to adjustments under chapter 7, this could not possibly reflect an environmentally sustainable level of take. And this assessment applies equally to
5 the modelled 3,200 a year plus relaxed constraints scenario. It further follows that the requirements set out in section 21(4)(b) of the Act, namely, that the Basin Plan is developed on the basis of best available science has not in my view been adhered to by the MDBA, and it's a view I know shared by many other experts.

10 Just as a final point for this section or this part I would like to draw your attention to the issue of floodplain harvesting. As you are no doubt aware, the New South Wales Government is in the process of implementing its floodplain harvesting policy. EDO New South Wales supports the licence of floodplain harvesting to the extent that it is consistent with the requirement that SDLs reflect an environmentally sustainable
15 level of take. I note that the current SDLs were developed on the basis that floodplain harvesting accounted for approximately 210 gigalitres across the entire northern Basin. So that includes Queensland, and this figure was provided in the MDBA's compliance review report in 2017. In other words, the Baseline Diversion Limit assumed that this volume of water was being diverted for this purpose. The
20 concern arises because the volumes that are likely to be licensed across northern New South Wales appear likely to well exceed this figure, which raises questions about compliance with SDLs in relevant valleys.

25 THE COMMISSIONER: Is that by reason of some kind of grandfathering approach, that is, licensing that which is being done?

DR CARMODY: Yes, to a certain extent, yes. The MDBA has indicated that this issue will be addressed by simply raising baseline diversion limits and then raising
30 SDLs by the corresponding volume. In correspondence cited by my office, and which I can tender to the Commission if necessary, the MDBA indicated that, and I quote:

*An increase in the BDL to account for a wider range of water use will not
35 impact the amount of water returned to the environment under the Basin Plan.*

THE COMMISSIONER: Could you explain what that means.

DR CARMODY: If the BDL is raised by, say for argument's sake 200 - - -

40 THE COMMISSIONER: The BDL is.

DR CARMODY: The baseline.

45 THE COMMISSIONER: It's the supposed measure of what is already being done before one applies water plan measures.

DR CARMODY: It was – the reference point was to what was being extracted at 2009.

THE COMMISSIONER: Yes.

5

DR CARMODY: Yes, so - - -

THE COMMISSIONER: If you alter a BDL - - -

10 DR CARMODY: Yes.

THE COMMISSIONER: - - - conceptually, does that arise only if, as it were, you're correcting for error?

15 DR CARMODY: Yes, which I don't have a problem with.

THE COMMISSIONER: In fact, I would have thought to be welcomed. We're not talking about changing the date.

20 DR CARMODY: No. No. It's changing the volume at the reference date. That's my understanding of it.

THE COMMISSIONER: So the reference date is still the same.

25 DR CARMODY: Yes.

THE COMMISSIONER: But it's said that there is now better factual insight into what the volumes were.

30 DR CARMODY: Correct. The problem arises - - -

THE COMMISSIONER: Now, if you do that, how does that not have an effect on return to the environment?

35 DR CARMODY: That is exactly my point.

THE COMMISSIONER: Sorry. Right.

40 DR CARMODY: That is, in fact, I was provoked to say to the media that I considered the proposed method which was to simply raise SDLs by the same volume to be a hydrological and illegal nonsense because it is. If you increase the BDL, it is my view that you have to reduce the SDL to take into account the fact that more water was being consumed at the reference state, not maintained the level of water recovery before you increased the BDL. The correspondent - - -

45

THE COMMISSIONER: Am I old-fashioned in saying actually one way of doing – of saying that is if you follow the Water Act, you start with the concept of ELST - - -

DR CARMODY: Yes.

THE COMMISSIONER: - - - which is informed by ecological science.

5 DR CARMODY: Yes.

THE COMMISSIONER: And by a judgement involving an evaluative assessment which no doubt is subject to argument.

10 DR CARMODY: Yes.

THE COMMISSIONER: About the point beyond which there would be compromise of those environmental values.

15 DR CARMODY: Yes.

THE COMMISSIONER: The word “compromise” being one that refers to an unacceptable level of danger. I think that’s what it means.

20 DR CARMODY: Yes.

THE COMMISSIONER: Once you’ve done that, the sustainable diversion limit, all subject to the long-term averaging approach – the sustainable diversion limit emerges, if not arithmetically, pretty close to that. Isn’t that right?

25

DR CARMODY: Yes.

THE COMMISSIONER: And then one looks at what I will call baseline, which is meant to be history, expressed volumetrically, correct?

30

DR CARMODY: Yes.

THE COMMISSIONER: But being history, invites being revisited and corrected.

35 DR CARMODY: Indeed.

THE COMMISSIONER: And then again, more or less arithmetically, you observe the difference in the magnitude of the SDL and the baseline and work out whether farmers can get more or need to take less.

40

DR CARMODY: Yes.

THE COMMISSIONER: And notoriously it was the latter. More was being taken than was sustainable; that’s correct, isn’t it?

45

DR CARMODY: Yes.

THE COMMISSIONER: I don't think anybody disputes that at all, do they? That more was being taken than was sustainable?

5 DR CARMODY: There may be some who dispute it, but it's not – the – well, the consensus view is not the contrary to that statement.

THE COMMISSIONER: Certainly, nobody has come forward to this Commission to say that the environment doesn't need as much as it's getting, I don't think.

10 DR CARMODY: I haven't heard anyone, no.

THE COMMISSIONER: Anyhow, now, at that point, you have what I'm going to call the recovery amount, which is not a statutory concept, but which is produced by deduction in the manner I've just talked about. If you look at the baseline, you see a
15 lesser figure which is the Sustainable Diversion Limit, and you have thereby arithmetically produced the amount needing to be, as it's put, recovered for the environment.

20 DR CARMODY: Yes.

THE COMMISSIONER: Which leads to the famous 2,750 gigalitres. I call it famous, but it's not real in itself because it has already been, as you say, subject to adjustments.

25 DR CARMODY: Yes.

THE COMMISSIONER: Down, so as to increase a Sustainable Diversion Limit.

30 DR CARMODY: Yes.

THE COMMISSIONER: Now, given that arithmetic logic, I'm really struggling with the idea that if you alter one of those integers, you won't have an effect on what needs to be recovered.

35 DR CARMODY: I'm also struggling with that concept.

THE COMMISSIONER: Right.

40 DR CARMODY: Yes, and, in fact, it's my view that if you increase BDLs, which is legitimate if there is new improved science suggesting that more water was being taken than otherwise thought at the reference year - - -

45 THE COMMISSIONER: You call it science and appropriately so. It's really history, it's looking back on a time that has not changed and says, "I have better data now" to know about what happened.

DR CARMODY: Yes. That's a better way to express it. Yes. Better data. The issue arises because of the method they are proposing to use to incorporate licensed floodplain harvesting into the Basin Plan, i.e., that the water recovery volume will remain static. That is what is suggested in this communication from the Authority, and it's reiterated in another email from the Department of Industry. So the issue, to clarify, is not the licensing of floodplain harvesting which in and of itself is not a bad idea.

10 THE COMMISSIONER: No.

DR CARMODY: The framework that they have put forward, some elements of that, the water accounting, for example, the trade – I think that that is problematic, but the idea in and of itself we certainly do not object to. I'm merely talking about the manner in which the Commonwealth is proposing to incorporate that new information about additional water being taken at the baseline here, how they're proposing to incorporate that into the Basin Plan. I don't think it's legal.

THE COMMISSIONER: Thank you.

20 DR CARMODY: That concludes that section.

THE COMMISSIONER: Are you going to come back to floodplain harvesting?

25 DR CARMODY: I will touch on it again.

THE COMMISSIONER: Thank you.

DR CARMODY: If you would like to ask questions now though, I'm - - -

30 THE COMMISSIONER: I read your advice of 13 December 2017 to Mr Lamey. Have you taken the view that there's no room for the common law of nuisance here?

DR CARMODY: No, I haven't taken that view, no. And I understand Mr Lamey has an appropriately qualified lawyer in Queensland advising him about that matter.

35 THE COMMISSIONER: Thanks. That's all I want to raise at the moment. Thanks.

DR CARMODY: So part 3 addresses international obligations. I will just have a quick glance to see whether there are parts that I can skip over in light of previous conversations.

THE COMMISSIONER: I don't want to diminish the importance of international obligations, but at the risk of self-delusion, I think I am on top of them.

45 DR CARMODY: I think you – I think that's a fair assessment. Well, in that case, you would be aware of the views that I expressed in an article, a peer-reviewed journal article that I authored a few years back.

THE COMMISSIONER: Yes, I am.

DR CARMODY: So there may be little need to reiterate those views now.

5 THE COMMISSIONER: No, you may proceed on the basis because it is true, that (a) I have studied them, and (b) there is no question I want to ask by way of challenging them.

DR CARMODY: All right.

10

MR BEASLEY: Is that tab 18 you're talking about the Convention on Biological Diversity and when is that convention be implemented – the Silence of the Plan?

15 DR CARMODY: It's the Silence of the Plan, yes.

THE COMMISSIONER: No, I've, if I may say so, with respect and gratitude, benefitted greatly from that. Thank you.

20 DR CARMODY: Thank you, Commissioner. I might just add then – because, subsequent to the publication of that article, of course, the Northern Basin Review was undertaken. The article was published in 2013, and the amendment was subsequently passed so earlier this year or became law.

25 THE COMMISSIONER: Yes.

DR CARMODY: Which reduced, amongst other things, the volume of environmental water in that part of the Basin by 70 gigalitres relative to the current version of the Basin Plan.

30

THE COMMISSIONER: Yes.

DR CARMODY: So this included returning 12 gigalitres to the consumptive pool in the Macquarie Valley and 14 gigalitres to the consumptive pool in the Gwydir Valley, and as you would be well aware, both of these catchments are homes to Ramsar listed wetlands.

35

THE COMMISSIONER: Yes.

40 DR CARMODY: The decision to classify the Macquarie Valley as over-recovered is, to me, particularly perplexing as in 2009, the Australian Government submitted an article 3.2 notice to the Ramsar Secretariat stating that the Macquarie Marshes were likely to experience a change in ecological character. In this notice, the government indicated and I quote:

45

That the most significant action in place to help respond to the threats currently facing the Macquarie Marshes and other important waterways is the

Australian Government's \$3.1 billion restoring the balance in the Murray-Darling program.

The notice goes on to state that the goal of this program is to, and I quote:

5

Acquire water entitlements from willing sellers that represent value for money and use the water allocated to them for the environment.

So I've raised - - -

10

THE COMMISSIONER: That was before the amendment of the Water Act to put the cap on acquisitions?

DR CARMODY: Yes.

15

THE COMMISSIONER: Yes.

DR CARMODY: I have raised this issue in the context of Australia's international obligations as it is unclear how reducing the volume of water available for a vulnerable wetland is consistent with the requirement to promote the conservation and wise use of wetlands

20

THE COMMISSIONER: That's scholarly understatement by you, isn't it?

25

DR CARMODY: Sometimes it pays to be restrained, Commissioner.

THE COMMISSIONER: Yes, I understand. Thank you. Now, the international obligation involves, I take it, continuing to make notifications as previous notifications become outdated.

30

DR CARMODY: Yes.

THE COMMISSIONER: Or, to put it more cruelly, would be misleading if understood still to be current.

35

DR CARMODY: Yes.

THE COMMISSIONER: Has there been an updating of that change of character notification?

40

DR CARMODY: Not that I'm aware of. Not that I'm aware of. You could double-check that with the Commonwealth Environmental Water Holder, their wetlands unit – the wetlands unit, but I'm not aware of that, no.

45

THE COMMISSIONER: Thank you.

DR CARMODY: So the decision, as part of the Northern Basin Review and amendment, to classify these two catchments as over-recovered appears to work inner synergistically with proposals to amend cap factors in parts of New South Wales. You may wish to consider the documents at item 5 of the index. These
5 documents were obtained by our client Inland Rivers Network pursuant to a request for information under the Commonwealth FOI Act. The document 282 in that bundle comprises the presentation to the MDBA by a particular industry group arguing that the Macquarie catchment was over-recovered and that cap factors were inaccurate, and they went on to recommend replacement cap factors, and we note
10 that the cap factors proposed by the New South Wales Government earlier this year are consistent with this presentation and the recommendations contained therein. So I'm just providing that information for your consideration.

MR BEASLEY: Was it tab 5?
15

DR CARMODY: Item 5, I thought it was. Yes.

MR BEASLEY: Yes.

20 DR CARMODY: It's item 5.

THE COMMISSIONER: Item - - -

DR CARMODY: And item 5 comprises a series of documents.
25

MR BEASLEY: Yes, document 278, yes, sorry.

DR CARMODY: 278. Yes.

30 MR BEASLEY: Yes.

DR CARMODY: And within those documents, there's a presentation discussing the need to - - -

35 THE COMMISSIONER: I may - - -

MR BEASLEY: I can't see the - - -

THE COMMISSIONER: - - - well have the wrong document.
40

DR CARMODY: Keep turning - - -

MR BEASLEY: Yes.

45 DR CARMODY: - - - until you get to what appears to be - they haven't all been printed in your bundle.

MR BEASLEY: Right. I see. Right. So we're missing something - - -

DR CARMODY: Yes, the remainder of the documents I included.

5 MR BEASLEY: Yes. All right.

DR CARMODY: That can be remedied - - -

10 THE COMMISSIONER: Anyway, I've got the document, but not the interesting bits.

DR CARMODY: I have a copy if it would be - - -

15 THE COMMISSIONER: That's all right. I will just – the staff will fix that up.

MR BEASLEY: We will probably be able to get it over lunch.

THE COMMISSIONER: That's right.

20 DR CARMODY: That's easy enough to rectify.

MR BEASLEY: In fact, we will. Someone will get it over lunch. I nominate Ms Bajger who has been busy on social media, I noticed in the coffee break, not to do with the Commission, so she can do some work.

25 THE COMMISSIONER: All is well. All is well. Good. Right. Move on. We will come back to that. Yes.

30 DR CARMODY: So just as a final point, it's my view that the constitutional basis of the Act limits the extent to which it can be amended to erode its environmental objective, specifically, proper implementation of the Ramsar and biodiversity conventions in the Murray-Darling Basin arguably requires the presence of a minimum volume of water to discharge the core objectives contained therein. By way of example, the Ramsar handbooks for the wide use of wetlands, which is
35 intended to guide implementation of the convention by signatory, states:

Notes that the ecological character of wetlands can only be maintained in the presence of –

40 And I quote:

water supply of appropriate quality and quantity.

45 I do concede, however, that this is a very complex issue, and one that the Commissioner, you may wish to explore in further detail in your final report.

THE COMMISSIONER: Yes.

MR BEASLEY: Can I just ask you which – is that the 1 January 2010 ‘Handbook on the Wise Use of Wetlands’?

DR CARMODY: Yes. I think that’s the date.

5

MR BEASLEY: Yes. Where the – I think it’s the – what Dr Carmody is referring to is the Wise Use of Wetlands. There’s five handbooks all published on 1 January 2010 - - -

10 DR CARMODY: That’s correct.

MR BEASLEY: - - - which seem to be the most recent and they can be downloaded from the Ramsar website.

15 DR CARMODY: That’s correct.

THE COMMISSIONER: Dr Carmody, before you move to your next topic, I wanted to ask about something I know you’ve written and published about because I’ve read it and you just mentioned it, the constitutional footing for the
20 competence of the Commonwealth Parliament to enact the Water Act in its terms.

DR CARMODY: Yes.

THE COMMISSIONER: I don’t need to go over the various express implications of
25 various heads of power in the Act for certain provisions of it, nor do I need to note that the Act probably unnecessarily explicitly notes that any other footing that can be called in aid, if this ever comes to be argued, will, of course, be available. I think there has been some misunderstanding of earlier publications by this Commission,
30 particularly issues of paper number 2 concerning, what I will call in general terms, the validity of the Water Act. A misunderstanding, in particular, of some comments concerning the need to take into account the content of Australia’s international obligations in relation to the proper interpretation of statutory provisions which require the external affairs power to be enacted at all.

35 DR CARMODY: Yes.

THE COMMISSIONER: Its validity in the sense that you must interpret it in a way that the Tasmanian Dams case would appear to require, or else you won’t have
40 availed yourself of the external affairs power. That’s your understanding, I think, of the way in which the obligations may inform an understanding of the Water Act; is that right?

DR CARMODY: Yes, and I’ve also referenced in that article another case – another
45 High Court case. It’s the Commonwealth – sorry, Victoria v the Commonwealth in which they talk about proper treating implementation, whether it’s full or partial treaty implementation. You’re no doubt familiar with that case, so there’s no need to
- - -

THE COMMISSIONER: No. No, it's not so much the jurisprudence I'm asking you about, but another legal question – a constitutional question. It's a matter of principle. As you're aware, the Act is also said, in part, to be supported by a referral of powers in what I will call a text sense. You're aware of that.

5

DR CARMODY: A limited referral of powers which occurred pursuant to an amendment.

THE COMMISSIONER: Yes.

10

DR CARMODY: Yes.

THE COMMISSIONER: Why wouldn't the whole of the Act be supportable under the external affairs power alone?

15

DR CARMODY: I wonder if the trade provisions require extra heads of power. I'm just wondering – I'm thinking out loud Commissioner. I don't have a definitive answer, but I'm wondering if they could potentially require support from other heads of power under the constitution?

20

THE COMMISSIONER: When you say the "trade provisions", you're referring to those that intersect with, interact with and call up, what I'm going to call, water trading rules; is that right?

25

DR CARMODY: Yes. Yes. Water trading rules underpinning water markets in the Murray-Darling Basin.

THE COMMISSIONER: Yes.

30

DR CARMODY: Yes.

MR BEASLEY: So part 4 of the Act.

35

THE COMMISSIONER: Well, it may be unfashionable, but can't 51(xxxix) be called in aid for them? That is, they do appear to be ancillary to or incidental to the management of the water resource, don't they?

40

DR CARMODY: That seems logical. I'm just looking, now, at the Act to see if there are other provisions which would require support from other heads of power under the constitution. Enforcement - - -

THE COMMISSIONER: There's a - - -

45

DR CARMODY: Enforcement provisions in relation to corporations, the corporations power.

THE COMMISSIONER: Yes.

DR CARMODY: It's where - - -

THE COMMISSIONER: Yes, 51(xx) has got a very broad understanding now.
Yes.

5

DR CARMODY: Keeping in mind that many water entitlements are held by corporations, not just individuals, and that the Basin Authority does have some enforcement powers under the Water Act.

10 THE COMMISSIONER: There's at least a question, in your mind, I take it, as to whether state referrals matter legally. They very much matter, politically, but do they matter legally?

15 DR CARMODY: Does the limited referral – are you asking whether the limited referral of power in this instance is legally necessary?

THE COMMISSIONER: Yes, if a state abrogated its referral.

20 DR CARMODY: If it was in relation to trade and critical human water needs, from memory; is that your - - -

THE COMMISSIONER: Yes. In relation to anything, frankly. You've heard of political statements of pulling out of the plan.

25 DR CARMODY: Indeed, I have and I've written - - -

THE COMMISSIONER: I know you've written about it as well. I know.

30 DR CARMODY: Yes, about those.

THE COMMISSIONER: I'm not quite sure what meaning can be given to that idea. Like all polities in the federation, the states are bound by legislation apt to bind them.

35 DR CARMODY: Yes.

THE COMMISSIONER: It's not a voluntarist rule of law.

DR CARMODY: Yes.

40 THE COMMISSIONER: It's a rule of law. Yes.

DR CARMODY: I did – I did – after the so-called Northern Basin Amendment was disallowed earlier this year, I did write a brief article addressing that concept because the immediate response from certain Basin states - - -

45

THE COMMISSIONER: I've read that with real interest. It's something - - -

DR CARMODY: Right.

5 THE COMMISSIONER: - - - I don't – and, again, it's relevant in a couple of my terms of reference now. I don't want to get in – I don't want to take up your time with the – what I call the political or intergovernmental negotiation aspect of this, but I must say I'm interested to know whether you have a view that it has any legal meaning for a state to say, "I'm going to withdraw from the Plan, say, by abrogating my referral." It just seems to me that - - -

10 DR CARMODY: Very – by abrogating the referral, very little meaning because the referral was so circumscribed in the first instance, and I do agree with the proposition that the bulk of the Water Act derives its constitutional validity from the suite of international environmental treaties to which where symmetry - - -

15 THE COMMISSIONER: That's, for example, when there are WRPs which must comply with the Basin Plan and which must include environmental watering - - -

DR CARMODY: Yes.

20 THE COMMISSIONER: - - - then state – the states and all its agencies and offices are bound to comply with it.

DR CARMODY: Yes.

25 THE COMMISSIONER: So it appears to be purely political. Perhaps you don't want to answer this, but it strikes me that it seems to be political posturing, rather than the statement of a legal position for a state to say, "If such and such happens under the Basin Plan, we're out of here."

30 DR CARMODY: Well, apparently, New South Wales did receive advice about what that might look like, and that was referred to in the infamous Four Corners episode. Of course, I have no idea what was contained in that advice, but in the legal opinion I published after the northern basin amendment was disallowed in the first instance, I did set out a number of possible explanations for what might be meant
35 legally if a Basin State chose to walk away from the Basin Plan. They were fairly limited options, some of which would actually disadvantage the Basin State and its constituents in the longer run – in the longer term.

40 THE COMMISSIONER: Yes. Action being counterproductive has not, in my experience in the Government of Australia, meant it's less likely to be taken.

DR CARMODY: I could neither confirm nor deny that statement.

45 THE COMMISSIONER: Very well. What did you want to turn to next?

DR CARMODY: So part 4 addresses climate change and planned environmental water. So I've already touched on the issue of climate change in relation to the

concept of an environmentally sustainable level of take. The CSIRO review indicates that SDLs were based on historic climate data due to, and I quote:

5 *Policy decision by the MDBA to accept the climate change risk sharing amongst users that is represented in current Water Sharing Plans. Under most current Water Sharing Plans, planned environmental water is the least secure water share under a drying climate.*

10 The vulnerability of planned environmental water in a changing climate raises serious questions with respect to clause 28 – sorry, 10.28 of the Basin Plan and section 22(5) of the Water Act. That might be 21(5) actually, both of which require that there be no net reduction in the protection of planned environmental water under the Basin Plan and Water Resource Plan.

15 THE COMMISSIONER: Yes, it's - - -

DR CARMODY: I think it's 21(5). It's a - - -

20 THE COMMISSIONER: It's subsection 21(5), yes.

DR CARMODY: Yes, the point being no net reduction in the protection of planned environmental water under the Plan or water resource plans. The noun "protection" or the verb "to protect" is defined in the Oxford Living Dictionary to include preservation or conservation in the environmental sense. Within the present context, this would arguably mean preserving the volume of planned environmental water provided for under water sharing plans or equivalent instruments immediately prior to the passage of the Basin Plan.

30 THE COMMISSIONER: So planned environmental water - - -

DR CARMODY: Yes.

THE COMMISSIONER: - - - is a concept that has to have sensible meaning before the Basin Plan commences?

35 DR CARMODY: Yes.

THE COMMISSIONER: Just remind me, what is it?

40 DR CARMODY: In essence, in New South Wales, which is the jurisdiction I'm most familiar with, it's – it's environmental water that's not held on an entitlement. It's provided for in rules in water sharing plans. There is a requirement under the water management Act in New South Wales that each Water Sharing Plan provides - - -

45 THE COMMISSIONER: So, nowadays, in the verbiage, planned contrast withheld; is that right?

DR CARMODY: That's correct, "held" being licensed environmental water; "planned" being rules based environmental water provided for in water sharing plans. It's often defined in a Water Sharing Plan, basically, as the water left over after consumptive use.

5

THE COMMISSIONER: Quite. That's why it's of such significance to the logic of the plan.

DR CARMODY: It is the bulk of environmental water.

10

THE COMMISSIONER: Yes, it is.

DR CARMODY: We talk frequently about the Commonwealth Environmental Water Holder and their water holdings, but, actually, volumetrically the bulk of the environmental water - - -

15

THE COMMISSIONER: Is what's left over.

DR CARMODY: - - - is the Plan environmental water, yes.

20

THE COMMISSIONER: Which bears, as it were, the residual risk.

DR CARMODY: Yes. And it's a commonly held view. It's a view that's expressed in the CSIRO review that this water is particularly vulnerable to the impacts of climate change.

25

THE COMMISSIONER: What does it mean to protect it?

DR CARMODY: That's a good question. In my view, within this context, it's to protect or preserve the volume that was available prior to the Basin Plan being passed. I don't see how you could protect water without maintaining at least the volume of water, and - - -

30

THE COMMISSIONER: A really dark view would be to say this. You've got to ask a question about reduction in protection of planned environmental water. Planned is a misnomer, because it's really just leftover. There is no protection of it. And so nothing we can do will produce a reduction.

35

DR CARMODY: I guess the protection lies in the cap on extractions.

40

THE COMMISSIONER: Yes. But there was no cap.

DR CARMODY: And other rules. There are - - -

45

THE COMMISSIONER: Historically, there was a cap, yes.

DR CARMODY: Yes, there has been a cap since 1995.

THE COMMISSIONER: So behind the - - -

DR CARMODY: And other rules. So - - -

5 THE COMMISSIONER: But prior to extractions in something like 10.28, there is really just the 1995 gap. Is that right?

DR CARMODY: In New South Wales.

10 THE COMMISSIONER: Yes.

DR CARMODY: Yes. Yes. And I think, ancillary to that, there are rules in some Water Sharing Plans in New South Wales that are designed as well to protect, use that word again, planned environmental water. And so if you change those rules, you
15 have to ask yourself is that complying with clause 10.28 and section 21(5) of the Basin Plan, to the extent that it erodes the availability or utility of that water for the environment.

THE COMMISSIONER: So on the overall Basin level, the legislated facts seem to
20 produce, look, there is going to have to be recovery for the environment.

DR CARMODY: Yes.

THE COMMISSIONER: But at 10.28 WRP level, the local level, if you like, with
25 its particular hydrology and ecology, it's a reminder that you're not going to be able to leave less for the environment than was the case when the Basin Plan started.

DR CARMODY: Which is – viewed within the concept of the Water Act and the Basin Plan is entirely logical. If the premise is upon which - - -
30

THE COMMISSIONER: Quite. No. No. No. Quite.

DR CARMODY: - - - the Act was enacted was the idea that - - -

35 THE COMMISSIONER: That's 2012, is it, the commencement of the Basin Plan?

DR CARMODY: It was, yes, the end of 2012. Yes.

THE COMMISSIONER: Thank you.

40

DR CARMODY: Yes. So I've just covered what I think protection means - - -

THE COMMISSIONER: Yes.

45 DR CARMODY: - - - in the legal sense. And, as I pointed out, this can include relevant rules in water sharing plans designed to procure a specific ecological outcome with that water. It's my view that one cannot protect and diminish a

resource at the same time, because these are diametrically opposed processes, unless someone can convince me otherwise.

THE COMMISSIONER: I'm not going to try, so - - -

5

DR CARMODY: Thank you. It's therefore arguable that in order to properly comply with section 21(5) of the Water Act SDLs must take into account climate change and less water availability across the Basin remains unchanged. Failure to do so will in time reduce the volume of planned environmental water relative to the volume that was available prior to the introduction of the Basin Plan. The same argument would apply in relation to clause 10.28 of the Basin Plan.

10

If SDLs do not take into account climate change, the only other conceivable means of preserving pre-Basin level of protection for planned environmental water would be to ensure that allocations for consumptive use diminish over time consistently with reduced water availability, which I think most people would find is an undesirable outcome.

15

THE COMMISSIONER: Most people would find what?

20

DR CARMODY: That it would be, if you're a consumptive user, that's an undesirable outcome.

THE COMMISSIONER: Well, depends what you mean by undesirable outcome.

Many consumptive users have given evidence to me that they understand there has to be a reduction in consumption.

25

DR CARMODY: Okay.

THE COMMISSIONER: All other things being equal, that is, in an imaginary world.

30

DR CARMODY: Yes.

THE COMMISSIONER: It would be nice to be able to keep all the irrigation, but it's not an imaginary world.

35

DR CARMODY: So, really, the only way – if you don't take into account climate change when developing SDLs, the only way of complying with clause 10.28 and section 2 (5) of the Act is to begin to erode the reliability of allocations in order to maintain the pool of planned environmental water.

40

THE COMMISSIONER: Yes.

DR CARMODY: So I note that the risk assignment provisions in the Water Act preclude entitlement holders from being compensated due to changes in allocations that are attributable to climate change, this being consistent with clause 48 of the National Water Initiative.

45

THE COMMISSIONER: And probably, but query, consistent with 51(xxxi) of the Constitution.

DR CARMODY: Okay. I will make a note of that.

5

THE COMMISSIONER: Yes. That is, it's in the nature of things - - -

DR CARMODY: Right.

10 THE COMMISSIONER: - - - that what you might regard as a property right in 51(xxxi) probably does regard as a property right, doesn't call for just terms if what Parliament enacts and the Executive enforces is a response to climate change.

DR CARMODY: Okay.

15

THE COMMISSIONER: But I have said, but query, not just out of the habit of the constitutional lawyer, but because these things are not all planned to demonstration.

DR CARMODY: Okay.

20

THE COMMISSIONER: But, as you know, there's a class of circumstance to which the notion of acquisition of property on just terms might apply or might be thought to apply - - -

25 DR CARMODY: Yes.

THE COMMISSIONER: - - - where that will have no operation because it is simply in the nature of things - - -

30 DR CARMODY: Yes.

THE COMMISSIONER: - - - that it is adjustable. And climate change, if I may say so, is nature's way of adjusting things.

35 DR CARMODY: Yes. So it's possible that it would be preferable for the government to make a decision to amend SDLs by 2024 to take into account climate change and to purchase the necessary volume of water from willing vendors. This would in turn allow entitlement holders to sell their water at market value and to reinvest the proceeds in the most appropriate manner, rather than being forced to
40 simply absorb the cost of reduced allocations at some future date, assume the government intends to comply with clause 10.28 or in section 21(5) of the Water Act.

45 Alternatively, the government could maintain current SDLs, which in all likelihood will fail to protect planned environmental water as required, thereby resulting in breaches of section 21(5) of the Act and clause 10.28 of the Basin Plan.

THE COMMISSIONER: Who could sue to restrain that?

DR CARMODY: A party with common law standing.

5 THE COMMISSIONER: Who would have common law standing?

DR CARMODY: An environment group.

THE COMMISSIONER: Would they?

10

DR CARMODY: A farmer. A community group with - - -

THE COMMISSIONER: Would they?

15

DR CARMODY: - - - a demonstrated interest in the management of Basin water resources.

THE COMMISSIONER: This is going to – well, this, in my mind, moves us towards the area of clause 6.14 of the Basin Plan.

20

DR CARMODY: The dreaded 6.14.

THE COMMISSIONER: Yes. Well, I don't dread it, but I'm going to say something about it. I'm not going to – I'm not going to be so pretentious as to pretend to be giving an authoritative reading of it. But it does seem to me that it has produced a deal of folk law. I take it that 6.14 is a part of the tussle between the politics as to whether the Commonwealth can be snookered into paying compensation.

25

30

DR CARMODY: Yes.

THE COMMISSIONER: 51.31 applying to the Commonwealth, but not to the States.

35

DR CARMODY: In my view, it's an oddly drafted clause.

THE COMMISSIONER: Do you mind – we're about to adjourn, but do you mind if I just ask you this. Take this on notice. I've read some things you've written about 6.14. I'm very interested in your views, but I'm not sure that you've quite addressed it in this fashion. It uses the concept of a change in reliability of water allocations.

40

DR CARMODY: Yes.

THE COMMISSIONER: Of a kind – I stress of a kind - - -

45

DR CARMODY: Yes.

THE COMMISSIONER: - - - that would trigger subdivision B of division 4 of part 2 of the Act.

DR CARMODY: Yes.

5

THE COMMISSIONER: It's heart stirring drafting, isn't it? Well, now, you go off to that part of the Act - - -

DR CARMODY: Yes.

10

THE COMMISSIONER: - - - and the first thing one notices is that it's about changes to the Basin Plan.

DR CARMODY: That's right. There needs to be a change to the Basin Plan before B can be - - -

15

THE COMMISSIONER: So how does 6.14 come to operate? Nothing in the Basin Plan requires a change in the reliability of water allocations of a kind that would trigger provisions about changes in the Basin Plan.

20

DR CARMODY: Yes. It's curious, isn't it? I return to the surrealist poetry reference.

THE COMMISSIONER: Yes, which is much better fun than this. Very well. I'm going to ask you questions about that, because I really need help on that but after - you're going to come I think later to - - -

25

THE COMMISSIONER: I do, yes. And I have tendered an advice. It was also tendered by the client for whom I wrote it on a previous occasion.

30

THE COMMISSIONER: Thanks. That's why I've read it.

DR CARMODY: And I'm equally interested in your views, because I do think it is a somewhat complicated area, notwithstanding that I think there has been some confusion, perhaps by certain parties, about the difference between allocation and use and I will note that - - -

35

THE COMMISSIONER: Yes, I've noticed that distinction - - -

40

DR CARMODY: Yes.

THE COMMISSIONER: - - - of your writing. Yes.

DR CARMODY: That the provisions in question concern reliability in relation to an allocation, not use, which is different, legally and substantively different.

45

THE COMMISSIONER: You may need to explain that to me later.

DR CARMODY: All right.

THE COMMISSIONER: Is it – I want to make sure we have enough time. Is 2 o'clock okay or should it be 1.45?

5

MR BEASLEY: You would have to ask Dr Carmody.

THE COMMISSIONER: Will 2 o'clock be okay?

10 DR CARMODY: Yes, that's fine.

THE COMMISSIONER: We will adjourn till 2 o'clock.

15 **ADJOURNED** **[1.02 pm]**

RESUMED **[2.01 pm]**

20

THE COMMISSIONER: Are you ready?

DR CARMODY: Yes.

25 MR BEASLEY: We've had tab 5 of the brief - - -

THE COMMISSIONER: I saw that. Thank you.

MR BEASLEY: - - - volume 1 updated for Dr Carmody.

30

THE COMMISSIONER: Thanks.

DR CARMODY: So that brings me to part 5 of the submissions. And part 5 concerns the Northern Basin Review and subsequent amendment of the Basin Plan, as well as an amendment to the Water Act. So EDO New South Wales has published a range of materials concerning the Northern Basin Review and associated legislative amendments. These amendments comprise the Basin – well, proposed amendments – the Basin Plan amendment instrument number 1 of 2017 which was disallowed; the 2018 version, which I will refer to as the Northern Basin Amendment and the Water Act – the Water Amendment Act 2018.

40

The relevant material has been tendered. And they're located at item 10 of the index. And these include a submission dated February 2017 responding to the Northern Basin Review and proposed amendment, a briefing note dated May 2018 and the Water Amendment Act 2018 and documents obtained on behalf of our client Inland Rivers Network under the Commonwealth Freedom of Information Act.

45

So you will note from the submission responding to the Northern Basin Review, EDO Australia raised concerns about the lawfulness of the proposed amendment, including in relation to the socio-economic analysis underpinning the proposal. Specifically, we were concerned that this work may not have met the legal threshold for best available socio-economic analysis as specified in section 21(4)(b) of the Water Act.

MR BEASLEY: That submission also refers to the opinion of Professor Williams and Dr Kildayer - - -

THE COMMISSIONER: Yes.

MR BEASLEY: - - - who expressed the view that any attempt to privilege socio-economic factors over environmental outcomes would be, in their view, unconstitutional.

THE COMMISSIONER: Now, am I looking at the right document? It was dated what?

DR CARMODY: February 2017.

MR BEASLEY: It's 10E of the brief. 10E. I was reading from page 2.

THE COMMISSIONER: Yes. Thank you. Thanks.

DR CARMODY: So documents which were obtained under the Commonwealth Freedom of Information Act for our client, the IRN, may support our concerns regarding the socio-economic analysis undertaken for the purposes of the Northern Basin Review. And they're available at item 4 of the index to peruse at your leisure.

THE COMMISSIONER: Thank you.

DR CARMODY: However, this issue has already been canvassed in much more detail by previous witnesses, including Professor Sarah Wheeler in her evidence. So I don't - - -

THE COMMISSIONER: Yes.

DR CARMODY: - - - consider it necessary at this juncture to go into any further detail. The point was just to make that, as a lawyer, I was concerned - - -

THE COMMISSIONER: Yes.

DR CARMODY: - - - that the threshold stipulated in the Act may not have been met. It appears to be corroborated by Professor Wheeler and her colleagues in the evidence tendered. Our submission raised concerns regarding the hydrological modelling which was undertaken for the purposes of the review. And these concerns

were elaborated on in a legal opinion dated 16 February 2018 that was published on behalf of EDO New South Wales.

5 In summary, the issues include, but are not limited to, meeting only 44 per cent of environmental targets for the northern Basin under the amendment, compared to 49 per cent under the previous iteration of the Basin Plan, with the overall probability for achieving site-specific indicators being lower. The fact that the modelling excluded low flow targets on the Barwon-Darling River. The fact that modelled environmental outcomes are dependent on the implementation of toolkit measures
10 which have no statutory basis and which depend on State cooperation. The ability for targeted water recovery which purportedly reduces environmental impacts for varied and assumptions regarding compliance.

15 MR BEASLEY: Can I just ask, Dr Carmody, is that the document behind tab 21, also dated 16 February 2018, but it looks more like an article than an opinion?

DR CARMODY: That's correct.

20 MR BEASLEY: That's it?

DR CARMODY: It was published on the EDO website.

MR BEASLEY: All right. Thank you.

25 DR CARMODY: So these concerns remain, including in relation to the coordination of environmental flows, which, again, is one of the assumptions underpinning the justification to reduce environmental flows by 70 gigalitres. I'm pleased to see that one such trial has been run in northern New South Wales. However, there are still no statutory measures in place guaranteeing that this will be
30 repeated at the necessary intervals or that this water will benefit from statutory, or will face protection in water resource plans.

35 THE COMMISSIONER: It is the kind of matter ideally dealt with by WRPs, isn't it?

DR CARMODY: In my view, yes.

40 THE COMMISSIONER: And, furthermore, it's the kind of matter that would require connectivity between WRPs.

45 DR CARMODY: Indeed. And I understand the issue has been raised by previous witnesses. In terms of my concerns regarding assumptions around compliance, obviously, New South Wales has made considerable progress in that regard and we do welcome the creation of the Natural Resources Access Regulator which has commenced proceedings in the Land and Environment Court in relation to a number of matters. But I can't say the same in relation to progress with respect to metering and compliance in Queensland. So my concerns in that regard remain.

So accordingly we were and remain concerned that the scientific work underpinning the 70 gigalitre reduction scenario and associated amendments – and this included in relation to increased groundwater diversions – would not meet the threshold for best available scientific knowledge specified in the Water Act. Furthermore, it appears
5 unlikely that the 390 gigalitre a year reduction figure for the Northern Basin satisfies the requirement that SDLs reflect an ESLT. To that extent, it’s difficult to reach a more favourable conclusion in relation to a 320 gigalitre a year scenario.

10 THE COMMISSIONER: Again, that seems to be solely an understatement. If 390 is not enough, 320 isn’t.

DR CARMODY: Indeed. Unless there’s a magic river up there that none of us are aware of.

15 THE COMMISSIONER: Sorry. It’s the other way around. If 320 is not enough recovery 390

MR BEASLEY: 415.

20 DR CARMODY: That’s right.

THE COMMISSIONER: Yes.

25 DR CARMODY: Finally, we’re concerned about the consultation process undertaken for the Northern Basin Review was inequitable with a relatively small number of industry groups privileged over and above other stakeholders, including many EDO clients who are physically located in the Northern Basin or who have a strong history of interest and involvement in water management matters and
30 processes in the Basin. And this includes community groups and conservation groups. Evidence to support this claim is contained in documents that have been tendered. And they’re available at item 4 of the index. And this includes a brief analysis of these documents by Mr Bill Johnson, who has previously appeared as a witness.

35 THE COMMISSIONER: Yes.

40 DR CARMODY: Just to clarify, the documents formally tendered aren’t the full suite of documents we obtained, but we have attempted to select some that are perhaps more pertinent to this inquiry. So I just move on to the briefing note which concerns the Water Amendment Act 2018. And this, effectively, facilitated the retabling of the Northern Basin Amendment. I’m not sure if you’ve had a chance to read that and whether you have any specific questions. I thought that might be a more useful course of action than me repeating verse and chapter - - -

45 THE COMMISSIONER: Yes and no are the answers.

DR CARMODY: Okay. So no questions?

THE COMMISSIONER: That's right.

5 DR CARMODY: Well, then, we will move on to part 6 which concerns prerequisite policy measures and water shepherding. Of course, the term prerequisite policy measures isn't statutorily defined. It appeared at some point and also refers to unimplemented policy measures, as you're aware. So you're no doubt very familiar with chapter 7 of the Basin Plan including clause 7.15, which concerns the so-called unimplemented policy measures.

10 THE COMMISSIONER: Yes.

15 DR CARMODY: Which at some point were re-badged as prerequisite policy measures. Briefly, this clause sets out the method for calculating supply contribution under the adjustment mechanism and states that all unimplemented policy measures are to be deducted from the overall supply contribution figure. So that's a relatively uncontroversial fact. An unimplemented policy measure is defined as an anticipated measure consisting of a policy to (a) credit environmental return flows for downstream environmental use or (b) allow the call of held environmental water from storage during an unregulated flow event, to the extent, if any, that the measure
20 at the time of the determination is not expected to or did not come into effect by 30 June 2019.

25 So two elements of this definition are somewhat elliptical: first, the concept of environmental return flows; and, second, the concept of an anticipated measure. And I will deal with each of these in turn. So in the first instance the term environmental return flow is not defined in either the Water Act or the Basin Plan. However, it's understood as environmental water that is, in a regulated system, at least, released and used at an upstream location and then subsequently at downstream locations. So it benefits more than one part of the river.

30 THE COMMISSIONER: It's a return flow.

35 DR CARMODY: Well, it's a little confusing, because there is also the separate concept of return flows, but it's to be distinguished from that concept. So the - - -

THE COMMISSIONER: Well, an environmental return flow I understand to mean the movement of water back into the river channel.

40 DR CARMODY: I don't think it necessarily means that in all instances in this context. The Environmental Water Holder in Victoria provides what I consider to be a useful description on its website. Perhaps I should read that, if you think that will be of assistance.

45 THE COMMISSIONER: Yes, please.

DR CARMODY: So the connected river and floodplain system of northern Victoria provide opportunities to achieve multiple environmental benefits as water flows

through the system. One water release can hit several ecosystem targets in different locations as it moves downstream.

THE COMMISSIONER: Yes. That doesn't make it a return flow.

5

DR CARMODY: Not in the sense that - - -

THE COMMISSIONER: Not in any sense.

10 DR CARMODY: Yes. Which is why I drew attention to the use of that term, because it's not defined and its meaning isn't immediately obvious from the words that comprise the phrase. I had to look to secondary extrinsic sources to try and understand what it meant. I'm satisfied with the definition, or the description, at least, provided by the Victorian Environmental Water Holder.

15

THE COMMISSIONER: What does it mean to have a policy to credit them for downstream environmental use?

20 DR CARMODY: Well, that's the next part of the legal argument that is currently unfolding before you, because there is a difference between the fact in itself of - - -

THE COMMISSIONER: A flow.

25 DR CARMODY: - - - of the flow being used at multiple sites and then a policy to allow for it to be re-credited.

THE COMMISSIONER: What does crediting mean?

30 DR CARMODY: I think – well, to me it allows that water to be credited to a licence further down the stream.

THE COMMISSIONER: A licence?

35 DR CARMODY: For example. And my understanding is that water shepherding, the methodology developed for the purposes of water shepherding, was one such means by which that water could be re-credited.

THE COMMISSIONER: But credited to whose account? In what sense?

40 DR CARMODY: Yes. So shall I get to that? Should I - - -

THE COMMISSIONER: Please.

45 DR CARMODY: Okay. So the issue of environmental return flows is relevant to the management of the CEWH's portfolio of licences. To that end, in a submission that it made to the inquiry into the integrity of the water market it noted that:

There are no rules in place in some states, such as New South Wales, for the crediting of return flows. Consequently, environmental water that flows from one catchment into another becomes available for legal extraction by other licence holders or re-regulated by river operators.

5

So this is - - -

THE COMMISSIONER: This is crediting in the sense of maintaining the character or identity of.

10

DR CARMODY: Well, minus any state transmission losses, depending on the methodology used.

THE COMMISSIONER: Okay.

15

DR CARMODY: So it could account for transmission losses but re-crediting a volume, presumably determined in accordance with a formula, to a licence further downstream that is in this instance also owned by the Commonwealth Environmental Water Holder. And then it would allow for it to be formally used as held environmental water further downstream, rather than re-regulated or used by other licence holders.

20

THE COMMISSIONER: Thank you.

25

DR CARMODY: So to me this implies – the CEWH statement implies that a legal mechanism is actually necessary to facilitate the movement of environmental return flows between catchments – well, moreover, to ensure that that water is credited and protected.

30

THE COMMISSIONER: So in order to fit within this definition of an unimplemented policy measure, there does need to be a policy.

DR CARMODY: Indeed. Which is the point I'm going to - - -

35

THE COMMISSIONER: Sorry.

DR CARMODY: Yes. That's okay. I think your mental trajectory is going in the same direction as my - - -

40

THE COMMISSIONER: I hope so.

DR CARMODY: - - - submissions, which is probably a good thing. So I've drawn your attention to this statement as to the CEWH statement, as it begins to explain how shepherding is, essentially, a method developed to facilitate the downstream crediting of environmental return flows.

45

THE COMMISSIONER: Yes.

DR CARMODY: So in order to make out this argument I will take you through several documents. In the first instance, the memorandum of understanding in relation to the shepherding of water, which was entered into between New South Wales and the Commonwealth in 2010. And this document is available at item 6M.

5

THE COMMISSIONER: Now, in relation to it - - -

DR CARMODY: Yes.

10 THE COMMISSIONER: - - - what would it mean to say it had come into effect or not?

DR CARMODY: Sorry, Commissioner. Could you repeat the question?

15 THE COMMISSIONER: What would it mean in relation to this memorandum of understanding - - -

DR CARMODY: Yes.

20 THE COMMISSIONER: - - - to say – how do we know whether it has come into effect?

DR CARMODY: Well, as a lawyer, I would be looking for provisions in Water Resource Plans or Water Sharing Plans as they're currently known to facilitate - - -

25

THE COMMISSIONER: What about its own clause 5?

DR CARMODY: I will just find the document. I have to go to my second folder. So are we looking at document tab 6M?

30

THE COMMISSIONER: I am.

DR CARMODY: The memorandum.

35 THE COMMISSIONER: Clause 5.

DR CARMODY: And you've drawn my attention to clause 5. So the MOU commences on the date on which the implementation plan was signed.

40 THE COMMISSIONER: Right. So I'm finding it difficult to understand how I relate that to the statutory expression, which is:

An anticipated measure to the extent - - -

45 DR CARMODY: Yes.

THE COMMISSIONER:

...to the extent that the measure at the time of the determination –

and that's the determination of the supply contribution, was it not?

5 DR CARMODY: Yes.

THE COMMISSIONER:

...is not expected to come into effect by 13 June 2019.

10

DR CARMODY: Well, the argument I'm elaborating is twofold. The first is demonstrating how shepherding is a necessary policy to allow for the crediting of environmental return flows within the context of clause 7.15 because there has been some debate as to whether or not that actually crediting environmental return flows can be equated with the concept of shepherding. And then I move on to explaining how it can be classified, shepherding can be classified as an anticipated measure.

15

THE COMMISSIONER: If it's to be an anticipated measure, it must not relevantly be expected to come into effect by 30 June 2019.

20

DR CARMODY: Yes. If it does not come into effect – if it's anticipated, it does not come into effect. The volume that would otherwise have been provided for, had that policy been implemented, must be deducted from the supply measure contribution. I'm wondering whether it would be useful to continue through the submissions because it sets up the argument that perhaps - - -

25

THE COMMISSIONER: Yes. Please.

DR CARMODY: - - - you're moving towards or trying to understand. So the shepherding is defined at page 3 of the MOU. It's defined as:

30

The delivery of a calculated volume of water that was created by the non-activation, reduced extraction at a nominated licence location to a more downstream location after consideration of losses where it will be made available for extraction or use for the environment.

35

So this definition is expanded upon in a document by DPI Water as it was then known dated March 2012, and that's entitled 'Proposed Arrangement for Shepherding Environmental Water in the New South Wales Draft for Consultation' available at 6I in your tender bundle. Page 1 provides as follows, and I quote:

40

Water shepherding which is a new and innovative concept in water management - - -

45 THE COMMISSIONER: So new and innovative.

DR CARMODY: New and - - -

THE COMMISSIONER: Yes.

DR CARMODY: Yes:

5 *...is being proposed as a means by which the Commonwealth can optimise the*
 use of these entitlements to meet environmental watering objectives within the
 Murray-Darling Basin. The concept involves moving water from the parent
 licence location to an environmental asset further downstream. Shepherding
10 *will enable the Commonwealth to make the most effective use of environmental*
 water by giving it the capacity to achieve its watering objectives not only in the
 water source where it holds the entitlements, but also in downstream locations
 extending beyond the Menindee Lakes.

15 THE COMMISSIONER: Well, now, that seems to me to be just wrong, that the
 concept does not involve moving water at all, whether you have shepherding as a
 concept or not, water is going to move downstream.

20 DR CARMODY: Well, it's a framework for recrediting it and allowing its use
 downstream.

 THE COMMISSIONER: No. I understand that. I think I'm trying to explore this
 woeful bureaucratic English to find what they're getting at.

25 DR CARMODY: Yes.

 THE COMMISSIONER: So the concept certainly does not involve moving water.
 That's just nonsense. Water goes downstream. That's why it's called downstream.
 Now, the concept involves the maintenance of some legal character - - -

30 DR CARMODY: Yes indeed.

 THE COMMISSIONER: - - - of the conduct involved in designating a certain flow.
 Now "flow" is relevantly capable of being identified by volume, time, including
 duration.

35 DR CARMODY: Yes.

 THE COMMISSIONER: And location.

40 DR CARMODY: Yes.

 THE COMMISSIONER: Or locations. And I would have thought, if the people
 who wrote these documents bothered to consider the interests of those who might
 read them, there would have been some reference to this aspect of the concept.
45 Where do I find that?

 DR CARMODY: Which aspect, Commissioner?

THE COMMISSIONER: The notion that you will – that will identify an event by reference to a flow, that is, time.

DR CARMODY: Yes.

5

THE COMMISSIONER: Duration, volume.

DR CARMODY: Yes.

10 THE COMMISSIONER: Locations.

DR CARMODY: I think the understanding was that it would be released from a regulated tributary into the unregulated part of the system, the Barwon-Darling.

15 THE COMMISSIONER: Yes. Well, there's self-serving stuff on page 2 under the heading 'What is Water Shepherding' which is equally unimpressive, it seems to me.

DR CARMODY: Yes.

20 THE COMMISSIONER: I am bound to say it is as if people do not wish readers to have a clear notion of what's being talked about.

DR CARMODY: Well, I have to admit when I originally was asked to engage with the government in relation to this issue, well, it was our office, EDO New South
25 Wales back in 2012, I remember reading all of the materials relating to shepherding, and I did find some aspects of it somewhat mysterious.

THE COMMISSIONER: Well, I'm afraid to say I'm beginning to wonder whether that's deliberate.

30

DR CARMODY: I don't know. It's not – the materials are certainly not – they're not written for the purpose of illuminating the average member of the public which includes many of our clients. So from that perspective, I do find it somewhat objectionable that the language is so esoteric.

35

THE COMMISSIONER: It doesn't seem to me it's an esoteric concept at all.

DR CARMODY: The concept in and of itself, no, but it took me some time to wade through the various documents back in 2012 before the concept or the essence of the
40 concept became apparent. So it's my view that that description, as poorly drafted as it may or may not be, is broadly consistent with a framework for crediting return environmental flows, that is, environmental water that is used upstream and then able to be used further downstream because its characteristics have been retained on a licence in another catchment.

45

THE COMMISSIONER: Was there any such policy at the time of the determination of supply contribution?

DR CARMODY: Not for the Barwon-Darling, no, and that's where the concern - - -

THE COMMISSIONER: So this is all just academic, then?

5 DR CARMODY: Well, the concern arises that if they were meant to develop water
shepherding as a prerequisite policy measure, and that didn't occur, which is I think
legally it's possible that it doesn't occur, but if it doesn't occur, then a necessary
consequence is that that volume that would otherwise have been available has to be
10 7.15.

THE COMMISSIONER: I wonder whether I've misread a negative. I'm sorry
about this. In 7.15 - - -

15 DR CARMODY: Yes.

THE COMMISSIONER: - - - we are concerned with a calculation.

DR CARMODY: That's correct.

20

THE COMMISSIONER: And the calculation is called the total supply contribution
- - -

DR CARMODY: Yes.

25

THE COMMISSIONER: - - - of notified measures, and the measures are supply
measures.

DR CARMODY: Yes.

30

THE COMMISSIONER: And they are measures by which equivalent
environmental outcomes can be achieved with less water.

DR CARMODY: Well, according to a methodology set out in schedule 6, not
35 literally equivalent environmental outcomes, but for the purposes of modelling
undertaken - - -

THE COMMISSIONER: With the schedule 6 approved method.

40 DR CARMODY: Yes.

THE COMMISSIONER: Applicable method, I should say, which, as you correctly
point out in terms does not call for actual environmental equivalency, but seems to be
some kind of gesture in that direction.

45

DR CARMODY: As achieved in the model, yes.

THE COMMISSIONER: Yes. Well, the method involves a specified model.

DR CARMODY: Yes.

5 THE COMMISSIONER: Frozen in time and not improved; isn't that right?

DR CARMODY: Yes.

10 THE COMMISSIONER: It's actually a specified model.

DR CARMODY: Yes.

THE COMMISSIONER: I don't know why anyone would think that was a good idea, but, in any event, it has been done, but 7.15 says that:

15

In calculating the supply –

sorry:

20 *The purpose of calculating the supply contribution, of course, is that that will tell you by how much the sustainable diversion limit can be adjusted.*

DR CARMODY: Yes.

25 THE COMMISSIONER: Upwards.

DR CARMODY: Yes.

THE COMMISSIONER: So 7.15 stipulates the basis of this calculation.

30

DR CARMODY: Yes.

THE COMMISSIONER: And it starts by fictitiously ignoring climate change, does it not?

35

DR CARMODY: Yes.

THE COMMISSIONER: The notion of repeating historical climate conditions is itself, even without climate change, a somewhat problematic notion when one considers the variability, is it not?

40

DR CARMODY: I would agree with that statement.

THE COMMISSIONER: So we then have the all-important notion of the benchmark conditions of development, that they get modified by the addition of the supply measures whose contributions you're trying to calculate.

45

DR CARMODY: Yes.

THE COMMISSIONER: And there are to be removed unimplemented policy measures.

5

DR CARMODY: Yes.

THE COMMISSIONER: Now, the only reason why an unimplemented policy measure would be removed is if it had been built into the benchmark - - -

10

DR CARMODY: The modelling.

THE COMMISSIONER: - - - conditions of development, isn't it?

15

DR CARMODY: Well, if it had been assumed in the modelling, yes.

THE COMMISSIONER: That's right. And you get that from 7.02. Where do I find in schedule 6 the assumption of the unimplemented policy measures?

20

DR CARMODY: I'm not sure that it's referred to in schedule 6.

THE COMMISSIONER: So how does all this hang together as a legal document, then?

25

DR CARMODY: Well, I think solving the riddle of the sphinx is maybe easier than answering that question.

THE COMMISSIONER: Yes. But you see my problem. We're told in 7.02 the benchmark conditions of development means the conditions of development that were assumed in the benchmark model described in schedule 6.

30

DR CARMODY: Yes.

THE COMMISSIONER: So I go to schedule 6 and S02 – S6.02 is the benchmark model.

35

DR CARMODY: Yes.

THE COMMISSIONER: And it comprises a particular model.

40

DR CARMODY: That's right. And I've had a look at the hydrological modelling document.

THE COMMISSIONER: Well, I'm – no doubt I'm missing things, but I can't find in S602 any relevance to – any reference to these unimplemented measures.

45

DR CARMODY: No, and that's where the confusion arises. I completely agree which is why when I was first required to advise a client about this matter, apart from having to grapple with the context of environmental return flows within the context of 7.5 because it's not defined, I had to work out what on Earth they meant by an
5 anticipated measure because it's not defined clearly. It occurred to me that it was a measure that had been built into the modelling. The modelling results had assumed that that would continue to occur. 7.15 provides that if that doesn't happen, if that policy isn't, in fact, implemented, then the volume, whatever that adds up to, needs to be deducted from the supply measure contribution for the relevant supply measure.
10 So I then went on a journey of discovery and read - - -

THE COMMISSIONER: It's note 1 in my print of the Basin Plan.

DR CARMODY: Yes.
15

THE COMMISSIONER: Note 1 to the definition of benchmark conditions of development that holds out this promise.

DR CARMODY: Yes.
20

THE COMMISSIONER: But I just can't find it in the - - -

DR CARMODY: So you have to go and look at the modelling results and deduce from those what the policy settings are, which is what I did.
25

THE COMMISSIONER: And what does that tell you about shepherding?

DR CARMODY: So then I went and I had a look at the hydrological modelling that was undertaken for the purposes of the Basin Plan. I looked at the modelling
30 undertaken for the Barwon-Darling – sorry, Barwon-Darling. I will just skip forward a few steps. So I examined the 2012 report entitled hydrologic modelling to inform the Basin Plan, methods and results. So I draw your attention to chapter 5.7 which concerns the Barwon-Darling River and in particular 5.7.5 which is entitled 'Modelling Methodology' and 5.7.7 which is entitled 'Future Work', and those
35 sections are on pages 104 and 113 of that document. So I will begin with 5.7.5 at point 1 which states:

The water recovery in the Barwon-Darling system was modelled by changing the threshold at which water can be punched from the river. Threshold change is a substitute for future shepherding of recovered water, but this approach ensures that future diversions for consumptive use are consistent with the SDL. In practice, the approach for shepherding or accounting of environmental water in unregulated systems may be different.
40

45 And then 5.7.7 at 1 goes on to say:

The modelling carried out for the Barwon-Darling system achieved a reduction in diversions by increasing pumping thresholds and is therefore not consistent with the proposed water recovery program to bridge the gap between baseline diversions and proposed SDLs.

5

THE COMMISSIONER: So who was - - -

DR CARMODY: How – I – can I just finish the next sentence – may I:

10

However, the modelling is dependent on the water shepherding approach and their inclusion in the model.

THE COMMISSIONER: So who's writing that?

15

DR CARMODY: This was in the MDBA's 2012 report, 'Hydrologic Modelling to Inform the Proposed Basin Plan, Methods and Results'.

THE COMMISSIONER: So whether obscurely or not, they are describing their model and their resort to it.

20

DR CARMODY: Yes, and the assumptions underpinning the modelling of the Barwon-Darling.

25

THE COMMISSIONER: So it ends up by sitting on the fence about whether the modelling was – whether it did incorporate shepherding.

30

DR CARMODY: Well, they said that they used threshold change. They increased the pumping threshold which means that users in that part of the system would be unable to pump water because of the increased threshold, and, in theory, that allows water that's being shepherded to move through the system without it being pumped. So I think what they're saying is that threshold change is a proxy. They say it's a substitute for future shepherding of recovered water, perhaps because they didn't have any other method at the time to incorporate that policy assumption into the modelling. The best they could do was to raise the pumping threshold because that

35

THE COMMISSIONER: Presumably from time to time.

40

DR CARMODY: Indeed, on what's called an events basis.

THE COMMISSIONER: I understand that.

DR CARMODY: Yes.

45

THE COMMISSIONER: But this is – so the model here is trying to accommodate events that have not yet happened and are not going to proceed by way of clockwork.

DR CARMODY: Yes. Which I think is one of the functions of hydrological modelling to anticipate - - -

5 THE COMMISSIONER: Well, it's one of the challenges of hydrological modelling.

DR CARMODY: Yes.

10 THE COMMISSIONER: And one of the reasons why there's no such thing as a perfect model.

DR CARMODY: Yes. And it's – the better the data, the better the output from the model.

15 THE COMMISSIONER: Well, one further component, had a willingness to revisit the match of the first and the second.

DR CARMODY: Yes.

20 THE COMMISSIONER: Which is not observed, I have to say, in anything the MDBA has done in the last several years at all. Well, now, it's by that means then that you have identified shepherding as an unimplemented policy measure.

25 DR CARMODY: Well, to the extent that I believe that it is a legal mechanism that was developed to allow these environmental return flows to be credited downstream. It's the use of the word "crediting" in 7.15 that to me is key because that implies as a necessary condition some kind of legal mechanism to allow that to happen. Otherwise, the water just moves through the system, and that just happens.

30 THE COMMISSIONER: What's the legal mechanism, the MOU?

35 DR CARMODY: Implementing shepherding. So, for example, the Barwon-Darling Water Sharing Plan which was implemented in 2012 includes a provision which says this sharing plan can be amended to take into account – or to provide for, rather, water shepherding, which hasn't occurred. And the counter argument – so I did draft about this issue for the Inland Rivers Network which was a longstanding client of the EDO, and the advice was passed on to various people, including senior members of staff in the MDBA, and they responded by email indicating that they didn't agree with the analysis for various reasons, and I've tendered that response to you for your
40 own edification.

MR BEASLEY: That's – where is that? 60.

45 DR CARMODY: Interestingly, up until a certain point, Commissioner, the New South Wales Government made it very clear in their policy documents that they considered that water shepherding was a means by which this PPM, known as crediting environmental return flows that could occur in the Barwon-Darling River.

And there's documentation which is no longer available online, but which I had hard copies and electronic copies of, so I've been able to tender them to you, there is documentation that makes it clear that they were proceeding on the basis of creating a PPM policy which included water shepherding on the Barwon-Darling River for the purposes of satisfying this crediting environmental return flows matter.

So, for example, there's a document entitled 'Draft New South Wales Prerequisite Policy Measures Implementation Plan' by the then DPI Water. It's dated May 9th 2015. And it states on page 8:

The shepherding framework is a proposed option to meet the environmental flow reuse PPM in the unregulated Barwon-Darling system.

It then sets out a proposed method for implementing this PPM. Notably, paragraphs 5 and 6 explain the process for trading from a shepherding access licence upstream to a shepherding access licence downstream with the arrival of the environmental water then resulting in it being credited to the relevant licence account. And it's that crediting that's provided for under this shepherding framework. In other words, it is describing a method for crediting environmental flow from an upstream catchment. I have - - -

THE COMMISSIONER: The response to your opinion in effect says that – well, I don't know what it does say. Well, is Mr James a lawyer?

DR CARMODY: No, he is not.

THE COMMISSIONER: In any event, he is – he confidently says:

The PPMs defined in the Basin Plan do not include shepherding.

DR CARMODY: Yes.

THE COMMISSIONER: I can't find the Basin Plan defining PPMs anywhere.

DR CARMODY: An anticipated policy measure assumed in the modelling, consisting of A or B. I think that's the closest evidence we come to a definition in 7.15.

THE COMMISSIONER: Well, perhaps - - -

DR CARMODY: Well, and - - -

THE COMMISSIONER: - - - non-lawyers in MDBA should stop doing their own lawyering. I mean, this is really – this is a very bad use of Commonwealth resource, I would have thought. In any event, an anticipated measure is a defined expression in the Basin Plan.

DR CARMODY: Yes.

THE COMMISSIONER: But the Basin Plan doesn't – correct me if I'm wrong – it doesn't specify them. It's a genus.

DR CARMODY: Indeed.

5

THE COMMISSIONER: It doesn't say what are – you know - - -

DR CARMODY: No.

10 THE COMMISSIONER: You know, water scheme policy number 3. It doesn't do that.

DR CARMODY: There's no specified list. That's correct.

15 THE COMMISSIONER: So when Mr James thought it was appropriate to say, in response to your analysis:

The PPMs defined in the Basin Plan do not include shepherding.

20 What is he saying, that there are - - -

DR CARMODY: That the word "shepherding" doesn't appear in clause 7.15, I believe, is what he's alluding to, which is why I've gone to some trouble to explain the link between the concept of environmental flow reuse, crediting that
25 environmental flow and shepherding.

THE COMMISSIONER: Where do you think he's saying it doesn't appear? In - - -

DR CARMODY: 7.15.

30

THE COMMISSIONER: But you wouldn't expect shepherding to appear in 7.15, because if there's a shepherding - - -

DR CARMODY: Well, I wouldn't, because it's a legal mechanism to allow - - -

35

THE COMMISSIONER: That's my point.

DR CARMODY: It's a legal mechanism to allow environmental flows to be re-credited further downstream.

40

THE COMMISSIONER: 7.15 has got nothing to do with particular measures. It talks about a genus, unimplemented policy measure, which is a species of a genus anticipated measure.

45 DR CARMODY: Yes.

THE COMMISSIONER: You wouldn't expect shepherding to be there. If Mr James really thinks that, then he should be ashamed of himself. That's just terrible.

5 MR BEASLEY: I don't understand why Mr Taylor is the principal lawyer.

THE COMMISSIONER: Mr Taylor makes it quite clear that Mr James prepared that reply.

10 MR BEASLEY: That's right. Why isn't the lawyer doing it?

DR CARMODY: Well, I don't know who prepared the reply. I don't know - - -

15 THE COMMISSIONER: Because, as tax payers, we're spending money on Commonwealth lawyers and Commonwealth officers not taking their advice. Now, so what we had is Mr Russell James saying that the PPMS defined in the Basin Plan do not include shepherding. That seems to me at best to be misleading and at worst to be dishonest. Next it says:

20 *Rather, the PPM that appears to be referred to in the advice –*

That's your advice –

only requires a mechanism for crediting environmental return flows.

25 So what I'm trying to understand is a mechanism for crediting environmental return flows.

30 DR CARMODY: Is in my view a legal mechanism. It has to be a legal mechanism. And shepherding has been proffered by the New South Wales Government as a legal mechanism.

THE COMMISSIONER: Thank you. So if I use the words of the Plan, it would be a policy of a kind that you can sensibly say it can come into effect.

35 DR CARMODY: Yes.

40 THE COMMISSIONER: So they're the words that the Basin Plan uses. So if shepherding could be – can be identified in the history as something that is the subject of a policy to credit environmental return flows or to allow the call of held environmental water from storage, etcetera - - -

DR CARMODY: Yes.

45 THE COMMISSIONER: - - - in such a way that it is imaginable or possible that as a measure it could come into effect – again, I'm using words from the definition.

DR CARMODY: Yes.

THE COMMISSIONER: Then you have an unimplemented policy measure within the meaning of 7.15. So what does Mr James mean by his dismissive statement concerning your reference to shepherding that it only requires a mechanism for crediting environmental return flows?

5

DR CARMODY: Perhaps they will address that in their submission to you.

THE COMMISSIONER: Not likely.

10 DR CARMODY: I don't know.

THE COMMISSIONER: Not likely. And if there's nobody here to answer my questions about it, it will have zero plausibility. Well now, I don't understand, then, his next point:

15

The benchmark model specified for the operation of the SDL adjustment mechanism.

And that means appendix 6, doesn't it?

20

DR CARMODY: Yes. The benchmark model you previously referred to in S6.02.

THE COMMISSIONER: It's appendix 6, isn't it? Schedule 6.

25 DR CARMODY: That's correct. S6.02.

THE COMMISSIONER: Yes. So he says:

30 *That doesn't include any PPMs relating to the crediting of environmental return flows for the northern Basin.*

DR CARMODY: Yes.

35 THE COMMISSIONER: How would one go about testing whether that is true or not?

DR CARMODY: Well, I went back to the modelling to see what the modelling said.

40 THE COMMISSIONER: And what does the modelling say about the measures relating to the crediting of environmental return flows for the northern Basin?

DR CARMODY: The modelling doesn't mention crediting environmental return flows, but it does refer to shepherding which I believe is the legal mechanism - - -

45

THE COMMISSIONER: I understand.

DR CARMODY: - - - by which you would credit environmental return flow. So that's in five – I referred to paragraph – I think it was 5.5.5. Sorry – 5.7.5 of the 2012 modelling document and 5.7.5:

5 *The thresholds change is a substitute for future shepherding of recovered water, presumably because it was the best method.*

THE COMMISSIONER: Well, now, to be fair to Mr James, it may be that the whole thing comes down to this obscurity about what it means to be crediting
10 environmental return flows.

DR CARMODY: In my view, to credit them you need a legal mechanism.

THE COMMISSIONER: Or at least a policy involving a measure that could be put
15 into effect.

DR CARMODY: Yes.

THE COMMISSIONER: I'm just using the language here.
20

DR CARMODY: Yes. As I said, interestingly, the Barwon-Darling Water Sharing Plan does include a provision which expressly states that it can be amended to provide for water shepherding. And that was gazetted two years after the shepherding MOU was entered into between the New South Wales and
25 Commonwealth Governments.

THE COMMISSIONER: Thank you.

DR CARMODY: It's in the order of the complex. So I don't wish to be too
30 dismissive of Mr James, but I must respectfully say I don't agree with his interpretation.

THE COMMISSIONER: Yes.

DR CARMODY: There was reference, as well, in the response to Northern –
35 modelling for the northern and the southern Basin. In the advice that I prepared for our client I discuss the methodology set out in schedule 6. And this includes references in S6.04 to hydrologic indicator sites located in both the northern and the southern Basin. And this is repeated in S6.07 of the schedule.

40
And the point I'm making is that the methodology for the calculation of supply measure contributions provides for the inclusion indicators in the northern Basin to the extent that this is relevant. Because another commonly cited reason for the Barwon-Darling not being relevant to the calculation of supply measure
45 contributions for the Menindee Lakes scheme supply measure project is that it's in the northern Basin and supply measures only concern the southern Basin.

THE COMMISSIONER: Yes.

DR CARMODY: Hydrologically, that doesn't make sense, but legally I can't see anything that precludes one from taking into account that connectivity between the Barwon-Darling and the Menindee Lakes, given that the Menindee Lakes is filled with water from the Barwon-Darling River. In fact, as I've just pointed out, there are two references in schedule 6 to modelling being undertaken – sorry – to hydrologic indicator sites located in both of northern and the southern Basin - - -

10 THE COMMISSIONER: Thank you.

DR CARMODY: - - - for the purposes of the modelling undertaken for supply measure contributions.

15 THE COMMISSIONER: 6.02, the benchmark model – the use of the benchmark model replicates in its paragraph 3B certain language familiar from 7.15 of the Basin Plan itself. Do you see that?

DR CARMODY: I will just have a look, Commissioner.

20

THE COMMISSIONER: Supply contribution assessed against the benchmark model under this method - - -

DR CARMODY: Yes, indeed. Yes.

25

THE COMMISSIONER: - - - must take into account - - -

DR CARMODY: Yes. Thank you.

30 THE COMMISSIONER: - - - the following – for reasons known only to themselves, they use another phrase:

The following policy settings included in the benchmark model –

35 so you're back to the benchmark model.

DR CARMODY: Yes.

THE COMMISSIONER: To the extent that – again, a phrase that is just bureaucratic cowardice:

40

To the extent that at the time the method is applied, the specific settings used in the benchmark model - - -

45 DR CARMODY: Yes.

THE COMMISSIONER: I don't know what "specific" adds to that, but anyhow:

...are not expected to be or were not implemented by 2019.

DR CARMODY: Yes.

5 THE COMMISSIONER: I think the expression “not expected to” or “were not” contemplates determinations being made after the relevant date in 2019. is that right?

DR CARMODY: I believe so.

10

THE COMMISSIONER: Although that would be unlawful, would it not?

DR CARMODY: I think the expectation was that they would be implemented by that date. If not, then the deduction has to occur.

15

THE COMMISSIONER: Yes. Well, so we’ve got – it’s a bit odd, because something could be expected to be implemented by the relevant date in 2019, but not turn out to be.

20 DR CARMODY: Yes.

THE COMMISSIONER: Expectations are disappointed in my experience as often as not. In any event, so leave that weird logic aside.

25 DR CARMODY: That’s a good point, yes.

THE COMMISSIONER: We’ve got this notion of this critical adjustment which will affect an SDL.

30 DR CARMODY: Yes, for the Menindee Lakes supply measure - - -

THE COMMISSIONER: Yes.

DR CARMODY: - - - project.

35

THE COMMISSIONER: It means that you’ve got to look at what was included in the benchmark model and what was used in the benchmark model.

40 DR CARMODY: Yes. And that’s what I attempted to do in drafting the advice for our client.

THE COMMISSIONER: Where does Mr Russell James, in his confident advice sent to you on 21 November 2016 by Mr John Taylor, where does he condescend to address those matters?

45

DR CARMODY: I’m not aware that he does, Commissioner.

THE COMMISSIONER: If anywhere, it will be the first sentence of his item 3, won't it:

5 *The benchmark model specified for the operation of the SDL adjustment mechanism doesn't include any PPMs –*

By which he means, I think, unimplemented measures.

10 DR CARMODY: Yes.

THE COMMISSIONER:

...relating to the crediting of environmental return flows for the northern Basin.

15 And that involves, charitably to him, an assertion that the use of a proxy for shepherding by reference to raised pumping thresholds - - -

DR CARMODY: Yes.

20 THE COMMISSIONER: - - - does not involve or is not directed to what's called the crediting of environmental return flows.

DR CARMODY: And that's I guess where the disagreement about the law arises.

25 THE COMMISSIONER: And it's a matter upon which I've got a very open mind, because I don't know what "credit" means and I thought I knew what "return" meant, but it appears I don't. This seems to me, to put it mildly, a very unsatisfactory matter to be left at the most authoritative statement being – from the MDBA being of that a – of Mr James on the point.

30 DR CARMODY: Well, they may have – for all I know, they may have received supplementary legal advice. I have no idea, because, obviously, that information hasn't been made available. That's the only information that I have regarding their perspective on the matter. The concern I have is that if my interpretation is correct –
35 and ultimately it would be for the court to decide, but if my interpretation is correct, then the supply measure contribution for one of the largest supply measure projects under the adjustment mechanism has not been calculated in accordance with the law. That would be - - -

40 THE COMMISSIONER: You're talking now about the Menindee Lakes, aren't you?

DR CARMODY: Yes, that's right, Commissioner.

45 THE COMMISSIONER: While we're on that, can I ask you this. Have you seen the references in the MDBA material to the inapplicability of the environmental equivalence requirement?

DR CARMODY: I'm not sure that I have. Perhaps you need to talk me through it.

THE COMMISSIONER: I wonder if we can just show that to - - -

5 DR CARMODY: I may have, but I've read so much material.

THE COMMISSIONER: No. No. I'm not suggesting you should remember.

10 DR CARMODY: I'm just reluctant to comment if I don't have the document in front of me.

THE COMMISSIONER: Very wise.

15 MR BEASLEY: So it's in the Menindee Lakes supply measure court folder, tab 6. I will give it to Dr Carmody.

THE COMMISSIONER: I will need one as well.

20 DR CARMODY: Thank you.

MR BEASLEY: So if you go to tab 6. This is a document that is produced from - - -

25 DR CARMODY: Yes.

MR BEASLEY: - - - the Senate - - -

DR CARMODY: Yes.

30 MR BEASLEY: - - - under compulsion – order for production, I should say. So it's at page 5 of 11. After the four bullet points there's a paragraph, "the role", and then the next paragraph:

35 *The Menindee Lakes falls outside of the SDLAM framework for testing environmental equivalence.*

Now, I'm not sure why that is.

40 THE COMMISSIONER: How does the Menindee Lakes fall outside of the SDLAM framework for testing environmental equivalence?

45 DR CARMODY: I'm just going to look for another document that might assist, if you can give me a moment. So I think the answer lies – I think – I'm referring back to the legal advice I drafted for the client on the issue. So I've noted at paragraph 29 the CSIRO report. That report being the ecological elements method for adjusting the Murray-Darling Basin Plan sustainable diversion limit. I assume your staff have a copy of it. It was published in 2015 with Overton being the lead author.

THE COMMISSIONER: Yes.

DR CARMODY: The CSIRO report only includes hydrologic indicator sites and ecological assessments of the southern Basin. It does not include a hydrological indicator site north of Menindee Lakes. And then I go on to say that it's possible that this is inconsistent with the requirements of schedule 6, given that schedule 6 does refer to both the northern and the southern Basin.

THE COMMISSIONER: But environmental equivalence is not site-specific that will involve connectivity.

DR CARMODY: I don't think I'm the best person to answer that, Commissioner.

THE COMMISSIONER: Very well.

DR CARMODY: I'm sure there are scientists who can give you a definitive response to that question.

THE COMMISSIONER: Yes. Thank you.

DR CARMODY: Well, that brings me to the conclusion of part 6 of my submissions, unless there were any further questions. I'm not sure if we've - - -

THE COMMISSIONER: No.

DR CARMODY: - - - clarified anything.

THE COMMISSIONER: No, you have. No. It has been extremely useful. Thank you. Please go on.

DR CARMODY: As I said, I concede it's a complex point, but I am concerned that it may not have been properly addressed by the Commonwealth and what the consequences of that may be legally.

THE COMMISSIONER: Yes.

DR CARMODY: So part 7, I'm addressing efficiency works and part 2AA of the Water Act.

THE COMMISSIONER: Yes.

DR CARMODY: So EDO New South Wales and EDOs of Australia, which is our broader Australia-wide network, we repeatedly expressed concern with respect to three core aspects of on-farm efficiency programs. The first concerns the absence of any statutory requirement at the Commonwealth level that independent third party auditing be undertaken in relation to these projects to ascertain whether contractual obligations are being met. The failure to properly audit and manage on-farm

efficiency projects assist arguably reflected in the recent prosecution of a prominent cotton farmer by the Queensland Major and Organised Crime Squad. And I will make no further comment on that, as the matter is before the court.

5 THE COMMISSIONER: So when you're talking about auditing, you're really talking about ensuring that works are done or payments are made in accordance with stipulations - - -

DR CARMODY: Yes.

10

THE COMMISSIONER: - - - governing the receipt of money - - -

DR CARMODY: Yes.

15

THE COMMISSIONER: - - - under a so-called efficiency measure.

DR CARMODY: Yes. Which I would have thought from a legal point of view is a bare minimum requirement, given the money that has been expended on these projects.

20

THE COMMISSIONER: You're pushing an open door with auditing for expenditure of money, but it's something that the Auditor-General might be interested in, too.

25

DR CARMODY: But also the contractual obligations are being met and I guess I've referred to the recent prosecution, because it perhaps highlights what can happen at the extreme end if there are statutory obligations that that auditing be undertaken by an independent third party.

30

THE COMMISSIONER: Now, with these efficiency measures, in theory they operate by public money being expended on works to or in relation to private irrigated land.

DR CARMODY: Yes.

35

THE COMMISSIONER: A calculation of an efficiency contribution said to be the capacity, in effect, to obtain, or to use less water to achieve the same irrigated production. The so-called saving then being dealt with by some of it, a part of it, becoming a Commonwealth entitlement that is held environmental water.

40

DR CARMODY: Yes.

THE COMMISSIONER: That's the theory.

45

DR CARMODY: That's the theory, yes. That's fundamentally how it's supposed to work.

THE COMMISSIONER: An important part of that theory it's not the whole of the saving. It's a fraction of it ordinarily.

5 DR CARMODY: Indeed. Under the Healthy Headwaters Scheme it's 50 per cent of the purported savings.

THE COMMISSIONER: Is that subject to agreement otherwise?

10 DR CARMODY: Sorry? Could you repeat - - -

THE COMMISSIONER: Can one agree in return for some other benefit to give up the whole of the savings?

15 DR CARMODY: That's my understanding that yes, one could; there's no legal prohibition on giving all of one's water to the Commonwealth if one so desires.

THE COMMISSIONER: No, I don't mean as a charitable gift. I mean can you do it in return for money and would that be relevant to the cap?

20 DR CARMODY: Yes, I think one could exceed the commonly used 50 per cent threshold.

25 THE COMMISSIONER: But the commonly used 50 per cent is intended to be an incentive for people to - - -

DR CARMODY: Yes, correct.

THE COMMISSIONER: - - - get publicly funded efficiencies - - -

30 DR CARMODY: Yes.

THE COMMISSIONER: - - - for which they will not have to give up as much water as they've saved.

35 DR CARMODY: That's right, yes.

THE COMMISSIONER: So they will be ahead financially, ahead in infrastructure and ahead in water allocation. Correct?

40 DR CARMODY: Well, they give – well, they do give some of the water that's purported to have been saved.

THE COMMISSIONER: Only a part – only a fraction

45 DR CARMODY: Yes.

THE COMMISSIONER: Is my point.

DR CARMODY: Yes. Indeed. I would agree with that analysis.

THE COMMISSIONER: I'm not saying it's a wrong thing, but, I mean, it's a bundle of incentives.

5

DR CARMODY: Yes, which from a policy perspective I can understand.

THE COMMISSIONER: Absolutely. Well, now, that makes the assessment of efficiency contributions really critical, doesn't it?

10

DR CARMODY: Absolutely, particularly as we now have a 1,500 gigalitre cap on the outright purchase of buybacks. That has been in place for several years. And the 450 gigalitres of additional water under part 2AA is tied to efficiency works, including on-farm efficiency works, although there has been some speculation as to whether or not there will be any more funding for on-farm works under that pool of money sitting under part 2AA. I think the push is for off-farm efficiency measures at this stage.

15

THE COMMISSIONER: A paradigm of them is plugging leaks in delivery channels. Is that right?

20

DR CARMODY: For example.

THE COMMISSIONER: That's just an example, yes.

25

DR CARMODY: Yes.

THE COMMISSIONER: So what do you want to tell me in particular about part 2AA in that regard?

30

DR CARMODY: Well, that ideally it would be amended to include auditing provisions, noting that part 2AA only concerns the distribution of money from that special account, that efficiency works are funded out of other pools of money, as well, or have been historically.

35

THE COMMISSIONER: Correct me if I'm wrong, but these aren't exempt from the Auditor-General, are they?

DR CARMODY: No. I'm concerned not just about the financial implication but about whether or not the contractual obligations are being met and the absence of any statutory - - -

40

THE COMMISSIONER: But the Auditor-General, if I may say so, not intending to flatter, but certainly intending to compliment, is particularly expert - - -

45

DR CARMODY: Perhaps that would be the solution.

THE COMMISSIONER: - - - at testing whether the Commonwealth expenditure has been appropriately laid out.

DR CARMODY: But is the Commonwealth - - -

5

MR BEASLEY: But doesn't it go to the states and then the states do the individual - - -

DR CARMODY: Yes.

10

MR BEASLEY: - - - decisions about – so he may not have - - -

THE COMMISSIONER: Or she.

15

MR BEASLEY: He or she may not have – is it a she?

THE COMMISSIONER: I can't remember.

MR BEASLEY: I apologise if it is. He or she may not have jurisdiction.

20

THE COMMISSIONER: But this is a Commonwealth account.

MR BEASLEY: It is, but the money goes to the various – what's it called, psalms in South Australia and various state programs and all their own individual

25

THE COMMISSIONER: You might be right, which case I must say my experience of Auditors-General around the country is that they're all that stand between us and anarchy. They're very good.

30

DR CARMODY: I'm a devoted fan of the Auditor-General.

THE COMMISSIONER: So am I.

35

DR CARMODY: But is the Auditor-General going through every single contract entered into between the relevant government agency to verify.

THE COMMISSIONER: I'm sure no. I'm so sorry. I apologise for this ignorance. Do you know whether - - -

40

DR CARMODY: Not at all.

THE COMMISSIONER: Do you know whether the, being a special account for the purposes of the Public Governance Performance and Accountability Act 2013 removes the water for the environment special account from the Auditor-General's supervision.

45

DR CARMODY: I don't – I don't know the answer to that, Commissioner, I'm afraid. But it's a good question.

5 THE COMMISSIONER: In any event, if I may say so, even if – look, I imagine the Auditors-General can look at everything that needs to be looked at, but then so can the Parliament.

DR CARMODY: I don't have a perfect policy solution. I don't have - - -

10 THE COMMISSIONER: I guess I'm just resisting making, yet, more law.

DR CARMODY: But how do we – I guess the question is – this is the – this is the problem and I don't have a ready solution, but I can identify the problem which is that these contracts are entered into, usually, as Mr Beasley pointed out, between
15 state government agencies that have been funded by the Commonwealth and individual landholders or irrigation corporations. The contract on the whole remains concealed from the public. The public - - -

20 THE COMMISSIONER: Why is that?

DR CARMODY: Well, I think, ostensibly, to protect - - -

THE COMMISSIONER: What?

25 DR CARMODY: - - - commercial interests.

THE COMMISSIONER: What commercial interests?

30 DR CARMODY: I don't know. You're asking the wrong person. I'm not the person refusing to reveal these contracts.

THE COMMISSIONER: I confess, I don't know what is, to use this horrible phrase, commercial in confidence. I've got no idea what is commercial in confidence about a deal by which - - -
35

MR BEASLEY: Government is giving money, yes.

THE COMMISSIONER: - - - public money is spent - - -

40 DR CARMODY: Yes, and we're again – I guess you - - -

THE COMMISSIONER: - - - in order to produce water savings, only some of which come back to the public.

45 DR CARMODY: You've anticipated my point that there's a lack of transparency around the money that's distributed.

THE COMMISSIONER: Now, I should warn you, the word “transparency” brings me out in a rash, and I don’t like it at all, but - - -

DR CARMODY: I have some cream in my bag.

5

THE COMMISSIONER: - - - nor will I sign up to a conceptual proposition, that “transparency”, so called, is always a good thing. I don’t accept that. It appears to me it’s a rhetorical label attached to what the speaker likes in terms of degrees of disclosure.

10

DR CARMODY: Well, I guess use different language because I can certainly sympathise with your objections, overly, of happening phrases or terminology.

THE COMMISSIONER: But it should be publicly disclosed information - - -

15

DR CARMODY: Essentially - - -

THE COMMISSIONER: - - - how our money is being spent.

20

DR CARMODY: Yes. Why isn’t this information being disclosed and, more to the point, doesn’t the public have an interest in understanding whether or not those contractual obligations are being met, and in knowing that the government is taking steps, in accordance with best practice, which is employing or ensuring that these individuals are employed, that they’re independent third party expert assessors. That that – that, at the moment, isn’t guaranteed under statute. I hear what you’re saying about your reluctance to simply add more laws to - - -

25

THE COMMISSIONER: Well, particularly if it’s a specialised audit.

30

DR CARMODY: It would be very specialised.

THE COMMISSIONER: I worry about capture - - -

DR CARMODY: It would be very specialised.

35

THE COMMISSIONER: I worry about an auditor being captured by the only industry or only is looking at.

DR CARMODY: And, indeed, we see that happening in the development industry.

40

THE COMMISSIONER: Whereas, I like the idea that a person whose generalised skill is auditing can be, one week, looking at a rocket program, another week, looking at a school lunches program, and the week after, looking at an efficiency water program - - -

45

DR CARMODY: An on-farm efficiency program.

THE COMMISSIONER: - - - and they bring the same skills of scepticism and try to find out the facts.

5 DR CARMODY: Yes. Well, I think having identified the problem, now, the issue is how does one solve it in a meaningful way, and as I said, I'm not wedded to one particular solution, but I am concerned that there's no obligation for this to happen, for the information to be disclosed. The public doesn't know if the contractual obligations are being met.

10 THE COMMISSIONER: Yes.

MR BEASLEY: Professor Wheeler and Professor Grafton and another has made a submission to you. I'm just concerned though that if the word "transparency" brings you out in a rash, what the term "triple bottom line" is actually doing to you. You must mean - - -

THE COMMISSIONER: It's causing - - -

20 MR BEASLEY: - - - to have, like the Singing Detective singing Commissioner.

THE COMMISSIONER: Close to terminal leprosy, I'm afraid, but anyway - - -

DR CARMODY: I can only recommend a holiday.

25 THE COMMISSIONER: Right. Onto the next point. So you may assume that I have accepted and will accept your submission about the need, one way or the other, for a real audit, yes.

30 DR CARMODY: Yes, and I think the recent prosecution is evidence enough of the need for that.

THE COMMISSIONER: And you will understand if I make no comment about that.

35 DR CARMODY: And I make no further comment either for the same reason.

THE COMMISSIONER: Yes.

40 DR CARMODY: So Mr Beasley just referred to Professor Wheeler et al, and so those other witnesses, amongst others, have provided expert evidence to the Commission regarding underlying problems with these on-farm efficiency programs with respect to water accounting, return flows and the possibility of increased efficiencies resulting in greater water use at a catchment scale. So that's outside of my immediate area of expertise. So – and I don't think there's anything I could add
45 to that. But I do wish to note that if these projects are not, in all instances, saving water or saving the volume of water purported, then that is a significant issue, particularly given, now, that the bulk of the remaining water recovery to be

undertaken in relation to the 450 is intrinsically tied to efficiency measures of one description or another.

5 So I just – I have to say I’m not particularly convinced by the commonly invoked
argument that the transfer of a water access entitlement is sufficient proof that these
projects are, indeed, increasing actual flows. In the first instance, a paper transaction
does not, in and of itself, guarantee that there is any additional water in the river.
Rather, it is proof of a share in a water resource, nothing more. If water savings are
10 not actually being achieved to the extent reflected in licensed shares that are
transferred to the Commonwealth, then the pool of water assumed to be available for
licensed use will be less than the actual physical pool of water.

THE COMMISSIONER: That’s one of the concerns behind what is sometimes
called the real water question.

15 DR CARMODY: Yes.

THE COMMISSIONER: Is that right? Yes.

20 DR CARMODY: By way of example, perhaps to simplify it for anyone listening or
who will read the transcript, imagine that there are three licences in a valley that – in
a valley that add up to 300 megalitres. So for the sake of simplicity, we will assume
that each licence holder is only entitled to take 100 per cent of their share component
in any one year, subject to allocations to the contrary, and that carryover does not
25 apply. Basically, the rules are simple. So the first licence is each for 100 megalitres,
and they’re used for irrigation. So that’s 200 megalitres used for irrigation. The
third is for 100 megalitres, and was transferred to the Commonwealth as a result of
an on-farm efficiency program. So that’s the 300 megalitres; 100 was the result of a
transfer.

30 However, the project only resulted in an additional 50 megalitres of water being
physically returned to the river, even though the CEWH now holds a licence for 100
megalitres. This means that the three licensed holders who still collectively own 300
megalitres on paper are, in fact, drawing from a physical pool of water that only adds
35 up to 250 megalitres. This then begs the question, where does the additional 50
megalitres of water come from to service the shared components of each of these
three licences that add up to 100 megalitres.

THE COMMISSIONER: Doesn’t it come from - - -

40 DR CARMODY: Planned environmental water.

THE COMMISSIONER: Thank you.

45 DR CARMODY: So it will, in all - - -

THE COMMISSIONER: Yes. No, I’m with you there. Right.

DR CARMODY: Yes – in all likelihood, be drawn from the pool of planned environmental water.

5 THE COMMISSIONER: Could only come from there, unless you've allocated to a dry riverbed, that's where it's coming from.

DR CARMODY: Yes. So this, in turn, raises questions as to whether the failure to ensure that on-farm efficiency projects are actually saving water will result in breaches of section 21(5) of the Act - - -

10 THE COMMISSIONER: Yes.

DR CARMODY: - - - and clause 10.28 of the Basin Plan.

15 THE COMMISSIONER: No, thank you. That's something that hasn't occurred to me. Thank you very much.

DR CARMODY: Both of which require that there be no net reduction in the protection of planned environmental water under the Plan, the Basin Plan.

20 THE COMMISSIONER: But those provisions are sufficiently generally expressed, aren't they, as to go to the implementation of an efficiency measure, doesn't it?

DR CARMODY: Yes. So I think if we turn to the Water Act, a copy of which is hiding somewhere.

25 MR BEASLEY: There's one.

DR CARMODY: Thank you. So if we turn to 21(5) in the enabling legislation, the Basin Plan - - -

30 THE COMMISSIONER: It's perfectly general, you're right. Yes.

DR CARMODY: Yes. Must ensure that there is no net reduction in the protection of planned environmental water.

THE COMMISSIONER: So that means all and any provision in the Basin Plan.

DR CARMODY: Yes.

40 THE COMMISSIONER: So you could then go to the Basin Plan, and it is – which was it again?

DR CARMODY: Clause 10.28.

45 THE COMMISSIONER: That's right.

DR CARMODY: And that refers to Water Resource Plans.

THE COMMISSIONER: and so - - -

5 DR CARMODY: It's the same obligation in respect of Water Resource Plans.

THE COMMISSIONER: And Water Resource Plans are the way in which locally – and so as to cover the whole, ultimately, of the Basin - - -

10 DR CARMODY: Yes.

THE COMMISSIONER: - - - the requirements of the Plan are put into effect.

15 DR CARMODY: Yes. Which then begs the question, what should Water Resource Plans be doing about this issue?

THE COMMISSIONER: On the other hand, neither – let me just check. A Water Resource Plan, of course, has nothing to do with an SDL adjustment.

20 DR CARMODY: No. The adjustments are reflected in the SDLs in Water Resource Plans.

THE COMMISSIONER: An SDL adjustment comes under the – is effected by the Basin Plan.

25 DR CARMODY: Correct.

THE COMMISSIONER: And the Act.

30 DR CARMODY: Correct, yes.

THE COMMISSIONER: So it's really subsection 21(5) that carries the weight, isn't it?

35 DR CARMODY: Ultimately.

THE COMMISSIONER: Yes. So the Basin Plan, meaning a calculation of an efficiency contribution, etcetera for an efficiency measure - - -

40 DR CARMODY: Yes.

THE COMMISSIONER: - - - must not permit a net reduction, yes.

DR CARMODY: Yes.

45 THE COMMISSIONER: In the protection of planned environment - - -

DR CARMODY: Yes.

THE COMMISSIONER: Thank you. I understand, I think. Thank you.

5 DR CARMODY: I'm just looking at the next paragraph and shaking, because it does include the word "transparency".

THE COMMISSIONER: That's all right.

10 DR CARMODY: Now, do you need some antihistamines before I move on?

THE COMMISSIONER: Well, I took some this morning, so - - -

MR BEASLEY: It also says on time and in full.

15

THE COMMISSIONER: God. Righto.

DR CARMODY: No. And it doesn't. And it doesn't say triple bottom line either. It's just - - -

20

MR BEASLEY: Actually, I started shaking then when I said those words

DR CARMODY: Sorry.

25 THE COMMISSIONER: Righto. So - - -

DR CARMODY: Well, really – I mean, really it's the point - - -

30 THE COMMISSIONER: I braced myself. I think you've given me a trigger warning. Righto. I accept that trigger warning. Now, tell me what did you want to say.

DR CARMODY: I mean, it's really the point that there isn't publicly available information or sufficiently publicly available information about these projects where the contractual arrangements are being complied with, the volume and class of licence transferred to the Commonwealth and so on. I mean, of course, as a lawyer I can undertake title searches to ascertain this information. That takes time, it costs my client money and many people don't have access to lawyers with this kind of expertise to do that work. Why isn't the information just simply publicly available?

40

THE COMMISSIONER: I can't think of any good reason.

DR CARMODY: It's the Commonwealth's held environmental water.

45 THE COMMISSIONER: As I say, I can't think of any good reason.

DR CARMODY: You know, the volumes and the valleys in which those volumes have been recovered, that is available, but to me more specific information about the characteristics of the licences would be useful.

5 THE COMMISSIONER: Ultimately, as we know, the Commonwealth Environmental Water Holder has to report publicly upon his or her use by environmental watering of this public resource.

DR CARMODY: Yes.

10

MR BEASLEY: It's her.

THE COMMISSIONER: At the moment it's her, yes.

15 MR BEASLEY: The Auditor-General is male and always has been, both collectively and individually.

DR CARMODY: Someone is going to publish an essay about that tomorrow, someone in the gender studies department in this country.

20

THE COMMISSIONER: I hope so.

DR CARMODY: Yes.

25 THE COMMISSIONER: I hope so. But it does seem to me that what falls out from this is that it's only by, as it were, inferences from the Environmental Water Holder's reports - - -

DR CARMODY: Yes.

30

THE COMMISSIONER: - - - that at the moment in practice one knows the whole of the holdings. That seems curious to me.

DR CARMODY: The fault to my mind doesn't lie with the Environmental Water Holder.

35

THE COMMISSIONER: Far from it.

DR CARMODY: The fault lies at the state level. Why isn't this information being available – made available on registers for example? If one goes through every single licence in the New South Wales water register and then runs title searches to ascertain the holder of each of those licences, one would find out which licences were held by the Commonwealth Environmental Water Holder and the precise characteristics of those licences. But I put it to you that that is an unreasonably onerous burden to portray to the public.

45

THE COMMISSIONER: Without betraying any privileged material, are you able in general terms to tell me whether any of your clients have ever given you an insight into why they might want to keep such information secret?

5 DR CARMODY: I don't know that they want to keep it secret. It's just perhaps never been considered necessary to formally disclose.

THE COMMISSIONER: Thanks.

10 DR CARMODY: The actual licence – I'm talking about the actual licence. I mean, as a lawyer, what I want to see is the physical entitlement.

THE COMMISSIONER: Yes.

15 DR CARMODY: Or the allocation as it's called in Queensland.

THE COMMISSIONER: Quite. Thanks.

20 DR CARMODY: And attempting to ascertain that information, for example, for clients in Queensland, because of the lack of publicly available information, it is quite difficult, even for a trained lawyer who specialises in water law.

THE COMMISSIONER: Thanks.

25 DR CARMODY: So the seriousness of these matters cannot be, in my view, be overstated. This is particularly true given the amount of public money involved and the role that efficiency projects are supposed to play in water recovery and legislated environmental outcomes in the Murray-Darling Basin. And in making this comment I've taken into account the 1,500 gigalitre cap on the outright purchase of water
30 entitlements provided for in section 85C of the Act and the 450 gigalitres, which is tied to efficiency works. Any further questions?

THE COMMISSIONER: No.

35 DR CARMODY: The only other comment I would make is that the drafting of part 2AA is somewhat ambiguous with respect to the nature of the obligations that are contained therein.

THE COMMISSIONER: Which in particular?

40

DR CARMODY: So section 86A(3) to my mind is particularly perplexing. On the one hand, it's contained in the objects of the part which suggest - - -

THE COMMISSIONER: 86.

45

DR CARMODY: AA(3).

THE COMMISSIONER: A?

DR CARMODY: A(3).

5 THE COMMISSIONER: Hang on.

DR CARMODY: You know an Act has been amended many times when there are that many letters involved. That's correct. So section 88 – sorry –I will start again. Section 86AA(3) is perplexing because on the one hand it's contained in the objects
10 to the part, which suggests that it does not give rise to a binding obligation to acquire the 450 giga litres and to relax constraints. On the other, the use of the verbal instruction to be achieved is reflective of a more binding commitment. I don't - - -

15 THE COMMISSIONER: I think it's the latter, but I can understand why you raise the point.

DR CARMODY: Right. So you think the latter.

20 THE COMMISSIONER: I think that the clumsy English is to be achieved by increasing the volume.

DR CARMODY: Notwithstanding - - -

25 THE COMMISSIONER: It doesn't describe something done elsewhere, which is what that would mean as a matter of English, but actually does it there and then.

DR CARMODY: So, notwithstanding the fact that it's contained in an objects provision, you believe it gives rise to a binding obligation?

30 THE COMMISSIONER: I don't know. I don't know.

DR CARMODY: Then we're of one mind. Neither of us knows.

35 THE COMMISSIONER: I'm repeating myself, I know, but - - -

MR BEASLEY: I would say it's not binding, to be honest.

THE COMMISSIONER: - - - it's not very good drafting.

40 DR CARMODY: Yes. Because it's in the object of the part. Yes.

THE COMMISSIONER: When you say - - -

45 MR BEASLEY: We had this objective which we may or may not get to, but it's to be achieved by this way.

THE COMMISSIONER: I don't know whether it's in the objects of the part. Subsection (1) simply said the objects of this part is. And then subsection (2) says environmental outcomes can be enhanced in certain ways. And I don't think that's talking about physical possibilities; it's talking about legal possibilities. And then
5 subsection (3) doesn't set an object. It refers back to the object which is in subsection (1).

DR CARMODY: Right.

10 THE COMMISSIONER: And it says:

It is to be achieved –

15 So that could be contrasted with the language in subsection (2) where environmental outcomes can be enhanced in certain ways.

DR CARMODY: So you think the objects, notwithstanding the fact that 86AA, the heading there involved is Objects of this Part and it contains sub-sections (1), (2) and (3), you think really - - -

20

THE COMMISSIONER: There's only one object in subsection (1).

DR CARMODY: And then everything is subsequent.

25 THE COMMISSIONER: Yes, the object in subsection (1) is to enhance environmental outcomes. The means by which that can be done - - -

DR CARMODY: I see. Yes. That makes sense.

30 THE COMMISSIONER: - - - are non-exhaustively stipulated in subsection (2).

DR CARMODY: Yes.

35 THE COMMISSIONER: It is also said to be something to be achieved by easing or removing constraints and increasing the volume by 450. Now - - -

DR CARMODY: Interesting.

40 THE COMMISSIONER: - - - unquestionably that authorises everything there. The question is whether it mandates it. And I think that's very odd, because the construction is to be achieved by is not at all very easy to construe in terms of a positive legal enactment in question. It's not at all clear. I don't think I find elsewhere in 2AA, do I, anything that might be regarded as an operative provision concerning the 450 gicalitres?

45

DR CARMODY: No.

THE COMMISSIONER: That's right. Yes.

DR CARMODY: No.

5 THE COMMISSIONER: Well, so, unless that was an orphan, it's 3B where you're going to find it, isn't it?

DR CARMODY: Yes.

10 THE COMMISSIONER: So, doing the best you can, and assuming the law is a law, rather than just wasted ink, that's what we have. Whether it means you have to increase the volume by 450 gicalitres is a very difficult question.

DR CARMODY: Yes.

15 THE COMMISSIONER: As you've drawn to my attention. I think it's really difficult. I'm a little concerned that you may be suggesting that I should consider advising the Governor of South Australia that South Australia should press for an amendment of this part of the Act?

20 DR CARMODY: Well, that would certainly clarify matters. I think it was deliberately drafted in this fashion as part of a compromise.

THE COMMISSIONER: Yes.

25 DR CARMODY: As a lawyer - - -

THE COMMISSIONER: Yes.

30 DR CARMODY: - - - I don't - do I need to invoke surrealist poetry again?

THE COMMISSIONER: No.

35 DR CARMODY: No. Perhaps they read the collected works of before they drafted it. I don't know.

THE COMMISSIONER: They wouldn't have drafted it like that if they had read his works, but anyhow. It would be much better. Right.

40 DR CARMODY: That's really all I wanted to discuss in relation to this issue.

THE COMMISSIONER: Yes.

45 DR CARMODY: I can move on, unless you have further questions.

THE COMMISSIONER: No. That's good. Thank you. Where do you want to move to now?

DR CARMODY: Access to information.

THE COMMISSIONER: We've covered a lot of that already, haven't we?

5 DR CARMODY: We've covered quite a lot. I have - - -

MR BEASLEY: Sorry. I should say what we were looking at there, at 86AA, you've got to link it to 7.12 of the Basin Plan.

10 DR CARMODY: That's true.

THE COMMISSIONER: Yes.

MR BEASLEY: Which uses the term that the state may notify efficiency measure.

15

THE COMMISSIONER: Yes.

MR BEASLEY: So if they don't, I don't know how you get to - - -

20 THE COMMISSIONER: That's right.

MR BEASLEY: - - - 86AA(3).

DR CARMODY: Yes.

25

THE COMMISSIONER: I agree. Spelling a mandatory obligation out is really very hard, which I assume, as Dr Carmody pointed out, is the cunning plan of the drafter.

30 MR BEASLEY: Yes. And that's why, the last I heard, was that of the 450 gegalitres, one gegalitre has been recovered – well, slightly less than one gegalitre.

THE COMMISSIONER: Access to information.

DR CARMODY: So - - -

35

THE COMMISSIONER: I feel inclined to adapt the apocryphal comment of Gandhi about British justice. "That would be a good idea." Well, yes, access to information would be a good idea. There should be more of it.

40 DR CARMODY: Yes.

THE COMMISSIONER: Both in relation to science, administration, compliance, calculation of efficiency contributions - - -

45 DR CARMODY: Yes.

THE COMMISSIONER: - - - the activities of the CEWH, all of that. I agree.

DR CARMODY: And I provided two case studies. I don't have to go through them. I can paraphrase. But, basically, they concern the challenges that we faced when attempting to obtain information for our clients under various FOI laws.

5 THE COMMISSIONER: I really mean this very – you should take this very seriously. I don't mean at all to deprecate the importance of this part of your submission. Can we take your case study notes - - -

DR CARMODY: Absolutely.

10

THE COMMISSIONER: - - - in writing.

DR CARMODY: I have tendered one of them and can tender the second, which concerns floodplain harvesting.

15

THE COMMISSIONER: Please do. Don't spend time on them now today.

DR CARMODY: Sure.

20 THE COMMISSIONER: They won't be overlooked, I assure you. Access to information is a very important part of my concerns.

DR CARMODY: Yes. So the second I will arrange to tender to your staff.

25 THE COMMISSIONER: Thank you very much.

DR CARMODY: It concerns out attempts to obtain information under the state – the Government information public access Act - - -

30 THE COMMISSIONER: Yes.

DR CARMODY: - - - which is the New South Wales Government FOI statute, information for our clients, the Macquarie Marshes Environmental Landholder Association, in relation to floodplain harvesting - - -

35

THE COMMISSIONER: What are the exemptions or preclusions that were relied upon?

40 DR CARMODY: At this stage, – so it's three months since the application was lodged, it's still hanging up in the air.

THE COMMISSIONER: But they haven't yet invoked exclusions or preclusions?

45 DR CARMODY: At this stage, they – well, they came back and said that it constituted a substantial and unreasonable diversion of agency resources.

THE COMMISSIONER: Yes.

DR CARMODY: I sought clarification as to how the application could be amended to refine the scope. They then attempted to turn it into a stakeholder engagement matter. They had a stakeholder engagement officer who, to give her credit, attempted to do her job well, but it was my view that it wasn't her responsibility to be dealing with a GIPA Act request for information, but they wanted her to manage the matter. I think, in good faith, she thought she was helping compliance by attempting to set up a series of meetings with various members of staff to address each of the items that we sought information about. There were seven straight items. It looked like there would be multiple meetings, and that it would extend over a protracted period of time. I very quickly said, "I don't think this is an appropriate way to deal with the statutory process" - - -

THE COMMISSIONER: Well, not - - -

15 DR CARMODY: - - - "and how is it consistent with your determination?"

THE COMMISSIONER: Exactly.

DR CARMODY: "Is this a substantial and unreasonable diversion of resources?"

20 THE COMMISSIONER: No, exactly.

DR CARMODY: That took a whole month. In the end, to cut a long story short, they did appoint somebody within the agency to give feedback about why that was the determination. It took some extra time, but they provided further information as to how I could refine the scope of the application. I did that and didn't hear back for a week. Then followed up and was told by the responsible officer, the GIPA Act officer that it still constituted a substantial and unreasonable diversion of the agency's resources because three of the seven items would take 14 hours to source. That doesn't seem - - -

30 MR BEASLEY: This is – I'm not sure if this is Utopia or Yes, Minister. It's close to either.

35 THE COMMISSIONER: But this – we're talking about information that they need for their own administration, isn't it?

DR CARMODY: They have the information. So three months later - - -

40 THE COMMISSIONER: I - - -

DR CARMODY: - - - I don't know what's happening with the application.

THE COMMISSIONER: I realise this is a matter for ENCAT, but I - - -

45 DR CARMODY: Yes.

THE COMMISSIONER: How on earth do you get 14 hours devoted to supplying information that you've already got yourself?

5 DR CARMODY: Apparently it would take that long to search and retrieve information.

THE COMMISSIONER: I don't believe that.

10 DR CARMODY: Well, and that's – part of the process was me inquiring into the methods they used because the original assessment came back as taking 700 – up to 700 hours - - -

THE COMMISSIONER: I don't believe that at all.

15 DR CARMODY: - - - to acquire the information for the seven items, and I said, "Well, I understand you use this document – you have this particular document management system that you use. Wouldn't this information be stored electronically? How could it possibly take 700 hours?"

20 THE COMMISSIONER: So they've shrunk it from 700 to 14?

DR CARMODY: So it was – that's 14 in respect of three of the seven items following the scope of the request being refined. I don't have further concrete information about how long they think it would take to search and deal with the remaining four items, but even 14 hours to me - - -

25 THE COMMISSIONER: Well, it would be useful to have that case study, yes.

30 DR CARMODY: And I'm still – it's three months later. The client, as I said, is the Macquarie Marshes Environmental Landholders Association. They live in the catchment. They have properties in the catchment. They are materially affected - - -

THE COMMISSIONER: And are, to put it mildly, serious people. So, yes, I understand.

35 DR CARMODY: And materially affected by policies pertaining to floodplain harvesting.

THE COMMISSIONER: Yes, I understand that. Yes.

40 DR CARMODY: So I mean, I'm personally vexed as a public interest lawyer, but I'm also vexed on behalf of my client that three months later, we're no closer - - -

THE COMMISSIONER: No closer - - -

45 DR CARMODY: - - - to getting this information - - -

THE COMMISSIONER: I'm afraid this may be an area where the overworked word "resources" will be invoked.

5 MR BEASLEY: But how does 700 hours go down to 14 hours, in any event? I mean that's - - -

THE COMMISSIONER: Or even - - -

10 DR CARMODY: Well, it was "up to". The estimation was - - -

THE COMMISSIONER: Or even to 50 hours or whatever. Yes.

MR BEASLEY: I mean, that's - - -

15 DR CARMODY: The estimation was 10 – originally, it was 10 to 100 hours for each of the seven items. So at the extreme end, if it takes 100 for each, that's 700 hours. I then pressed and sought further clarification.

20 THE COMMISSIONER: As you know, this is not an isolated example of GIPA abuses - - -

DR CARMODY: No, it's not.

25 THE COMMISSIONER: But it rather indicates that there needs to be a reordering in relation to things like water resources that it can't be right that government has just enough resources to do the administration, but not enough to tell the people about it.

30 DR CARMODY: Yes. Well, I'm not convinced that even 14 hours for that three – for those three items does constitute, in the legal sense, an unreasonable and substantial diversion of agency resources.

THE COMMISSIONER: I can see why you say that, but allow me to say, I think 14 – I think of what I can do in 14 hours. I just think that is nonsense.

35 DR CARMODY: Well – and I work for a community legal centre. So I could - - -

THE COMMISSIONER: And what they can do in 14 hours.

40 DR CARMODY: I can write the book and a film script about what it is to work - - - in an under-resourced environment and how much we get done.

THE COMMISSIONER: Yes.

45 DR CARMODY: Yes. I do to – all right.

THE COMMISSIONER: Right. So access to information, I understand and - - -

DR CARMODY: I will tender additional materials. I will move onto third - - -

THE COMMISSIONER: That's – please do.

5 DR CARMODY: - - - party impacts. So this is frequently invoked by government and stakeholders often in response to suggestions that environmental water be protected by rules and Water Sharing Plans or, indeed, in response to suggestions that Water Sharing Plans be amended prior to accreditation as Water Resource Plans.

10 THE COMMISSIONER: Now, what's this statutory footing for third party impacts is in that clause?

DR CARMODY: Well, this is why I raised it in this context in this – at this Commission. So it's not, to the best of my knowledge, defined in any legislation
15 and, to that extent, has no statutory basis or force. However, clients have informed me that the manner in which it is invoked would suggest otherwise. I was, therefore, inspired to investigate the genesis of this concept within the context of Basin Planning implementation and, briefly, I formed the view that the no third party impacts mantra is, in part, based on the misconstruction and misapplication of certain
20 clauses in both the Basin Plan and the MOU between New South Wales and the Commonwealth regarding water shepherding.

THE COMMISSIONER: So where in the Basin Plan do you think it comes from?

25 DR CARMODY: So clause 7.151 states that:

Supply measures must avoid detrimental impacts on reliability of supply of water to the holders of water access rights that are not offset or negated. The New South Wales draft prerequisite policy measures paper which I've tendered to the
30 Commission equates this phrase with no third party impacts which is, in my view, legally inaccurate.

THE COMMISSIONER: Why do they use the expression “third party”?

35 DR CARMODY: I think it's to refer to consumptive users.

THE COMMISSIONER: So this is part of the calculation for an adjustment by increase of the sustainable diversion limits by reference to less water going to the environment on the basis that the adjustment will be such that there are
40 environmental – equivalent environmental outcomes. That's the first one.

DR CARMODY: Yes.

THE COMMISSIONER: And, second:

45

No detrimental impacts on reliability of supply of water –

which is a composite phrase –

to the holders of water access rights that are not offset or negated.

5 Now, the:

... that are not offset or negated –

10 refers to, what, water access rights that are not being abolished or what? What does
“offset or negated” call up?

DR CARMODY: Well, I think that that’s a policy decision.

15 THE COMMISSIONER: Now, that’s – this is - - -

DR CARMODY: Yes.

THE COMMISSIONER: - - - delegated legislation.

20 DR CARMODY: Yes.

THE COMMISSIONER: So what does that actually mean? Holders of water
exercise - - -

25 DR CARMODY: What is the substance of offsetting or negating an impact of that
nature?

THE COMMISSIONER: Yes, that’s right.

30 DR CARMODY: I don’t know what that would look like which is why I think it
would ultimately be a policy decision how that’s dealt with.

35 THE COMMISSIONER: I don’t understand what it means to say there are no
detrimental impacts that are not negated. It’s a very clumsy way of saying there’s no
impacts, isn’t it?

DR CARMODY: Yes. I - - -

40 THE COMMISSIONER: “Offset”, I think I understand.

DR CARMODY: Yes.

THE COMMISSIONER: But we all know that offsets are difficult here.

45 *A detrimental impact on the reliability of supply of water coming about by a
total increase of an SDL –*

means what? That it's a warning against over-allocation, is it?

DR CARMODY: I'm not sure. Go back to the clause.

5 THE COMMISSIONER: But it's odd, isn't it, because if people thought that was the genesis of a reason not to do things because of third party impacts, the thing that it is – it represents an inhibition on is the lifting by increase of a sustainable diversion limit.

10 DR CARMODY: Yes.

THE COMMISSIONER: Which, I hardly need remind people, is the pool of consumptive use.

15 DR CARMODY: Yes.

THE COMMISSIONER: I've never yet heard anybody say, "Please don't give me more water. Somebody's reliability will be impacted."

20 DR CARMODY: Well, it could be - - -

THE COMMISSIONER: Nobody has told that.

25 DR CARMODY: To give one example, on the Lower Darling, if – okay. So this is - - -

THE COMMISSIONER: It makes sense that they should say that - - -

30 DR CARMODY: This is actually a concrete example - - -

THE COMMISSIONER: - - - because that's over allocation.

35 DR CARMODY: So the Menindee Lakes scheme supply measure will decrease reliability of supply to water users on the Lower Darling, which would then trigger this provision, even though overall the supply measure results in more water being physically available for consumptive use. And in that particular instance it would decrease reliability of supply, because the Menindee Lakes is, effectively, being decommissioned as a storage. And that's where most of their water comes from. That's one concrete example.

40 THE COMMISSIONER: The offset or negated is the means by which those unfortunate people in the Lower Darling can be, as it were, bought out.

45 DR CARMODY: That's right. And that would be, again, the policy decision, how they then satisfy - - -

THE COMMISSIONER: Offset or negate it. Yes.

DR CARMODY: Yes. And I know that they have put forward various propositions to people living down there. I query whether or not they satisfy that definition of offset or negate. But I guess to get back to the original point, which is this concept of no third party impacts is often invoked whenever someone says, for example, “We
5 need rules in Water Sharing Plans to protect environmental water.” And I quote from clients who attend SAP meetings the response is “But you can’t do that, because of third party impacts.” It’s just – that’s what they tell me. They attend these meetings and that’s what they’re told.

10 THE COMMISSIONER: 7.15(1) has nothing to do with that.

DR CARMODY: Exactly. Exactly. It has nothing – no. No. It’s more that - - -

15 THE COMMISSIONER: 7.15(1) does apply to Menindee Lakes as a supply measure.

DR CARMODY: No. I’m not suggesting – no. It’s not my suggestion that it applies.

20 THE COMMISSIONER: No. No. I appreciate that. I appreciate that. Yes.

DR CARMODY: It’s that it has created this idea in the minds of people, because these clauses have been misconstrued, the MOU in regards to water shepherding, as well, the proposed shepherding methodology that was proposed subsequent to that
25 MOU, again, it misconstrues clauses in that MOU to mean no third party impacts. So what I think is that it has almost become this part of the collective unconscious, as a result of these clauses being misconstrued, even though they have nothing to do, for example, with the developments of rules in the Water Sharing Plans on the Barwon-Darling per se. It’s more that it has created an idea.

30 THE COMMISSIONER: No third party impact, however, notwithstanding the inexactness of that as a slogan, it does capture, doesn’t it, the spirit of the times in relation to the commodification of water becoming property for the purposes of 51.31 of the Constitution and ensuring that there isn’t, in effect, an acquisition
35 otherwise than on just terms. And in itself that is a worthy concern to have, that governmental action doesn’t unfairly visit on particular people the burden of a general public good.

40 DR CARMODY: Yes. Well, and the Water Act deals with that issue, because there is a - - -

THE COMMISSIONER: Well, it used to.

45 DR CARMODY: There is a prohibition - - -

THE COMMISSIONER: Before the cap on acquisition - - -

DR CARMODY: Well, the compulsory acquisition of water entitlements is expressly prohibited under the Water Act.

5 THE COMMISSIONER: Well, that's what I mean. Before the cap, the 1,500 gicalitre cap, this was dealt with by voluntary sale.

DR CARMODY: Indeed. And the government is unable to - - -

10 THE COMMISSIONER: No 51.31 problem. Compulsorily acquire.

DR CARMODY: Thank you.

THE COMMISSIONER: It can do so as soon as it changes the law.

15 DR CARMODY: Yes, but for the purposes of the current provisions in the Water Act.

20 THE COMMISSIONER: That's assuming that these are rights which are not inherently variable, to use the concept of some of the 51.31 jurisprudence.

DR CARMODY: Well, I think at times - - -

THE COMMISSIONER: It may be they are, you see.

25 DR CARMODY: - - - people failed to distinguish between the aspects of the property right that are invariable and the variable aspects of that right.

THE COMMISSIONER: Yes.

30 DR CARMODY: So to me, sometimes people would say well, if you create rules to protect environmental water it will change the characteristics of that property right. I don't agree with that.

THE COMMISSIONER: Yes.

35 DR CARMODY: You see it across planning laws, not just in water law. The fact that you own property doesn't give you a right to do whatever you want with it.

THE COMMISSIONER: No.

40 DR CARMODY: That right is always circumscribed by - - -

THE COMMISSIONER: At Commonwealth level, that's subject under 51.31 to extreme cases such as some of the - - -

45 DR CARMODY: Or that. Yes. Acquisition.

THE COMMISSIONER: - - - mining lease cases where regulation tips into prohibition.

DR CARMODY: Yes.

5

THE COMMISSIONER: But they are always cases of extreme degree.

DR CARMODY: And in relation to water entitlements, what you can do with that right is highly litigated by very complicated rules contained for the most part in Water Sharing Plans, but also access licensed dealing rules in New South Wales, to a certain extent the Water Management Act.

10

THE COMMISSIONER: How is - - -

DR CARMODY: It's not an absolute right to do whatever you want.

15

THE COMMISSIONER: No. No. No. How can rules protecting environmental water, either – of either kind, how would they ever impact what I call private water rights?

20

DR CARMODY: Well, I don't think they do change the characteristics, but they – I think the argument is that at the moment it is lawful, for example, the Commonwealth Environmental Water Holder in a regulated system releases some of its water. All other things being equal it's lawful, assuming you have the water in your account and the pumping thresholds are met, it's lawful for a consumptive user to extract that water.

25

THE COMMISSIONER: So hence the need for shepherding.

DR CARMODY: Yes, for example, yes.

30

THE COMMISSIONER: And that provokes, you say, people saying shepherding - - -

DR CARMODY: Third-party impact.

35

THE COMMISSIONER: - - - infringes on a third party.

DR CARMODY: Yes.

40

THE COMMISSIONER: Right.

DR CARMODY: Because that necessarily requires periods of time when a licence holder is unable to pump as that water is moving through the system. I can understand from the point of view of certain farmers why they may consider that undesirable because it is a restriction on access to water, but it doesn't change the characteristics of the property right - - -

45

THE COMMISSIONER: Is that really a restriction on the reliability and impact on reliability?

5 DR CARMODY: It's not – well, not reliability of – again, okay, so we need to distinguish between reliability of allocation and reliability of use. It has nothing to do with the allocation. The allocation is the allocation, regardless of whether or not there is a rule in a Water Sharing Plan that says, “For the month of November, you can't pump water because we need to get water to a wetland”, to just give a simple example. That affects reliability of use which is materially and legally different. So
10 allocations are provided for.

THE COMMISSIONER: Where – yes, I see. Yes. I've got it. Yes.

15 DR CARMODY: So anyway, you understand how it works.

THE COMMISSIONER: I do. I do. Well, I think I do, which is not always a reliable thing to have.

20 DR CARMODY: And I do look at that issue in the advice on clause 6.14 which you have in your possession. We may not be able to have a cheerful discussion about it, but you have it in your tender bundle.

MR BEASLEY: Yes, tab 7, volume 2.

25 THE COMMISSIONER: Yes. No. I've read volume 2. Yes. There seems to be quite a bit of talk about 6.14 as if you don't inject into this notion of the kind the condition which attaches to the whole of those incorporated provisions which is change in the Plan.

30 DR CARMODY: Yes. There has to be a change to the Plan which affects reliability of allocations.

THE COMMISSIONER: You can see why I say it's all about 51.31 because what you see in section 4 of section 180:
35

If despite Commonwealth efforts, that is, to manage the impact of a potential change in reliability, there is a change in reliability of the water allocations

- - -

40 DR CARMODY: Yes.

THE COMMISSIONER:

45 *...for the holder of a Water Act's entitlement and the change is reasonably attributable –*

wouldn't you love to be a judge doing that:

...to the Commonwealth share in reliability, the holder may be entitled to a payment under section 83 which is intended to obviously constitute just terms.

5 DR CARMODY: Yes. One of the points that I make in that advice is that if 6.14 is used to argue that one could not put a provision in a Water Resource Plan seeking to protect environmental water because it would somehow unlawfully trigger those provisions in the Water Act that are linked to 6.14. I don't think that's accurate because protecting environmental water doesn't affect reliability of allocation which is the material issue dealt with in subsection B – sorry, subdivision B of division 4 of part 2.
10

THE COMMISSIONER: But making a WRP won't be a change to the Basin Plan.

15 DR CARMODY: Sorry.

THE COMMISSIONER: Making a Water Resources Plan will not change the Basin Plan. I'm right, aren't I? The Basin Plan requires you to have WRPs.

20 DR CARMODY: It does, yes.

THE COMMISSIONER: Which must comply with the Basin Plan.

DR CARMODY: Yes, so the provision – section 84 - - -

25 THE COMMISSIONER: Yes.

DR CARMODY: So this section applies if the transitional resource plan or an interim resource plan for a Water Resource Plan area is in effect when the Basin Plan first takes effect. Subsection (2):
30

This subdivision applies as if the provisions of the transitional Water Resource Plan or the interim Water Resource Plan had been provisions of the Basin Plan.

35 THE COMMISSIONER: So that means the making of every WRP where there is currently a transitional Water Resource Plan that will be a State Water Sharing Plan, for example.

40 DR CARMODY: Yes, or an interim one. If that is changed, that would constitute a change to the Basin Plan.

THE COMMISSIONER: There will be changes. So every one of those changes by reason of section 84 - - -

45 DR CARMODY: Yes.

THE COMMISSIONER: - - - needs to be examined to see whether it would result in a change in the reliability of water allocations in relation to the water resources of a Water Resource Plan area.

5 DR CARMODY: Yes, and subdivision B deals with changes in the reliability of water allocations that are not linked to changes to SDLs.

THE COMMISSIONER: That's what I mean.

10 DR CARMODY: But I don't see how - - -

THE COMMISSIONER: And it would occur otherwise because of a reduction in SDL.

15 DR CARMODY: I don't see how, for example, a rule to protect environmental water in a Water Resource Plan that had not previously been in the Water Sharing Plan – I don't see how it would trigger this subdivision because that doesn't concern reliability of allocation. It concerns, for want of a better phrase, reliability of access or use, and the two - - -

20

THE COMMISSIONER: I just question whether.

DR CARMODY: - - - are different concepts.

25 THE COMMISSIONER: I'm wondering whether it affects reliability at all, in any sense. Is the timing of permitted access truly a detraction from a liability? If it's long enough, maybe.

30 DR CARMODY: It is – well, it's certainly – there are critical – to be fair, there are critical periods when certain crops do need to be watered, and if they don't receive water, it could destroy the crop. So that's why I said before, I can understand why a farmer sometimes may be concerned. However, I think with sensitive planning, you could avoid prohibiting the extraction of water in that window of time.

35 THE COMMISSIONER: Indeed, there's an obligation - - -

DR CARMODY: Because it would be undesirable.

THE COMMISSIONER: - - - to endeavour to manage the impact. Yes.

40

DR CARMODY: It would be undesirable to have crops destroyed.

THE COMMISSIONER: That doesn't mean you can't have reasonable queueing.

45 DR CARMODY: Yes, and there are – yes, or that other people would argue the farmer knowing that at a particular time water won't be available can make adequate provision with respect to their planning.

MR BEASLEY: Commissioner, I hate to interrupt, but I know Dr Carmody has got a flight to catch, and she needs to leave at 4, and she missed her flight yesterday coming, here, although, I suspect that was the result of Ms Yvette Latty, L-a-t-t-y, the Business Manager of the Commission for failing to properly accommodate Sydney traffic.

DR CARMODY: That's unfair.

MR BEASLEY: Quiet. Now, I've told Dr Carmody we could finish by Skype if there's like half an hour to go.

THE COMMISSIONER: Yes.

MR BEASLEY: Another time.

DR CARMODY: Yes.

THE COMMISSIONER: Please.

DR CARMODY: Okay.

THE COMMISSIONER: Don't miss your plane. Is sale of water for – environmental water for non-environmental purposes a reference to fodder in times of drought?

DR CARMODY: Yes.

THE COMMISSIONER: Thank you.

DR CARMODY: And I did in the introductory - - -

THE COMMISSIONER: Yes, I know, yes.

DR CARMODY: - - - section discuss some of the key issues really that - - -

THE COMMISSIONER: No, I would like to return to that.

DR CARMODY: Yes.

THE COMMISSIONER: Would you mind, when we resume, just a little bit more, I would be very interested to hear more from you about 6.14.

DR CARMODY: Yes.

THE COMMISSIONER: I don't mean at large. I mean if I can - - -

DR CARMODY: Ask more questions.

THE COMMISSIONER: - - - bounce some things off you, I would be grateful.

DR CARMODY: Okay. Thank you, and if you have any – if you are able to further elucidate - - -

5

THE COMMISSIONER: Notify you of events, yes, I will.

DR CARMODY: Or further elucidate its application and meaning, I would welcome that as well.

10

THE COMMISSIONER: We will try together. Very well, we will adjourn until tomorrow at 10 o'clock here. Thank you very much Dr Carmody, I look forward to resuming.

15 DR CARMODY: Thank you.

MATTER ADJOURNED at 4.02 pm UNTIL FRIDAY, 21 SEPTEMBER 2018